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

In Re SRBA

Case No. 39576

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) STATE OF IDAHO'S MEMORANDUM
) IN RESPONSE TO IDAHO POWER
) COMPANY'S MOTION FOR PARTIAL
) SUMMARY JUDGMENT ON
) RECHARGE SUBORDINATION
)

INTRODUCTION

The Court should deny Idaho Power's Motion for Summary Judgment¹ in its entirety. The Company's Motion ignores the language of the Swan Falls Agreement, the undisputed record and applicable State law, and asks this Court to read new subordination restrictions into

¹ Filed October 17, 2008. (Hereinafter, "Idaho Power's Motion for Summary Judgment," "Idaho Power's Motion," "the Company's Motion for Summary Judgment," or "the Company's Motion").

the Agreement that are not part of the original language or intent of the settlement, and are contrary to this Court's rulings in this subcase. Idaho Power's Motion is based on a convenient narrative that amounts to little more than the latest chapter in the Company's ongoing campaign to "chip away" at the Swan Falls Agreement, something Idaho Power's attorney said it would not do.²

Idaho Power's Motion ignores key elements of the settlement, including that Idaho Power: (1) specifically agreed in the Swan Falls Agreement that the hydropower rights in question do not extend to surface water or ground water flows upstream from Milner; and (2) specifically conceded to and agreed not to challenge application of the 1986 amendment to Idaho Code § 42-203B(2) to the water rights. Idaho Power's Motion also disregards the trust established by Idaho Code § 42-203B, and re-submits familiar but flawed arguments this Court has rejected concerning ownership and subordination of the "subordinatable" water rights held in trust by the State.

Idaho Power's Motion for Summary Judgment further ignores the fact that it expressly agreed, as a term of the Swan Falls Agreement, to subordinate the hydropower water rights at issue to three recharge water rights the Company dismissed from the "7500 Case."³ Moreover, and contrary to Idaho Power's assertions, nothing in the contractual provisions of the Swan Falls Agreement limits subordination of the "subordinatable" water rights held in trust by the State to "consumptive" uses, and in any event the parties understood recharge to be a "consumptive" use pursuant to a judicial ruling in the litigation they were attempting to settle. The fact that the

² See Third Affidavit of Michael C. Orr (July 18, 2008) ("Third Orr Aff."), Exhibit 27 at 21 (pages 74-75 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Feb. 5, 1985, 7:00 p.m.) (Boise) (Tom Nelson's comments dismissing concern that Idaho Power would "chip away" at the settlement).

³ *Idaho Power v. State*, Case No. 81375 (Fourth Judicial Dist., Ada County). See Fourth Affidavit of Michael C. Orr (Oct. 17, 2008) ("Fourth Orr Aff."), Exhibit 22 (excepted pages of Complaint in Ada County Case No. 81375).

Agreement does not specifically mention recharge demonstrates that the parties had no intention of barring subordination of the “subordinatable” water rights held in trust by the State to recharge uses. Moreover, Idaho Power sought, and obtained, protection against recharge diversions in the form of the higher minimum flow of 5,600 c.f.s. that the Company demanded for the non-irrigation season. The recharge question was settled as part the “winter flows” issue, and the Company’s Motion seeks protections beyond those provided in the Agreement.

Idaho Power’s contention that the Agreement incorporated certain provisions of Idaho Code §§ 42-234, 42-4201 and 42-4201A as they existed in 1984 ignores Idaho law and the intent of the parties. The Idaho Supreme Court has held that such general statutory provisions do not become part of a contract if the parties show a contrary intent, and the plain language of the Agreement, the parties’ statements in the implementation record, and the settlement’s overall structure, all show that the parties had no intention of incorporating these provisions into the Agreement.

Further, Idaho Power is incorrect in asserting that the 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) confirmed a subordination limitation in the settlement. While these statutes currently provide that recharge water rights diverting below Milner are secondary to the water rights held in trust by the State,⁴ the State may amend or repeal the provisions making recharge secondary to the water rights held in trust by the State without causing any legally cognizable injury to Idaho Power.

STATEMENT OF FACTS

The State incorporates herein the statements of fact on pages 4-25 of the Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment (Jan. 11, 2008), and pages 4-

⁴ Except for recharge water right 37-7842, to which the hydropower water rights were expressly subordinated as a term of the Swan Falls Agreement. *See infra* Part II of “Argument” section.

24 of the Memorandum in Support of State of Idaho's Amended Motion for Summary Judgment on Issue of Recharge Subordination (Oct. 17, 2008) ("State's Opening Brief"). The State also presents additional facts in the "Argument" section, below. As discussed herein, the State disputes Idaho Power's factual assertions on material points, including but not limited to the intent of the parties with respect to recharge subordination.

ARGUMENT

I. IDAHO POWER'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED TO THE EXTENT IT SEEKS RULINGS THAT APPLY TO WATER OR WATER RIGHTS UPSTREAM FROM MILNER DAM.

Idaho Power's Motion ignores the fact that the Company specifically agreed in the Swan Falls Agreement that the hydropower water rights at issue in this consolidated subcase do not extend to or encumber any surface water or ground water flows upstream from Milner Dam, and carry no entitlement to seek curtailment or administration of any uses of water upstream from Milner Dam. This fact forecloses Idaho Power's Motion as to any uses of water for recharge purposes above Milner Dam.

A. The Milner Divide Was At Issue In The Swan Falls Controversy.

The origin of the Milner divide, its role in the Swan Falls controversy and the parties' agreement to define the hydropower water rights as limited to flows arising downstream from Milner Dam are discussed in detail in pages 25-49 of the State's Opening Brief. A brief summary is provided below.

Because the Snake River descends into a deep canyon below Milner, early irrigation development on the Snake River occurred primarily above Milner, resulting in full development of the river's reliable natural summer flow by the beginning of the twentieth century.⁵ Even so, springs in the canyon below Milner regenerated the river by discharging significant quantities of

⁵ See generally State's Opening Brief at 4-5.

water from the Eastern Snake Plain Aquifer ("ESPA"), thus providing flows to support hydropower development downstream from Milner.⁶ Subsequent planning, development and management of the Snake River were based on the natural divide into two different but complimentary hydrologic and economic regimes: an agricultural river upstream from Milner, and a hydropower reach downstream from Milner.⁷

Idaho Power conceded to this principle in constructing and licensing its facilities at American Falls and Twin Falls.⁸ In the contentious federal proceedings on Idaho Power's application for a federal power license for its Hells Canyon complex, the Company introduced and relied on a development analysis that anticipated future development would divert all flows at Milner year-round for agricultural purposes, including for ground water recharge.⁹ Idaho Power's attorney in the Hells Canyon proceedings subsequently stated that a guiding principle for Snake River development should be to "[s]pill no water to waste past Milner."¹⁰ The view that waters above Milner were reserved for existing and future uses above Milner was a settled principle of management and property rights expectations on the Snake River by the time of the Swan Falls controversy.¹¹

Idaho Power conceded to the Milner divide in its first Swan Falls lawsuit, Ada County Case No. 62237,¹² and only sought to renounce it after the Idaho Supreme Court unexpectedly held that the Company's water rights upstream from Hells Canyon were not subordinated by

⁶ See generally State's Opening Brief at 5-6.

