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November 7, 2008

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In Re: SRBA Subcase 92-23

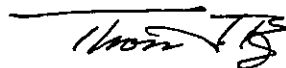
Dear Ladies and Gentlemen:

Enclosed please find the following:

1. Upper Snake Water Users' Response to Idaho Power's Motion for Partial Summary Judgment;
2. Second Affidavit of Ronald D. Carlson;
3. Third Affidavit of Thomas J. Budge.

If you have any questions please feel free to give me a call.

Best Regards,



THOMAS J. BUDGE

TJB:nj
Enclosures



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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 00-92023

**UPPER SNAKE WATER USERS' RESPONSE
TO IDAHO POWER'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
RECHARGE SUBORDINATION**

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

for and on behalf of their member water users (collectively the “Upper Snake Water Users”), by and through counsel, hereby respond to *Idaho Power Company’s Motion for Partial Summary Judgment on Recharge Subordination* pursuant to Rule 56 of the Idaho Rules of Civil Procedure and in accordance with the Court’s *Second Amended Scheduling Order Setting Discovery Deadlines on Motion for Summary Judgment on Issue of Recharge Subordination*.

ARGUMENT

Idaho Power’s opposition to aquifer recharge reflects a modern campaign to secure more water for hydropower generation than the Company is entitled to receive under the Swan Falls Settlement¹. Under the Settlement, Idaho Power agreed that its hydropower right would be limited to Snake River flows below Milner Dam, above which the Company has no claim. The Company further agreed to an unsubordinated minimum flow of 3900 c.f.s. during the irrigation season, and 5600 c.f.s in the non-irrigation season. Only the trust water, which is tributary to the Snake below Milner, is subordinatable. Regardless of whether Mother Nature provides more water than is needed to maintain the minimum flows, Idaho Power is barred from reaching above Milner to tap surplus water for the purpose of generating hydropower. Consequently, the only way for Idaho Power to use surplus Snake River flows is to prevent upstream users from diverting the water above Milner Dam, leaving only one place for it to go. Toward that end Idaho Power seeks to prevent all future diversions for groundwater recharge—a maneuver designed to minimize beneficial use of the East Snake Plain Aquifer (ESPA) through the indirect curtailment of groundwater pumping. It is a strategy Idaho Power developed after the Swan

¹ The “Swan Falls Settlement” is a settlement of two lawsuits, Ada County Case Nos. 62237 and 81375, filed by Idaho Power against the State of Idaho and numerous water users. The settlement is embodied in instruments entitled “Agreement” and “Contract to Implement” and certain legislative and administrative action. The term “Agreement” as used herein refers to that specifically-named instrument.

Falls Agreement was signed, aimed at enlarging the Company's entitlement and gaining influence over water use upstream from Milner Dam.

I. IDAHO POWER'S CLAIM THAT AQUIFER RECHARGE WAS DELIBERATELY EXCLUDED FROM THE SUBORDINATION OF ITS HYDROPOWER RIGHT IS BELIED BY THE PLAIN LANGUAGE OF THE SWAN FALLS SETTLEMENT AND THE HISTORICAL RECORD.

A. The plain language of the Agreement does not exclude recharge from the subordination of Idaho Power's hydropower right.

Idaho Power wrongly argues that the "plain language of the Agreement cannot be interpreted to include a subordination of Idaho Power's hydropower rights to recharge," on the basis that the subordination provision "does not describe the recharge concept, and does not even mention the term 'recharge' at all."² The non-recognition of recharge does not create an exception to the subordination of Idaho Power's hydropower right. Indeed, the subordination provision doesn't specifically mention *any* type of beneficial water use. Rather, the provision subordinates Idaho Power's hydropower right to "subsequent beneficial upstream uses" without exception.³ Because the provision fails to specifically exclude any water uses, it must be read to include all beneficial water uses. On its face, the plain language of the Agreement cannot be interpreted to *exclude* recharge from the subordination of Idaho Power's hydropower right.

The reality is that there was no need to delineate between beneficial uses in the Agreement. The purpose of the Swan Falls Settlement was not to pick and choose which subsequent water uses Idaho Power's right would be subordinate to; it was purely to secure a supply of water for the future development. The Settlement affirmed the State's prerogative to define which beneficial water uses to authorize and permit "in accordance with State law," so long as the required minimum flows are maintained.⁴ Indeed, the Settlement was designed to

² Idaho Power's Opening Br. on Recharge Subordination at 11.

³ Agreement ¶ 7(B) (Orr Aff., Ex. 30 at 4.)

⁴ *Id.*

“allow the State to ... promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest.”⁵ The lack of reference to recharge or any other beneficial use in the subordination provision is to be expected considering that Idaho Power has an unsubordinated right to only the fixed minimum flows at Murphy Gauge. The Company’s hydropower rights above the minimum flow are held in trust by the State.⁶ How beneficial use is defined is up to the Idaho State Legislature. Idaho Power has no control over new water development that complies with State law so long as the minimum flows are satisfied.

B. Neither the public interest criteria nor the use of recharge for stream flow augmentation create an exception to the subordination of Idaho Power’s hydropower right.

Idaho Power creatively attempts to exclude recharge from the subordination of its hydropower right by constructing a fictitious distinction between the Framework’s provision of a public interest criteria for new development (section 2) and its provision for aquifer recharge as a way to augment Snake River flows (section 5).⁷ There is simply no correlation between either of these provisions and the subordination of Idaho Power’s hydropower right. The purpose of implementing public interest criteria was to ensure that new water development would proceed “in a manner which will maximize long-term economic benefit to all sectors of society.”⁸ Aquifer recharge is referenced as a potential mechanism to “enhance stream flows in the Snake River.”⁹ These provisions are related to each other in that aquifer recharge will facilitate maximum long-term economic benefit to all sectors of society, but neither provision limits the subordination of Idaho Power’s hydropower right in such a way as to exclude aquifer recharge.

⁵ Framework at 5 (Gheleta Aff. Ex. A) (emphasis added).

⁶ See I. C. 42-203B(2)

⁷ Idaho Power’s Opening Br. of Recharge Subordination at 10: “the Framework makes a distinction between new development to which the public interest criteria would be applied in Section 2 that did *not* include recharge, and future studied in Section 5 [sic] of a ‘number of methods ... suggested to enhance stream-flows in the Snake River’ the explicitly *did* include recharge.”

⁸ Gheleta Aff. at Ex. A (Framework at 4).

⁹ Gheleta Aff. at Ex. A (Framework at 7).

C. The provision for hydrologic and economic studies has no bearing on the subordination of Idaho Power's hydropower right.

Idaho Power further argues that recharge was too mysterious to be subject to subordination, and that the parties instead agreed to “simply study recharge,” leaving its role in the Settlement to be decided at a later day.¹⁰ The Company derives this idea from language in the Framework providing for “hydrologic and economic studies to determine the most cost-effective and environmentally friendly sound means to implement the State Water Plan and to augment flows in the Snake River,” which Idaho Power construes to mean that the impacts of recharge “needed to be studied before recharge could be implemented.”¹¹ Yet the referenced studies have nothing to do with subordination. Rather, they reflect the reality that the State owned no surface water storage, and recharge presented one possible way for the State to meet its minimum stream flow obligation.¹² Applying recharge to meet targeted stream flows was a new frontier, drastically more complex than conventional recharge for storage and irrigation purposes. Hydrologic analysis would be required to determine the timing, quantity, and location of return flows to the Snake River from various recharge sites and under various conditions. Economic analysis would be needed to determine whether it would be cost-effective. Therefore, the parties agreed to fund studies to determine the feasibility of recharge “as a method to enhance stream flows in the Snake River.”¹³ The provision for these studies falls far short of creating an exception to the subordination of Idaho Power's hydropower right.

¹⁰ Idaho Power's Opening Br. of Recharge Subordination at 14.

¹¹ *Id.* at 10.

¹² Second Carlson Aff. ¶ 4 at 3.

¹³ *Id.*

D. Recharge is a depletionary water use designed to augment and expand the supply of water available for irrigation and other consumptive uses.