⁷ See generally id. at 5-16.

⁸ See Third Orr Aff., Exhibit 4 at 7 (Exhibit H to Idaho Power's "Application for License" to Federal Power Commission for Project No. 18) (Twin Falls) (Feb. 1, 1922); see also id. Exhibit 5 (same); see also id. Exhibit 6 at 3-4 (Article 21 of "Contract Between the United States and Idaho Power Company Relative to Power Rights at American Falls, Idaho") (June 15, 1923); see also Fourth Orr Aff., Exhibit 21 at 5 (Exhibit W to Application for Relicense - Swan Falls Hydroelectric Project) (Dec. 1979).

⁹ See State's Opening Brief at 9-12.

¹⁰ Fourth Orr Aff., Exhibit 10 at 1 (Minutes of Meeting of Bureau of Reclamation and Advisory Committee) (Dec. 29, 1960) (Burley, Idaho).

¹¹ See generally State's Opening Brief at 12-16.

¹² See generally id. at 16-17; see also Fourth Orr Aff., Exhibit 19 at 1-15 ("Amended Complaint" in *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County) (Nov. 1, 1977).

Article 41 of the Federal Energy Regulatory Commission ("FERC") license for the Hells Canyon complex. Idaho Power Co. v. State, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983). The Company alleged for the first time that the hydropower water rights at issue carried an entitlement to water upstream from Milner in its second Swan Falls lawsuit, Ada County Case No. 81375, the "7500 Case."¹³ The 7500 Case was a public relations debacle for the Company, putting it directly at odds with its former political allies in the agricultural sector.¹⁴ The Company, afraid of ratepayer and shareholder suits, vigorously pushed in 1983 for passage of Senate Bill 1180 as a means of resolving the litigation.¹⁵

Senate Bill 1180 required the State and Idaho Power to enter into a contract. The proposed 1180 Contract was the best of all worlds from Idaho Power's standpoint. It would have given the Company the liability protection it needed to dismiss its claims against holders of water rights for **existing** uses, while also allowing it to control the remaining flows of the Snake River by wielding its claimed water rights to preclude **future** appropriations.¹⁶ The Governor refused to settle on such terms, but offered to enter into negotiations on a global settlement that would restore the State's control over future allocation, development and management of the waters of the Snake River.¹⁷ Idaho Power accepted Governor's offer.¹⁸

¹³ See generally State's Opening Brief at 17-18; see also Fourth Orr Aff., Exhibit 22 (excerpted pages of "Complaint," Idaho Power v. State, Case No. 81375 (Fourth Jud. Dist., Ada County) (Mar. 30, 1983)).

¹⁴ See Fifth Affidavit of Michael C. Orr ("Fifth Orr Aff."), Exhibit 1 at 12 (Chapter 18 of Legacy of Light – A History of Idaho Power Company) ("Swan Falls – An Alliance Collapses"); see also Second Affidavit of Michael C. Orr (Feb. 7, 2008) ("Second Orr Aff."), Exhibit 8 (newspaper advertisement portraying Idaho Power as a wolf in sheep's clothing).

¹⁵ Idaho Power Company's Opening Brief in Support of Motion for Partial Summary Judgment (Idaho Power's Opening Brief) at 8.

¹⁶ See Second Orr Aff., Exhibit 13 at 7 (excerpted pages of Deposition of Patrick Jerome Kole, *In re SRBA*, Case No. 39576) (Nov. 14, 1990) ("they could assert their water right or not assert their water right against different uses that would give them the ability to manage the resource").

¹⁷ See Affidavit of Michael A. Gheleta in Support of Idaho Power Company's Opening Brief in Support of Motion for Partial Summary Judgment on Recharge Subordination (Oct. 17, 2008) ("Second Gheleta Aff."), Exhibit E at 2 (page 2 of letter from John V. Evans, Governor, State of Idaho, to James Bruce, Chief Executive Officer, Idaho Power Company) (May 9, 1984) ("Such decision making clearly should be a governmental responsibility, bounded only by broad public interest considerations, and not the prerogative of a private corporation.").

B. The Swan Falls Agreement Recognized And Incorporated The Milner Divide.

Central to the Swan Falls Agreement was its recognition of the Milner divide as an element of the definition of the hydropower water rights at issue. The Agreement required as a term of its implementation that “[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s.”¹⁹ and expressly limited recognition of the adverse affects of non-irrigation season diversions on hydropower generation, and any requirement for corresponding “mitigation” to Idaho Power, to diversions from the Snake River “between Milner Dam and Murphy Gauge.”²⁰ In explaining the Milner “zero flow” and “mitigation” provisions in an Idaho Water Resource Board public information meeting on the settlement, Idaho Power’s attorney and negotiator Tom Nelson stated: “[W]e 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.”²¹ Mr. Nelson further explained that “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.”²²

The Legislature also based its implementation of the Swan Falls Agreement on the “zero flow” at Milner, as Senator Mike Crapo later explained in a public hearing on the administrative rules proposed to implement the “trust” and “public interest” legislation: “[Z]ero flow at Milner

¹⁸ See Affidavit of Shelley M. Davis in Support of Idaho Power Company’s Memorandum in Support of Cross-Motion for Summary Judgment (Jan. 24, 2008), Exhibit L (letter from James E. Bruce, Chairman and CEO, Idaho Power Company, to the Honorable John V. Evans, Governor of the State of Idaho) (May 23, 1984).

¹⁹ Affidavit of Michael C. Orr in Support of State of Idaho’s Motion for Partial Summary Judgment (Jan. 11, 2008) (“First Orr Aff.”), Exhibit 30 at 26 (Exhibit 6 to Swan Falls Agreement); see also id. at 7 (paragraph 13 of Swan Falls Agreement) (“Conditions on Effectiveness”) (requiring “[a]mendment of the State Water Plan to implement the provisions of Exhibit 6”).

²⁰ 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. See id., Exhibit 29 at 3 (Framework at 3); id., Exhibit 15 at 9 (State Water Plan Amendments at 7).