Idaho Power claims superiority over aquifer recharge on the basis that recharge is non-consumptive and non-depletionary, which it is not.¹⁴ Aquifer recharge is conventionally utilized to augment the amount of water stored in the East Snake Plain Aquifer (ESPA) for irrigation and other consumptive water uses. Like in-stream storage, recharge diversions deplete the flow of water in the Snake River for later diversion and application to beneficial use. That recharge diversions diminish flows in the Snake River makes recharge *depletionary*. The use of recharge to facilitate and expand consumptive water uses effectively makes it *consumptive*. Contrary to Idaho Power's assertion, recharge water does not all eventually return to the river; it is more than "simply moving water from one part of the hydrologic cycle to another."¹⁵

In 1980, in one of the lawsuits that precipitated the Swan Falls Settlement, Idaho Power requested a declaratory ruling that the subordination provision in its Hells Canyon and C.J. Strike hydropower licenses did not extend to aquifer recharge because, the company argued, recharge is a non-irrigation diversion.¹⁶ The Company referred specifically to proposals to "skim waters as available from Snake River and deprive Plaintiff of wintertime power generation,"¹⁷ and to recently-enacted recharge statutes that would "enable the diversion of flows that would otherwise be available for power generation."¹⁸ Idaho Power argued that "[t]he loss of this water, or other wintertime diversions below Milner Dam to offstream storage were not contemplated at the time of the subordination provisions,"¹⁹ and that its "position would have been different in the Hells

¹⁴ Cf. Idaho Power's Opening Br. on Recharge Subordination at 3.

¹⁵ Idaho Power's Opening Br. on Recharge Subordination at 4, 14.

¹⁶ Memorandum Decision at 431 (Fourth Orr Aff., Ex. 25).

¹⁷ Plaintiff's Memo. in Supp. of Mot. to Reconsider and Am. Summ. J. at 4 (Fourth Orr Aff., Ex. 24).

¹⁸ *Id.*

¹⁹ *Id.*

Canyon proceedings had winter diversion for summer irrigation purposes been then contemplated.”²⁰ The Court rejected Idaho Power’s argument, stating:

It is the opinion of this Court 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 provision. ...diversions will be allowed for irrigation purposes, without limitation as to when or how such diversions may be made. ...the rights of the Company are subordinated to the offstream storages for irrigation use.²¹

This ruling is representative of the common sense perspective that water stored in an aquifer can later be pumped for irrigation. There is little difference between storing water in the aquifer and storing water behind a dam for irrigation, other than the mechanism to control its release—a dam uses gates whereas aquifers use pumps. Both are means to store water for later beneficial use. This places recharge squarely within the uses to which Idaho Power’s hydropower rights were subordinated. Although Idaho Power appealed portions of the court’s decision to the Idaho Supreme Court, it did not appeal the decision as to subordination to recharge, and it is now estopped under the doctrine of *res judicata* from attempting to do so here.

E. Aquifer recharge was well-known at the time of the Swan Falls Settlement, had been seriously considered by Idaho Power, and is covered by the terms of the Settlement.

The Idaho legislature enacted recharge statutes in 1978—seven years prior to the Settlement. Idaho Power had contemplated recharge long before that. As early as 1953, in Federal Power Commission proceedings involving Idaho Power’s Hells Canyon Complex, then-watermaster Lynn Crandall submitted a report entitled “Future Upstream Depletion Above Hells Canyon” explaining that “surplus flood flows that would otherwise spill past Milner” could be

²⁰ Memorandum Decision at 432 (Fourth Cir. Aff., Ex. 25).

²¹ *Id.*

used for purposes of recharging the “ground-water reservoir beneath these plains.”²² In the 1970s Idaho Power commissioned a report entitled “Relationship – Irrigation Pumping Depletions Vs Hydro Generation ‘Affects of the Snake River Depletion Study’ 8/31/77.”²³ By 1980 the Company’s awareness and concern for recharge was such that it requested a declaratory ruling that its hydropower rights were not subordinate to recharge.²⁴ In that proceeding was represented to the Court that

plans are being developed by the Idaho Water Resource Board to divert water from the Snake River at Milner Dam during non-irrigation winter months, and stored for use during irrigation months. Other plans appear imminent to form recharge districts in accordance with recent legislative authority, I.C. 42-232 and 42-234 which will also likely result in diversion of water from the river.²⁵

The court denied Idaho Power’s request, ruling that recharge “clearly falls within the subordination provisions.”²⁶

Recharge was clearly on Idaho Power’s mind in the years leading up to the Settlement. For the Company to now claim that recharge efforts “could not have been envisioned by the negotiating parties at that time,”²⁷ when the topic was discussed in formal testimony during the Company’s Hells Canyon proceedings, the Idaho legislature had affirmatively authorized recharge, Idaho Power had both studied and directly litigated the issue, strains the bounds of credulity. Even more difficult to believe is that, after litigating what it considered an erroneous presumption that its Hells Canyon subordination provision extended to recharge, Idaho Power would not seek to clarify this issue in the Swan Falls Settlement. Instead, Idaho Power carefully

²² Fourth Orr Aff., Ex. 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., Ex. 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.”).

²³ Third Budge Aff., Ex. 1 at 1.

²⁴ Memorandum Decision at 431 (Fourth Orr Aff., Ex. 25).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Idaho Power’s Opening Br. on Recharge Subordination at 27.

negotiated and agreed that its water right would be “subordinate to subsequent beneficial upstream water uses,” without exception.²⁸ The Company further agreed that the Settlement would “provide a sound comprehensive plan for the management of the Snake River watershed.”²⁹ It is doubtful that the parties to the Settlement would have agreed to place the issue of recharge and its role in the Settlement on the shelf for a later day. Even more inconceivable is Idaho Power’s claim that the parties deliberately excluded recharge from the subordination of the Company’s hydropower right without incorporating into the Agreement specific language to that effect.

Had Idaho Power believed it could carve out an exception to the subordination of its hydropower right under the Settlement, it no doubt would have. The truth is, the essential support of the Settlement by upper Snake River Basin water users would have been impossible to procure had the Company insisted on remaining unsubordinated to recharge. Idaho Power’s representatives, both in the Hells Canyon proceedings and in the Swan Falls negotiations, were highly competent professionals who were very careful with the terms that they were negotiating. It could not be done at the time. As a result, Idaho Power is now engaged in another attempt to redefine previously agreed-to limitations on its hydropower rights as it sees fit.

II. THE LAW IN EFFECT AT THE TIME OF THE SETTLEMENT CONFIRMS THAT IDAHO POWER HAS NO CLAIM OVER WATER USE FOR RECHARGE PURPOSES ABOVE MILNER DAM.

Beyond the arguments set forth in section I of this response, the zero flow at Milner is an absolute bar against interference by Idaho Power with water use of any kind above Milner Dam, consumptive or non-consumptive, for recharge or otherwise. As explained in the *Upper Snake Water Users’ Motion for Summary Judgment and Supporting Memorandum*, Idaho Power agreed to limit its hydropower right to waters tributary to the Snake River below Milner Dam, expressly

²⁸ Agreement ¶ 7(B) (Orr Aff., Ex. 30 at 4).

²⁹ Agreement ¶ 11 (Orr Aff., Ex. 30 at 5).

incorporating into the Settlement a zero flow at Milner consistent with the historic division of the Snake River at Milner Dam. This was a non-negotiable term of the Settlement. Laws in effect at the time of the Swan Falls Settlement confirm that it was negotiated in a milieu that recognized that water use above Milner Dam was insulated from hydropower rights below Milner. The historical record further confirms that Idaho Power understood and agreed that its hydropower rights were limited to flows tributary to the Snake River below Milner Dam.

A. The historical record demonstrates that Idaho Power's hydropower right is limited to flows tributary to the Snake River below Milner Dam.

Over the course of history, Idaho Power has repeatedly acknowledged the inferiority of its hydropower rights to water use above Milner Dam.³⁰ In the federal power license for its Twin Falls hydropower facility in 1934, the Company stipulated that its right to call for water above Milner Dam was limited to “the 45,000 acre feet of primary storage capacity which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923.”³¹ In 1952, Idaho Power wrote to Governor Len Jordan, explaining that the Company

fully recognizes the primary importance in southern Idaho of the use of water for reclamation and irrigation purposes, and over more than 35 years of its existence has cooperated fully with water users in the Snake River valley. Our system has been planned and built accordingly, and in the entire history of the Company, I know of no instance where the Company has ever protested a water appropriation filing, or raised any objection to diversion or use of water, for such purpose.³²

As acknowledged by Idaho Power in its Opening Brief, the Company successfully defeated the proposed federal high dam in Hells Canyon due in large part to the

³⁰ See Upper Snake Water Users' Mot. for Summ. J. and Supporting Memo. at 9-16.

³¹ Third Orr Aff., Ex. 9 at 7 (Article 14 on page 11 of “License on Government Lands, Project No. 18, Idaho, Idaho Power Company” (Federal Power Commission, May 11, 1934));

³² Fourth Orr Aff., Exhibit 15 (letter from A.C. Inman, Vice-President and Secretary, Idaho Power Company, to the Honorable Len Jordan, Governor of the State of Idaho (Mar. 14, 1952)) (emphasis added).