²¹ Id., Exhibit 44 at 13 (page 41 of transcript of Idaho Water Resource Board public information meeting) (Oct. 25, 1984) (Twin Falls) (emphases added).

²² Id., Exhibit 44 at 9 (page 27 of transcript of Idaho Water Resource Board public information meeting) (Oct. 25, 1984) (Twin Falls) (emphases added).

was very heavily discussed and was the basis upon which the legislation was passed.”²³

The upper Snake River water user community emphasized to the members of the Legislature that its support for the settlement was contingent on continued recognition of the principle “[t]hat 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.”²⁴

In the Idaho Water Resource Board’s (“IWRB”) public hearings on the State Water Plan amendments necessary to implement the Swan Falls settlement, IWRB representative Frank Sherman explained that “[t]he negotiators agreed that above Milner there is a requirement for zero flow back to the dam.”²⁵ “They’re going to continue the zero flow at Milner Dam. All the water in the Upper Snake in low water years can be appropriated; therefore, there is no requirement for the water to be dumped past Milner Dam.”²⁶

The Agreement also contemplated that the hydropower water rights would be defined to be consistent with the Milner “zero flow” and the other provisions of the State Water Plan as amended to implement the settlement: “State and Company agree that the resolution of Company’s water rights and recognition thereof by State together with the Idaho State

²³ 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.) (emphasis added). Senator Crapo was the primary architect of the “Statement of Legislative Intent” for the acknowledged “centerpiece” of the Swan Falls legislation. See 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.”).

²⁴ 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); see also *id.*, Exhibit 61 (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).

²⁵ Third Orr Aff., Exhibit 24 at 19 (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).

²⁶ *Id.*, Exhibit 28 at 19 (page 65 of transcript of Idaho Water Resource Board meeting on proposed Policy 32 amendments) (Feb. 6, 1985, 7:00 pm) (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). Mr. Sherman also repeatedly explained in the IWRB Policy 32 meetings that the Agreement’s Milner “zero flow” provision meant that the new minimum flows established at Murphy under the settlement would be supplied primarily by spring discharges below Milner Dam. See generally State’s Opening Brief at 33-34.

Water Plan provide a sound comprehensive plan for the management of the Snake River watershed.”²⁷ Governor Evans’ statement on the State Water Plan amendments also emphasized the importance of the “zero flow” at Milner to the 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.”²⁸

C. The 1986 Amendment To Idaho Code § 42-203B(2) Clarified And Confirmed That The Parties Intended To Limit The Hydropower Water Rights At Issue To Flows Downstream From Milner Dam And Preclude Them From Encumbering Flows Upstream From Milner Dam.

1. By Failing To Recognize The Milner Divide, The Initial Water Appropriation Rules Led To The 1986 Amendment To Idaho Code § 42-203B(2).

The controversy triggered by the Department’s proposed administrative rules and regulations for processing applications for appropriations of “trust water” under the new “public interest” criteria of Idaho Code § 42-203C²⁹ underscored the central role of the Milner divide in the Swan Falls settlement. The Department proposed to define flows above Milner as subject to the water rights held in trust,³⁰ because Idaho Code § 42-203B(2) did not explicitly limit the trust to flows downstream from Milner.³¹ The parties explained in unequivocal terms that they had

²⁷ First Orr Aff., Exhibit 30 at 5 (page 5 of the Swan Falls Agreement) (emphasis added); *see also id.*, Exhibit 29 at 7 (Page 7 of the Framework) (“The State Water Plan is the cornerstone of the effective management of the Snake River and its vigorous enforcement is contemplated as a part of the settlement.”).

²⁸ Third Orr Aff., Exhibit 27 at 4 (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).

²⁹ *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 32 (page 2 of 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.”).

³⁰ *See* First Orr Aff., Exhibit 52 at 2 (“Currents,” Oct. 1985) (Rule 1.5 and Figure 1) (draft rules including flows above Milner); *see also id.*, Exhibit 54 at 2 (“Currents,” Dec. 1985) (Rule 1.5 and Figure 1) (proposed rules including flows above Milner).

³¹ While the Department recognized the contractual role of the “zero flow” provision, the Department explained it should not interpret what it viewed as unqualified statutory language as being limited by the contractual provisions of the Agreement:

intended the Agreement's "zero flow" provision to mean that the water rights were limited to the flows downstream from Milner.

In a Department public information meeting to gather comments and suggestions prior to drafting the administrative rules and regulations for appropriations of "trust water" under the new "public interest" criteria of Idaho Code § 42-203C, Idaho Power's attorney and negotiator Tom Nelson specifically explained that the Milner "zero flow" provision meant surface water diversions above Milner for recharge purposes were not subject to the water rights held in trust by the State:

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.³²

When the Department's proposed rules nonetheless defined surface water and ground water flows above Milner as subject to the water rights held in trust by the State under the settlement, Mr. Nelson again responded that such an interpretation was contrary to the intent of the Swan Falls Agreement:

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

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. . . . 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 . . .

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

³² Fourth Orr Aff., Exhibit 48 at 7 (page 23-24 of transcript of public information meeting) (May 23, 1985) (Twin Falls) (emphases added); see also *id.*, Exhibit 49 (statement of "Nelson") (similar).

by the statute, not by the agreement.^[33] However, if the intent of the rules is to 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.³⁴

Mr. Nelson's partner, attorney John Rosholt, submitted similar written objections: "Under the Swan Falls Agreement, and the statutes and regulations, its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam. . . . for the reason that the minimum stream flow at Milner is zero."³⁵ Mr. Rosholt explained 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."³⁶

Likewise, Attorney General Jim Jones emphasized in a press release and his written comments on the proposed rules 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

³³ Mr. Nelson's written comments on behalf of Idaho Power had pointed out that the trust was created by statute, not by the Agreement: "The agreement did not place any waters in trust. The trust was created by an act of the Legislature. . . . 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) (emphases added).

³⁴ *Id.* (emphasis added).

³⁵ *Id.*, 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).

³⁶ *Id.*, 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).

Dam at zero.”³⁷ The Attorney General explained 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.”³⁸

In a Department hearing on the proposed rules, Senator Mike Crapo stated 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.”³⁹ He explained that “everyone,” including Idaho Power, understood the “zero flow” provision to mean that the water rights would have no effect upstream from Milner:

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.⁴⁰

Written comments and oral testimony on the proposed rules from members of the public confirmed Senator Crapo’s view that the Agreement’s “zero flow” provision had been universally understood to mean that flows arising upstream from Milner would not be subject to any of the water rights encompassed in the Swan Falls Agreement.⁴¹ The universal rejection of the Department’s proposal to define the water rights held in trust by the State as encumbering flows upstream from Milner led to 1986 Senate Bill 1358. One of the principal purposes of

³⁷ Third Orr Aff., Exhibit 41 at 2 (“News Release,” Idaho Office of the Attorney General) (Jan. 29, 1986) (emphasis added).