Company's promises to subordinate its hydropower rights to all beneficial water uses above Milner Dam.³³

When in 1980 Idaho Power sought a determination as to whether the subordination provision in its federal power license included recharge, the Company argued that "[t]he loss of [non-irrigation season] water, or other wintertime diversions below Milner Dam to offstream storage were not contemplated at the time of the subordination provisions,"³⁴ evidencing the Company's recognition that it held no claim over water use above Milner. Shortly thereafter, during negotiation of the Swan Falls Settlement, representatives of both Idaho Power and the State reassured water users in the upper Snake River Basin that the Settlement would have no impact on water use above Milner.³⁵ Idaho Power Company's chief negotiator stated that "you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner. ... what goes on above Milner is not affected by this Settlement."³⁶ In reliance upon these representations, the Committee of Nine agreed to support the Settlement, passing a formal resolution to make certain "that in implementation it be clear that the following conditions prevail: 1. That there is, and will continue to be, no obligation to provide surface flows for water rights established below Milner Dam and that the 'zero' flow at Milner Dam be reaffirmed. ..."³⁷

B. The law in effect at the time of the Swan Falls Settlement confirms the Milner Division and makes no exception for recharge.

Idaho Power alleges that "there was no need to specifically include, exclude or address subordination of hydropower uses in the Swan Falls Agreement," claiming that two statutes in effect at the time of the Settlement categorically made all recharge possibilities secondary to

³³ Idaho Power's Opening Br. on Recharge Subordination at 20.

³⁴ Plaintiffs Memo. in Support of Mot. to Reconsider and Am. at 4 (Fourth Orr Aff., Ex. 24).

³⁵ See Upper Snake Water Users' Mot. for Summ. J. at 15.

³⁶ Orr Aff., Exhibit 44 at 27 (Nelson statements in transcript of Water Board public information meeting of Oct. 25, 1984 (Twin Falls)).

³⁷ Resolution of the Committee of Nine adopted January 17, 1985 (Second Budge Aff., Ex. 1 at 1).

hydropower. Whatever the statutory limitations referenced by Idaho Power, they were subject to the undeniable legal division of Snake River at Milner Dam set forth in the State Water Plan, conveniently ignored by Idaho Power in its revisionist representation of the history of the Swan Falls controversy. The first Idaho State Water Plan, adopted in 1976, included the policy of a “protected flow” at Milner of 0 c.f.s.³⁸ This provision was reaffirmed when the State Water Plan was updated in 1982.³⁹ Both plans were issued under the express authority of the Idaho Constitution and ratified by the Idaho Legislature.⁴⁰ If the Settlement is to be construed by the law in effect at the time of the Settlement, the State Water Plan provides overarching guidance.

Recharge statutes in effect at the time of the Settlement reflect the legal division of the Snake River at Milner Dam as provided in the State Water Plan. Unlike Idaho Code §§ 42-4201 and 42-4201A, which provided for recharge in the lower Snake River Basin, Idaho Code § 42-234, which authorized recharge in the Rexburg area, failed to make recharge secondary to hydropower. Likewise, Idaho Code § 42-232, which authorized recharge in Bonneville and Madison Counties, also declined to make recharge secondary to hydropower. Even with respect to the more restrictive recharge statutes, Idaho Power acknowledges that they were being broadened by 1982.⁴¹ Indeed, recharge was gaining steam at the dawn of the Swan Falls controversy, with the Lower Snake River Aquifer District initiating its recharge efforts in 1982 and spending \$40,000 on recharge in 1984.⁴²

Idaho Power’s claim that recharge was inherently excluded from the subordination of its hydropower right under the Settlement is further compromised by the Ada County District Court decision, issued a few short years before the Settlement, declaring that Idaho Power’s Hells

³⁸ 1976 Idaho State Water Plan – Part 2, at 116 (Carlson Aff., Ex. A at 116).

³⁹ 1982 Idaho State Water Plan at 42 (Third Budge Aff., Ex. B).

⁴⁰ Idaho Const., Art. XV, § 7

⁴¹ Idaho Power’s Opening Br. on Recharge Subordination at 17.

⁴² Third Budge Aff., Ex. A at 12.

Canyon hydropower rights were in fact subordinate to recharge, as explained above.⁴³ It is significant that the Court made that ruling despite the 1978 recharge statutes. That ruling was the law in effect at the time of the Swan Falls Settlement. Absent an explicit provision to the contrary, the Settlement must be read to be consistent with the understanding that subordination to upstream irrigation includes the use of water for aquifer recharge.