³⁸ *Id.* (emphasis added). The Attorney General 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).

³⁹ 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.) (Boise) (emphasis added).

⁴⁰ *Id.* at 5 (page 11 of transcript) (emphasis added).

⁴¹ See State’s Opening Brief at 41-43.

Senate Bill 1358 was to clarify "that trust waters do not extend to the Snake River or tributary ground or surface water above Milner."⁴²

2. The 1986 Amendment To Idaho Code § 42-203B(2) Clarified That The Parties Intended To Limit The Hydropower Water Rights At Issue To Flows Downstream From Milner Dam And Preclude Them From Encumbering Flows Upstream From Milner Dam.

1986 Senate Bill 1358 added the following provisions to Idaho Code § 42-203B(2):

[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.⁴³

Senator Crapo explained to the Senate Resources and Environment Committee on February 19, 1986, that the amendment had been negotiated by the interested parties "to merely clarify the [A]greement".⁴⁴

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.⁴⁵

⁴² First Orr Aff., Exhibit 60 at 6 ("Statement of Purpose" for 1986 Senate Bill 1358) (RS 12550). The "Statement of Purpose" expressly recognized that the rules "raised a number of issues concerning interpretation of the legislation." Id.

⁴³ Id. at 2; 1986 Idaho Session Laws 309; see also Idaho Code § 42-203B(2) (emphases added).

⁴⁴ First Orr Aff., Exhibit 62 at 1 (Minutes of the Senate Resources & Environment Committee) (Feb. 12, 1986).

⁴⁵ Id. (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." Id., Exhibit 63 at 1 (Minutes of the House Resources & Conservation Committee) (Mar. 13, 1986).

Further, “Tom Nelson, attorney for Idaho Power, agreed with Senator Crapo on the legislation and said [Idaho Power] too supported the bill and the change.”⁴⁶

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: “[A]pplication 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.”⁴⁷ The amendment also expressly excludes flows arising above Milner for purposes of the “determination”—definition⁴⁸—of **any** water right below Milner, which necessarily includes Idaho Power’s water right to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at Murphy.⁴⁹ “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.”⁵⁰

The plain statutory language, the legislative history, and the administrative record on the proposed rules and regulations for water appropriation demonstrate that the parties negotiated, presented and supported the 1986 amendment to Idaho Code § 42-203B(2) to clarify and confirm the original intent of the Agreement. They also demonstrate that the original intent was to define

⁴⁶ *Id.*, 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 this legislation.” *Id.*, Exhibit 63 at 1 (Minutes of the House Resources & Conservation Committee) (Mar. 13, 1986).

⁴⁷ *Id.*, Exhibit 60 at 2 (1986 Senate Bill 1358); 1986 Idaho Session Laws 309; Idaho Code § 42-203B(2).

⁴⁸ 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>”).

⁴⁹ Idaho Power’s Motion for Summary Judgment completely ignores the distinction between the water right held by the Company to the seasonal flows as measured at the Murphy gauging station, and the water rights held in trust by the State. This distinction is pivotal in resolving the Company’s Motion for Summary Judgment, however, and the State returns to it in Part III of the “Argument” section of this memorandum.

⁵⁰ First Orr Aff., Exhibit 60 at 2 (1986 Senate Bill 1358) (emphasis added); see also 1986 Idaho Session Laws 309; Idaho Code § 42-203B(2).

the hydropower water rights at issue as excluding surface water and ground water flows upstream from Milner, and as carrying no entitlement to seek curtailment or administration of any use of water upstream from Milner. Through the 1986 amendment, the parties removed any possible doubt as to the intended meaning and effect of the Agreement's "zero flow" provision.⁵¹

By negotiating and supporting the 1986 amendment to section 42-203B(2), Idaho Power expressly conceded to, and agreed not to challenge, the State's exercise of its authority under the amendment to "regulate and limit" the legal scope and effect of the hydropower water rights.⁵² 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").⁵³

3. The 1986 Amendment To Idaho Code § 42-203B(2) Precludes Idaho Power's Motion for Summary Judgment To The Extent It Seeks Rulings That Apply Above Milner Dam.

⁵¹ In effect, the 1986 amendment 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.

⁵² The Idaho Constitution provides that the State may "regulate and limit the use of water for power purposes." Idaho Const. Art. XV § 3. Idaho Code § 42-203B is an implementation of this authority. See Idaho Code § 42-203B(1) ("it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes").

⁵³ 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 *id.* (Petition for Declaratory Judgment, *Idaho Power Co. v. State*, Case No. 38526 (Fifth Jud. Dist., Twin Falls County) (Apr. 28, 1986)).

Idaho Power's Motion for Summary Judgment presumes that the hydropower water rights at issue in this consolidated subcase may be asserted or enforced upstream from Milner Dam. This assumption is incorrect because the water rights at issue are defined as limited to flows downstream from Milner, and carry no legal entitlement to call for flows upstream from Milner, as discussed above. Idaho Power's Motion should therefore be denied to the extent it seeks rulings that apply above Milner Dam.

The 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) do not alter this conclusion. The 1994 amendments only apply to hydropower water rights "that may otherwise be subordinated" under the Swan Falls Agreement and its implementing legislation.⁵⁴ Because the hydropower water rights that "may otherwise be subordinated" under the settlement do not extend above Milner Dam, the 1994 amendments also do not extend above Milner Dam. Simply stated, the settlement precludes the hydropower water rights at issue from calling for waters above Milner not as a result of a subordination condition, but rather because waters above Milner are not part of the defined source flows for the water rights. Thus, the 1994 amendments apply only downstream from Milner Dam, and cannot be viewed as impliedly amending or repealing the 1986 amendment to Idaho Code § 42-203B(2). See Thomas v. Med. Center Physicians, 138

⁵⁴

The relevant portions of the 1994 amendments provide 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 company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

Idaho Code §§ 42-234(2), 42-4201A(2) (emphasis added).

Idaho 200, 209, 61 P.3d 557, 566 (2002) (“This Court disfavors statutory amendment by implication absent clear, unequivocal legislative intent.”).⁵⁵

In sum, Idaho Power is not entitled to a ruling that the water rights at issue are not subordinated, or are not “subordinatable,” to recharge uses occurring above Milner Dam. Idaho Power’s Motion for Summary Judgment should be denied to the extent it seeks rulings that apply to water rights diverting from surface water or ground water flows upstream from Milner Dam.

II. IDAHO POWER’S FIRST COUNT FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE IDAHO POWER AGREED TO SUBORDINATE THE HYDROPOWER WATER RIGHTS AT ISSUE IN THIS CONSOLIDATED SUBCASE TO RECHARGE WATER RIGHTS NOS. 01-7054, 37-7842 AND 21-7166.

Idaho Power’s first count for summary judgment seeks a ruling that pursuant to the 1984 Swan Falls Agreement, Idaho Power Company “did not subordinate” the hydropower water rights at issue to recharge.⁵⁶ This Court has held that with respect to **future** uses, the Swan Falls Agreement did not resolve the question of whether the water rights held in trust by the State are “subordinate” to recharge. Rather, “[t]he Agreement made Idaho Power’s rights ‘subordinatable’ to future uses. . . . the [Company’s] right to use the flows is subordinate to subsequent future uses as approved by the State.” Summary Judgment Order at 41. Thus, the first count of Idaho Power’s Motion only raises the narrow question of whether, in the Swan Falls Agreement, Idaho Power contractually agreed to subordinate the water rights at issue to **existing** recharge water rights. On the undisputed record, the answer to this question is “Yes.”

Paragraphs 7(C) of the Swan Falls Agreement provides that the “subordinatable” water rights held in trust by the State, and also the water right held by the Company to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s as measured at the Murphy gauging station, are “subordinate to the

⁵⁵ Nothing in the legislative history of the 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) suggests that the Legislature intended these provisions to amend or repeal the 1986 amendment to Idaho Code § 42-203B(2). See *infra* Part V of “Argument” section.

⁵⁶ Idaho Power’s Motion for Summary Judgment at 2.

uses of those persons dismissed from Ada County Case No. 81375 pursuant to the [1180 Contract].”⁵⁷ Pursuant to this provision, Idaho Power dismissed three recharge water rights from Ada County No. 81375—recharge water rights 01-7054, 37-7842, and 21-7166.⁵⁸ All three of these recharge water rights are listed in the Company’s “Notice of Dismissal of Certain Defendants,” filed in Ada County Case No. 81375 on October 24, 1984.⁵⁹ During the Senate Resource and Environment Committee hearings on the Swan Falls settlement, Idaho Power’s attorney Tom Nelson acknowledged that these “1180 beneficiaries” were “dismissed with prejudice.”⁶⁰ Mr. Nelson also explained that “the power company is barred from challenging their water right.”⁶¹

Thus, the Company expressly agreed that all of the water rights at issue in this consolidated subcase are subordinate to recharge water rights 01-7054, 37-7842, and 21-7166. Idaho Power expressly re-affirmed this subordination to recharge water rights 01-7054 and 37-7842, which are now owned by the IWRB, in the “Stipulation” of April 11, 2006, between the State and the Company: “The Company agrees that its water rights are subordinated to water rights nos. 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement and will neither contest nor otherwise oppose the exercise of those water rights on the basis of priority, the Swan Falls Agreement, or I.C. §§ 42-234, 42-4201 and 42-4201A.”⁶² In addition, Idaho Power stated in the “Complaint” it filed in this consolidated subcase that it “does not here

⁵⁷ First Orr Aff., Exhibit 30 at 4 (Paragraph 7(C) of the Swan Falls Agreement).

⁵⁸ See Fourth Orr Aff., Exhibits 82, 83, 92 (permits for recharge water rights 01-7054, 37-7842, 21-7166).

⁵⁹ See *id.*, Exhibit 81 at 3 (page 30 of Idaho Power’s “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); see also *id.* at 4 (page 68 of “Notice of Dismissal of Certain Defendants”) (listing water right 21-7166).

⁶⁰ First Orr Aff., Exhibit 40 at 12 (pages 38-39 of transcript of Senate Resources and Environment Committee meeting) (Feb. 1, 1985).

⁶¹ *Id.* (page 39 of transcript).

⁶² Fourth Orr Aff., Exhibit 80 at 2 (page 1 of “Stipulation”).

challenge this subordination to existing uses as set forth more fully in Paragraphs 7(C) and 7(D) of the Agreement, the 1180 Contract, or the Consent Judgment in Case No. 81375”⁶³

Accordingly, the Company is not entitled to a ruling that it “did not subordinate” the hydropower water rights at issue to recharge uses or water rights.⁶⁴ The Company’s first summary judgment count should therefore be denied.

III. IDAHO POWER’S SECOND AND THIRD COUNTS FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE SUBORDINATION OF THE WATER RIGHTS HELD IN TRUST IS NOT LIMITED TO “CONSUMPTIVE” USES, AND EVEN IF IT WERE, THE PARTIES UNDERSTOOD RECHARGE TO BE A “CONSUMPTIVE” USE.

Idaho Power’s second count for summary judgment seeks a ruling that “[i]n Paragraph 7 of the Swan Falls Agreement, Idaho Power agreed to make its specified water rights subject to subordination only to subsequent beneficial consumptive upstream uses defined by the law in effect at the time of the Agreement.”⁶⁵ Idaho Power’s third count is similar, seeking a ruling that under the Agreement the State and Idaho Power “considered recharge a non-depletionary water management tool . . . not a consumptive beneficial use to which Idaho Power’s water rights would be subordinated.”⁶⁶

The second and third counts of Idaho Power’s summary judgment motion are based on Idaho Power’s flawed premise that the State’s right to subordinate, as legal owner of the “subordinatable” water rights held in trust, is controlled by Paragraph 7(B) of the Swan Falls Agreement rather than State law. The Court has held that under the Swan Falls Agreement Idaho Power conceded to and agreed not to challenge the State’s regulatory authority over the “subordinatable” water rights held in trust. Pursuant to this regulatory authority, the ownership

⁶³ Complaint and Petition for Declaratory and Injunctive Relief (May 10, 2007) (“Complaint”) at 9-10.

⁶⁴ Idaho Power’s Motion for Summary Judgment at 2 (first issue).

⁶⁵ Id. at 2 (second issue).

⁶⁶ Id. at 2 (third issue).

and subordination of the “subordinatable” water rights is governed by State law, not the contractual provisions of the Swan Falls Agreement.

A. Subordination Of The “Subordinatable” Water Rights Held In Trust By The State Is Controlled By State Law, Not Paragraph 7(B).