Idaho Power's argument that at the time of the Settlement it was a foregone conclusion that recharge was secondary to hydropower is simply not corroborated by the law of the times. Given the increasing development of recharge leading up to the Swan Falls controversy, together with Idaho Power's unsuccessful attempt to have its Hells Canyon subordination provision excused from upstream recharge, it is implausible that Idaho Power would treat the issue of recharge with such nonchalance. If anything, the legal climate made it more critical to address recharge in express terms had either the State or Idaho Power believed that recharge constituted an exception to the subordination of Idaho Power's water right and to the zero flow at Milner.

C. The 1986 amendment of Idaho Code § 42-203B erases any doubt that water use above Dam Milner is insulated from hydropower claims below Milner.

Idaho Code § 42-203B, enacted pursuant to the Swan Falls Settlement, undeniably affirms that Idaho Power's hydropower right is restricted to flows below Milner Dam. In 1985, when the Idaho Department of Water Resources proposed Water Allocation Rules, it mistakenly included flows above Milner in the trust water area. Upper Snake River Basin water users were incensed by what they perceived to be a betrayal of the promises made by the parties to the Swan Falls Settlement that the settlement would have no affect on water use above Milner.⁴⁴ In response, Idaho Code §42-203B was immediately amended in 1986 to correct the error, adding the following language:

⁴³ See section I.D. above.

⁴⁴ *Id.* at 16-19.

For the purpose 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.⁴⁵

This amendment was expressly supported by Idaho Power and the State of Idaho.⁴⁶

D. Idaho Power Company's actions since the Settlement demonstrate that it understood that recharge statutes only affected water use below Milner.

In its brief, Idaho Power makes much of the 1994 legislation authorizing recharge that makes it secondary to prior perfect rights "including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho Power on October 25, 1984." Idaho Code §42-4201A. The Company argues,

The 1994 recharge authorization legislation should be the starting and ending point of the controversy here since it remains in effect to this day.... This must be considered the "best evidence" of how Idaho and its legislature views recharge with respect to Idaho Power's rights under the Swan Falls Settlement, as well as how the parties viewed the issue during the negotiations on the Settlement.⁴⁷

However, regardless of the effect of Idaho Code § 42-4201A on trust water *below* Milner Dam, the legislation clearly has no application *above* Milner Dam when read consistently with Idaho Code § 42-203B(2), which states:

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.

One can search in vain when reading Idaho Code §§ 42-4201, 42-4201A and 42-234, to find any evidence that the legislature intended to override Idaho Code § 42-203B(2). Accordingly, the statutes must be read harmoniously, making §§ 42-4201, 42-4201A and 42-234 applicable with respect to waters tributary to the Snake River below Milner Dam only.

⁴⁵ Chapter 117, §1, p.208, 1986 Session Laws.

⁴⁶ See Upper Snake Water Users' Mot. for Summ. J. at 15.

⁴⁷ Idaho Power's Opening Br. on Recharge Subordination at 32.

That the 1994 legislation has no application above Milner is demonstrated by Idaho Power's lack of objection to a major recharge undertaking in Water District 1 that began in 1995—one year after the 1994 legislation was enacted—with \$1 million in funding from the Idaho legislature.⁴⁸ Nearly 500,000 acre-feet were recharged rather than left in the River to flow unused past Milner.⁴⁹ Had Idaho Power believed it had dominion over recharge in the upper Snake, one would certainly have expected an objection to such a large-scale recharge undertaking.

Idaho Power again demonstrated in 1998 that it did not believe the effects of the 1994 legislation reached above Milner. In that year, the Idaho Water Resource Board, together with North Side Canal Company and the Twin Falls Canal Company, applied for permits for groundwater recharge above Milner Dam.⁵⁰ In response, Idaho Power filed a Notice of Protest, citing only Idaho Code § 42-203 and insufficiency of the applications as its bases for protesting the application.⁵¹ Significantly, Idaho Power did not cite Idaho Code §42-4201A as a basis for protest, even though, under the Company's present view, it is "the starting point and ending point of the controversy."⁵² Nor did it assert that the issuance of the proposed recharge rights would be a violation of the Swan Falls Settlement. Recharge was very active in the upper Snake River Basin in the late 1990s, with no objection from Idaho Power.⁵³

With changing economic times, Idaho Power is changing its stance on the meaning of the Swan Falls Settlement and the applicability of certain statutes. The Company claims that the

⁴⁸ Senate Bill No. 1260, 1995 Sess. Laws, ch. 200, p. 692;

⁴⁹ Carlson Aff. ¶ 16, at 7-8; *see also*, testimony of Jeff Raybould before Senate Resource and Environment Committee, March 27, 2006: "Egin Bench Canals participated in the state-sponsored aquifer recharge program 1995-2000. During that period of time, we recharged 220,369 acre-feet of water, varying from 8,972 acre-feet in 1995 to a little over 69,000 acre-feet in 1998." (Fourth Orr Aff., Ex. 79 at 53).