This Court has held that Paragraph 7 of the Swan Falls Agreement “defines Idaho Power’s various hydropower rights as a single cumulative right and apportions the right between the unsubordinated and subordinated portions.” Summary Judgment Order at 28.⁶⁷ The “unsubordinated” portion of the cumulative water right is defined by Paragraph 7(A) and entitles the Company to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at the Murphy gauging station.⁶⁸ Paragraph 7(B) provides that the portion of the cumulative water right for flows exceeding the seasonal minimum flows as measured at the Murphy gauging station “shall be subordinate to subsequent beneficial upstream uses upon approval of such uses in accordance with State law.”⁶⁹ This Court has held that “[t]he Agreement made Idaho Power’s rights [for flows in excess of the seasonal flows established at Murphy] ‘subordinatable’ to future uses.” Summary Judgment Order at 41.⁷⁰

The Court also held that Paragraph 7 of the Swan Falls Agreement does not place the “subordinatable” water rights in trust: “Paragraphs 7A through E do not refer to a trust or division of ownership of the subordinated portions of Idaho Power’s rights into legal and

⁶⁷ See also Summary Judgment Order at 23 (“Paragraph 7 of the Agreement which defines Idaho Power’s rights defines them cumulatively as a single right apportioning the right between the subordinated and unsubordinated portions of the right”); id. at 42-43 (“The Swan Falls Agreement addresses the minimum flows for the claims cumulatively. The rate of flow for all claims is a cumulative rate measured at the Murphy gauge. The Agreement did not provide for a minimum rate of flow at Idaho Power’s individual upstream facilities”).

⁶⁸ First Orr Aff., Exhibit 30 at 3 (Paragraph 7(A) of the Swan Falls Agreement).

⁶⁹ Id. at 4 (Paragraph 7(B) of the Swan Falls Agreement).

⁷⁰ See also Summary Judgment Order at 40 (referring to the water rights held in trust as “‘subordinatable’ to future uses”).

equitable title.” Summary Judgment Order at 29.⁷¹ Rather, the Court emphasized that the State established the trust and took legal title to the “subordinatable” water rights under its regulatory authority: “the statute places the ‘subordinatable’ portions of the rights in trust. . . . Under the Agreement, the rights were to be put in trust pursuant to the State’s regulatory authority, not a transfer by Idaho Power.” Id. at 44-45. “Rather, the rights are held in trust *by operation of law*. The implementation of such law was not only a condition of the Agreement, but apparently a law which Idaho Power helped to draft.” Id. at 38 (italics in original).

Idaho Power simply agreed to the State’s regulatory authority as applied to its rights. Once the rights have been defined, the next step is to give effect to the statute. As discussed above the Court need not address any potential infirmity in the State’s regulatory authority because 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 45. This Court has further held that “as a term of the contract Idaho Power agreed to the State’s regulatory authority,” id. at 46; and that “[r]ather than transferring or assigning its rights,

⁷¹ Before filing its “Complaint” here, Idaho Power also viewed the trust as being established by statute rather than contract. As Idaho Power’s attorney Tom Nelson explained in Idaho Power’s written comments to the Department in 1986 regarding its proposed rules and regulations for water appropriation:

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) (emphases added); *see also* First Orr Aff., Exhibit 56 at 3 (“Idaho Power Company is both the holder of senior water rights, and the beneficiary of the trust established by § 42-203B, Idaho Code”) (page 3 of Idaho Power’s “Petition for Declaratory Judgment,” *Idaho Power Co. v. IDWR*, Case No. 38526) (Fifth Jud. Dist., Twin Falls County) (Apr. 28, 1986) (emphasis added). Nonetheless, Idaho Power continues to assert, at least outside of this Court, that the trust is a contractual arrangement established by Agreement and not the legislation, as Idaho Power’s recent responses to the State’s discovery requests demonstrate: “Idaho Power objects to the premise of this Request [for Admission] that a trust was established by Idaho Code § 42-203B. As Idaho Power has asserted throughout this litigation, the trust was established by the Swan Falls Agreement and that Agreement speaks for itself.” Fifth Orr Aff., Exhibit 2 at 2 (page 5 of Idaho Power Company’s Second Supplemental Response to State of Idaho’s Third Set of Discovery) (Sept. 5, 2008).

they were placed in trust pursuant to the State's regulatory authority. Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority." *Id.* at 31. The Court observed that Idaho Power's agreement to concede to the State's regulatory authority was consistent with the purposes of the settlement: "It was important that Idaho Power not be perceived to have voluntarily transferred its water rights because such transfer could have subjected Idaho Power to additional claims that it did not protect its water rights." *Id.* at 13 n.9.

The Court also held that "[t]he trust established a mechanism for reallocating" flows that would become available through subordination of the water rights held in trust by the State. *Id.* at 42. The reallocation mechanism is set forth in Idaho Code § 42-203B(2), which provides, in pertinent part: "The rights held in trust shall be subject to subordination to and depletion by future beneficial upstream users whose rights are acquired pursuant to State law, including compliance with the requirements of section 42-203C, Idaho Code." Compliance with section 42-203C, in turn, requires new appropriations to satisfy the "public interest criteria" analysis if they would significantly reduce flows available for hydropower generation under the water rights held in trust, thereby achieving the parties' goal of giving the State the authority to deny new applications without running afoul of the Idaho Constitution's directive that "[t]he right to divert and appropriate the unappropriated waters . . . shall never be denied":⁷²

By placing the portions of Idaho Power's water rights exceeding the minimum flows in trust, and making the rights "subordinatable" to future uses, the river would still maintain the status of being fully appropriated. This enabled the State to impose the public interest criteria in conjunction with issuing new rights. A straight subordination of Idaho Power's rights would not accomplish the same result as the river would not have been fully appropriated.

Summary Judgment Order at 40-41 (footnote quoting Idaho Code § 42-203C omitted). The plain language of section 42-203B(2) automatically subordinates the water rights held in trust by the

⁷² Idaho Const., Art. XV § 3.

State, by operation of law, to new water rights upon their approval by the Department under the “public interest criteria” analysis of section 42-203C. *See Summary Judgment Order at 45* (“Once the rights have been defined, the next step is to give effect to the statute.”).⁷³

Thus, the law of the case under this Court’s Summary Judgment Order is clear: with respect to the “subordinatable” water rights, the Swan Falls Agreement was simply an agreement by Idaho Power to concede to the State’s legal title and regulatory authority. Under statutes enacted pursuant to this regulatory authority, the State is the legal owner of the water rights for flows exceeding the seasonal flows established at the Murphy gauging station, and the water rights are subordinated to any lawfully acquired water right. Idaho Power is incorrect in arguing that Paragraph 7(B) of the Swan Falls Agreement governs subordination of the “subordinatable” water rights held in trust by the State. It is State law, not the contract, that determines the uses to which the water rights held in trust will be subordinated.