⁵⁰ Notice of Application (Third Budge Aff., Ex. J); *see also* Petition to Intervene (Third Budge Aff., Ex. D).

⁵¹ Notice of Protest (Third Budge Aff., Ex. C).

⁵² Idaho Power's Opening Br. on Recharge Subordination at 32.

⁵³ Carlson Aff. ¶ 16, at 7-8; *see also*, Third Budge Aff., Ex. E, F, G, H; *see also*, Fourth Orr Aff., Ex. 79 at 53.

Court should view the 1994 legislation as the “best evidence” of whether recharge is secondary to hydropower rights below Milner, yet the Company itself didn’t hold that view until recently. In seeking to gain control over water use above Milner Dam, Idaho Power asks the Court to ignore nearly a century of water rights administration, State Water Plans, and legislation that put the flows above Milner beyond the reach of the Company’s hydropower rights. Finally, Idaho Power fails to mention controlling authority at the time of the Swan Falls Settlement that explicitly included aquifer recharge in those uses to which the Company’s rights at Hells Canyon hydropower rights were subordinate.

D. Idaho Power remains equitably and quasi-estopped from claiming any right over water use above Milner Dam.

As explained in the *Upper Snake Water Users’ Motion for Summary Judgment and Supporting Memorandum*, water users in the upper Snake River Basin conditionally pledged their essential support of the Swan Falls Settlement in reliance upon repeated representation by both Idaho Power and the State of Idaho that the source of water for hydropower rights would remain limited to waters tributary to the Snake River below Milner Dam.⁵⁴ This was incorporated into the Swan Falls Settlement by the zero flow provision at Milner Dam, combined with the contractual promise by both parties “not take any position before the legislature or any court, board or agency which is inconsistent with this Agreement.”⁵⁵ Additional evidence that Idaho Power is estopped from claiming a right to water above Milner his provided herein.

That the upper Snake water users’ reliance on Idaho Power’s long history of representations that it had no control over water use above Milner is further supported by a 1952 letter from T.E. Roach, Idaho Power Company, to Ed Ermine, editor of the Idaho Farm Journal, in which Mr. Roach represented:

⁵⁴ See *Upper Snake Water Users’ Mot. for Summ. J. and Supporting Memo.* at 91-22.

⁵⁵ Agreement ¶ 4. (Orr Aff., Ex. 30 at 2.)

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. This is in conformity with the Company’s long-established and well-known policy of recognizing that the first and most important use for the waters of the Snake River is for the irrigation of the land.⁵⁶

This long-established and well-known policy formed the basis of Idaho Power’s own belief that it could not use its Swan Falls water right to curtail upstream irrigation development. In 1976, Idaho Power attorney Thomas G. Nelson prepared an in-house memorandum regarding the “[p]ossibility of using the Swan Falls water right to stop upstream depletion of the Snake River.”⁵⁷ In that memo, Mr. Nelson concludes that, “The Idaho Power Company’s water rights for its Swan Falls plant cannot be used to prevent consumptive uses from depleting the flows of the Snake River above Swan Falls.”⁵⁸ He pointed out that Idaho Power had facilitated and encouraged power-assisted irrigation development; then explained, “If IPC now attempts to enforce the Swan Falls right against [upstream irrigators], it is saying, ‘We saw you spend the money, we will deliver power for pumping and collect money for it, but don’t deplete our Swan Falls flow right.’”⁵⁹ As a result, Idaho Power’s legal counsel concluded that the Company’s history of subordination,

would be construed to make the Swan Falls right subject also to depletion, since the IPC plants on the Snake are all co-ordinated for operation, and since the water license depletion provision in the Strike and some of the Hells Canyon licenses were subordinated at the request of IPC.⁶⁰

By the same reasoning, many upper Snake River Basin water users adamantly opposed any compromise settlement with Idaho Power. Only in reliance upon express assurances that the Settlement would allow Idaho Power no influence over water use above Milner did the upper

⁵⁶ Fourth Orr Aff., Ex. 23 at 2.