Moreover, the Court has held that there are no inconsistencies between Paragraph 7(B) and the legislation proposed and enacted under the Swan Falls Agreement.⁷⁴ Indeed, the Court

⁷³ This is also in accord with the intent of the parties, as Pat Costello and Tom Nelson explained in the Idaho Water Resource Board public information meeting on the settlement a few days after the Agreement was signed:

MR. COSTELLO: No. The right becomes subordinate to each new right automatically by operation of law. If you acquire a permit from the Department of Water Resources and develop it into a license, it – you – the power company’s right is subordinate to yours immediately upon the issuance of the license, if this all is enacted by the legislature.

MR. NELSON: It doesn’t take a separate proceeding. It’s done as part of the licensing process.

First Orr Aff., *Exhibit 45 at 12* (page 37 of transcript of Idaho Water Resource Board public information meeting) (Oct. 31, 1984) (Lewiston); *see also id.*, *Exhibit 46 at 15* (page 50 of transcript of Idaho Water Resource Board public information meeting) (Nov. 1, 1984) (Boise) (“So that it is automatic, that as soon as they clear the water department, subordination attaches automatically. There isn’t any separate proceeding that they have to go through.”) (Pat Costello).

⁷⁴ *See Summary Judgment Order at 29* (“the way Idaho Power’s rights are defined in Paragraphs 7A through E is not inconsistent with a split in ownership as established by other sections of the Agreement”); *id.* at 31 (“Although Paragraph 7 of the Agreement (which defines Idaho Power’s rights) does not mention a trust arrangement, the rights are defined so as to reconcile with the application of the terms set forth in Exhibit [7]B.”) (parenthetical in original); *id.* at 44 (“the Consent Judgments are wholly consistent with the Agreement. The

has stated that it “finds it inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State pass legislation entirely inconsistent with the body of the contract or the intent of the parties.” Summary Judgment Order at 32.

By arguing that the subordination of the “subordinatable” water rights held in trust by the State is controlled by the contractual provisions of the Swan Falls Agreement rather than State law, counts two and three of Idaho Power’s Motion disregard the language of the Swan Falls Agreement and seek new rulings on issues this Court has decided. The second and third counts of Idaho Power’s Motion should be denied.

B. Counts Two And Three Of Idaho Power’s Motion For Summary Judgment Are Contrary To The Trust Compromise And Seek To Recapture The Control That Idaho Power Voluntarily Surrendered As Part Of The Compromise.

Idaho Power’s assertion that contractual provisions of the Agreement control subordination of the water rights held in trust is also fundamentally inconsistent with the trust’s purposes. The Company’s Motion would allow it to recapture the control and “watermaster” status that the State insisted the Company surrender in return for agreeing to “subordinatable,” rather than “subordinated,” water rights. As discussed in the State’s briefing on its first summary judgment motion, the parties reached an impasse during settlement negotiations about whether the water rights for flows in excess of the new seasonal flows established at Murphy would be immediately “subordinated” by the Agreement, or would simply be “subordinatable.”⁷⁵ Idaho Power insisted that the water rights be “subordinatable,” and the State agreed only because it

Consent Judgments define Idaho Power’s water rights and the statute places the ‘subordinatable’ portions of the rights in trust. There is no inconsistency between the two.”).

⁷⁵ See generally Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment (Jan. 11, 2008) at 8-11.

would hold legal title to the water rights—and would therefore control their subordination—under the trust arrangement.⁷⁶

The fundamental bargain was that the water rights for flows in excess of the seasonal flows at Murphy would be “subordinatable” so long as the State had exclusive control over subordination of the water rights held in trust by the State to “future beneficial users whose rights are acquired pursuant to state law, including compliance with section 42-203C, Idaho Code.” Idaho Code § 42-203B(2).⁷⁷ As Idaho Power’s attorney Tom Nelson explained in the first Senate committee hearing on the settlement: “The state then takes that water, places it in the trust, subject to reallocation, which had the effect of doing two things. It made clear the state’s control over the allocation of the water, clearer if you will, and it left the water unsubordinated.”⁷⁸ Mr. Nelson further explained in a subsequent Senate committee hearing: “The company had said it didn’t want to be watermaster, the state says, ‘Okay, then take yourself totally out of any vestige of control over the rights that you have defined.’ We said, ‘All right, but if you are going to be the watermaster, then you get out and you take care of it.’”⁷⁹

⁷⁶ MR. CHAPMAN: . . . Pat, in a meeting that you and the attorney general and I had sometime back, the attorney general’s office was adamantly opposed to the language that is now 7B. They were supporting the language that said “subordinated” but with opposed to language that referred to “water rights shall be subject to subordination.” My question to you is, why the abrupt turnaround?

MR. KOLE: Well, every time you’re in negotiations, you end up having to give up on some points. And what we ended up agreeing to was to, in essence, have the water right placed in trust in the ownership of the state in exchange for which we went with the concept of the subordinatable water right.

Summary Judgment Order at 34; see also First Orr Aff., Exhibit 46 at 14 (pages 45-46 of transcript of Idaho Water Resource Board public information meeting on the Swan Falls settlement) (Nov. 1, 1984) (Boise).

⁷⁷ See also First Orr Aff., Exhibit 30 at 29 (Exhibit 7B to the Swan Falls Agreement); see also id., Exhibit 60 at 3 (page 2 of 1986 Senate Bill 1358).

⁷⁸ Id., Exhibit 37 at 10 (page 22 of transcript of Senate Resources & Environment Committee meeting) (Jan. 18, 1985) (emphasis added).

⁷⁹ Id., Exhibit 40 at 8 (page 23 of transcript of Senate Resources & Environment Committee meeting) (Feb. 1, 1985).

Pat Kole, the negotiator for the Attorney General, emphasized in a subsequent deposition that the State was adamant that Idaho Power not be allowed to assert *de facto* control of the management and allocation of the waters of the Snake River:

A: The principal issue [of the negotiation] was who would run the river, whether it would be a private utility or whether it would be public ownership. And the State had always wanted to make it clear that this was their job to be the water master and not a private utility. And once both sides agreed that the State should be in charge, that it just then became a question of protecting everybody's water rights through the system and making sure that everybody was treated fairly and equitably].

Q: Why did Idaho Power Company or did Idaho Power Company want to run the river?

A: Well, whether they wanted to or not, they were as a result of the [Supreme] [C]ourt decision *de facto* in charge of the river because of the way they could assert their water right or not assert their water right against different uses that would give them the ability to manage the resource. From the State's point of view that was untenable.⁸⁰

In short, the trust compromise was intended to prevent Idaho Power from using its asserted water rights to usurp the State's proper role as "watermaster" of the Snake River. *See Parker v. Wallentine*, 103 Idaho 506, 512, 650 P.2d 648, 654 (1982) ("The decision as to how the optimum development of water resources in the State of Idaho can best be achieved is a policy decision exclusively within the province of the legislature."). In return, the State agreed to Idaho Power's demand that the water rights for flows in excess of the seasonal minimum flows at Murphy would be "subordinatable" rather than immediately "subordinated."