⁵⁷ Second Orr Aff., Ex. 7 at 1.

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 6.

⁶⁰ *Id.* at 6.

SNAKE water users eventually agree to support the Settlement and surrender the right, on remand from the 1983 Idaho Supreme Court decision, to litigate their equitable defenses to Idaho Power's claim of an unsubordinated water right at Swan Falls.

Water use for recharge purposes is vital to the health of irrigation in the upper Snake River Basin. This is evidenced in the voluminous testimony before the Senate Resources and Environment Committee regarding the Swan Falls Settlement and proposed recharge legislation in 2006. Below are a few comments representing the important of recharge to irrigation and other water uses in the upper Snake River Basin:

- My whole life depends on the aquifer. This is where we get all our water.⁶¹
- I believe it is incumbent upon us to make every effort we can to store that excess flow in our aquifers so that it returns to the River at some later date to be used for irrigation, recreation, municipal and industrial uses, and of course power generation, for the benefit of all the citizens of Idaho.⁶²
- I'm going to plead with you: do not lose control of Idaho's water because it is our lifeblood. You can manufacture power in many other ways, but you cannot manufacture plants without water.⁶³
- ...especially in times of drought, the aquifer is really essential for our well-being in Idaho for its people, its farmers, everybody. Therefore, we also believe that in times of plenty, it's our natural obligation to replenish this resource. The bottom line is: we think we could live with higher energy prices; we can't live without water.⁶⁴
- Egin Bench Canals participated in the state-sponsored aquifer recharge program from 1995-2000. During that period of time, we recharged 220,369 acre-feet of water, varying from 8,972 acre-feet in 1995 to a little over 69,000 acre-feet in 1998. ... I think the question is how are we going to deal with future growth in Idaho, not just [how we will] deal with the immediate needs.⁶⁵
- I am a young man, a farmer just beginning, and I would like to continue farming in that area where we irrigate with wells. I would appreciate your support on H

⁶¹ Testimony of Robert Murdock (Fourth Orr Aff., Ex. 79 at 37).

⁶² Testimony of Steven Howser, General Manager of Aberdeen-Springfield Canal Company (*Id.* at 42).

⁶³ Testimony of Brian Murdock (*Id.* at 45).

⁶⁴ Testimony of Michael Bamberger (*Id.* at 48).

⁶⁵ Testimony of Jeff Raybould (*Id.* at 53) (brackets in original).

800 and passing it so that my and many other people throughout the state can continue farming.⁶⁶

This testimony demonstrates the mindset of upper Snake River Basin water users that water is their lifeblood, and that they are committed to protecting and preserving that resource.

The upper Snake River Basin was developed in reliance upon a long history of unqualified assurances by Idaho Power that it would not interfere with water use above Milner. Under no circumstance would the upper Snake water users have supported the Settlement had it compromised or minimized the protection of the zero flow provision. It is axiomatic that upper Snake water users would have adamantly opposed any attempt by Idaho Power to get its foot in the Milner door. It is disingenuous for Idaho Power now—nearly a quarter-century after the Swan Falls Settlement—to claim an implied exclusion to its express agreement to the zero flow at Milner. The Company should be estopped from arguing that the use of water above Milner for aquifer recharge purposes is subservient to its hydropower water right at Swan Falls.

CONCLUSION

Idaho Power's argument that it deliberately refused to subordinate its hydropower right to recharge cannot be reconciled with the plain language of the Swan Falls Settlement and Idaho Code § 42-203B(2), particularly with respect to recharge upstream from Milner Dam. The parties to the Swan Falls Settlement incorporated a zero flow at Milner to assure that hydropower rights below Milner Dam could not seek water from above Milner. Idaho Power Company cannot be permitted to unilaterally renegotiate its obligations under Swan Falls Settlement.

⁶⁶ Testimony of Adam Hales (*Id.* at 58).

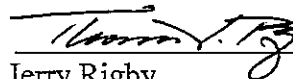
DATED this 7th day of November, 2008.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2008, the above and foregoing document was served in the following manner:

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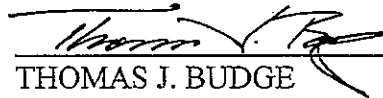
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