Idaho Power did not seek or obtain the additional benefit of specific guarantees regarding the future availability of flows exceeding the seasonal minimums or of the nature of future uses. As this Court has held: "No guarantees or promises were made to Idaho Power with respect to

⁸⁰ Second Orr Aff., Exhibit 13 at 6-7 (excerpted pages of Deposition of Patrick Jerome Kole, *In re SRBA*, Case No. 39576) (Nov. 14, 1990)

the availability of the excess flows.” Summary Judgment Order at 47. As the negotiators explained, the only guarantee with respect to future subordination was of a “public process”:

UNKNOWN SPEAKER: Are any other interests vested in this agreement? . . . Are we guaranteeing anybody else’s interests, that is, the irrigators or the—other than what is already appropriated according to that prior first file, first whatever that is?

MR. NELSON: In terms of guarantees, no. The only thing that gets fixed is the minimum flow and the power company’s rights up to that and the rights of existing water users of whatever class. And beyond that, then everybody has to come into the system and qualify under the new standards. So outside of existing users and the minimum flow rights, there’s nothing fixed.

MR. KOLE: The only thing that’s guaranteed is that it’s a public process.⁸¹

The trust ensured that Idaho Power would not be “watermaster” and that allocation decisions regarding a publicly-owned resource—and subordination of State-owned water rights—would be made in a public forum rather than in a corporate boardroom. Idaho Power’s second and third counts for summary judgment are contrary to the statutory trust arrangement and are simply an attempt to recapture control over Snake River flows that the Company voluntarily surrendered, while retaining the benefits of “subordinatable” water rights.

C. Paragraph 7(B) Of The Swan Falls Agreement Does Not Limit Subordination Of The Water Rights Held In Trust By The State To “Consumptive” Uses, And In Any Event The Parties Understood Recharge To Be A “Consumptive” Use.

Idaho Power argues that under Paragraph 7(B) of the Swan Falls Agreement, the water rights held in trust by the State may only be subordinated to “consumptive” beneficial uses, and that recharge is not a “consumptive” use.⁸² This is contrary to the language of Paragraph 7(B) and other provisions of the Agreement, and to the parties’ statements in the implementation proceedings. Further, the record demonstrates that the parties viewed recharge as a

⁸¹ First Orr Aff., Exhibit 45 at 10 (page 31 of transcript of Idaho Water Resource Board public information meeting on the Swan Falls settlement) (Oct. 31, 1984) (Lewiston).

⁸² See Idaho Power’s Opening Brief at 7-10, 20-25.

“consumptive” use, and that Idaho Power’s argument that recharge is “non-consumptive” and “non-depletionary” is contrary to its own prior assertions and arguments.

1. Nothing In Paragraph 7(B) Limits Subordination Of The “Subordinatable” Water Rights Held In Trust By The State To “Consumptive” Uses.

Idaho Power’s contention that the Swan Falls Agreement bars subordination to recharge of the “subordinatable” water rights held in trust by the State relies on subordination provisions in the Company’s licenses for its Hells Canyon, C.J. Strike and Twin Falls facilities, which refer to “beneficial consumptive uses”⁸³ and “irrigation.”⁸⁴ Idaho Power argues that “history illustrates that the Company was very careful in its subordinations, and only agreed to subordinate its hydropower development to upstream development for irrigation purposes and consumptive uses” and therefore the language of Paragraph 7(B) “must be narrowly construed in light of the relevant subordination history” and “squared with” these other subordination provisions.⁸⁵ The Company also argues that the absence of the term “recharge” from Paragraph 7(B) means the Agreement bars subordination of the “subordinatable” water rights held in trust by the State.⁸⁶

The flaw in these contentions is that Paragraph 7(B) of the Swan Falls Agreement conspicuously omits the terms “consumptive” and “irrigation.” Even assuming, *arguendo*, that Paragraph 7(B) were controlling with respect to subordination of the water rights held in trust—which it is not for reasons previously discussed—it simply provides that the water rights for flows in excess of the seasonal minimum flows as measured at the Murphy gauging station “shall be subordinate to **subsequent beneficial upstream uses** upon approval of such uses by the State

⁸³ Idaho Power’s Opening Brief at 7 (quoting the federal license for Idaho Power’s Hells Canyon complex).

⁸⁴ See generally id. at 7, 20-25.

⁸⁵ Id. at 25.

⁸⁶ Id. at 11-12.

in accordance with State law.”⁸⁷ The prominent omission of what Idaho Power asserts has always been a critical and “hard fought”⁸⁸ limitation on the subordination provisions the Company negotiated over the years is significant and controlling: it can only mean there is no such subordination limitation in the Swan Falls Agreement.

The legislation proposed under Exhibit 1 to the Swan Falls Agreement and enacted as Idaho Code § 42-203C confirms that there are no limitations on the type or nature of uses that may appropriate water flows subject to the water rights held in trust by the State. The “public interest criteria” set forth in Exhibit 1 and section 42-203C are the gateway to subordination of the water rights held in trust, because those water rights are subordinated to new water rights that “compl[y] with the requirements of section 42-203C, Idaho Code.” Idaho Code § 42-203B(2). If the parties or the Legislature had intended to limit subordination of the water rights held in trust to “consumptive” uses, this term would appear in section 42-203C or the corresponding part of Exhibit 1—but it does not. To the contrary, both section 42-203C and the corresponding part of Exhibit 1 explicitly contemplate subordination to “**multiple use development**” of the State’s water resources.⁸⁹ Further, the Legislature determined prior to the Swan Falls Agreement that recharge was a “**multiple use**” development of the State’s water resources. *See Idaho Code § 42-4201(1)* (stating the legislative finding that a pilot recharge project “shall serve the interests of the public and advance the **multiple use** water policy of this state . . .”) (emphasis added). The 1982 Idaho State Water Plan also discussed “recharging of dry aquifers for water storage for **multiple uses** including flow augmentation.”⁹⁰

⁸⁷ First Orr Aff., Exhibit 30 at 4 (Paragraph 7(B) of the Swan Falls Agreement) (emphasis added).

⁸⁸ Idaho Power’s Opening Brief at 20.

⁸⁹ First Orr Aff., Exhibit 30 at 16 (page 4 of Exhibit 1 to the Swan Falls Agreement) (emphasis added); *see also Idaho Code § 42-203C(2)(a)(iv)*.

⁹⁰ Fifth Orr Aff., Exhibit 3 at 17 (page 39 of 1982 Idaho State Water Plan) (emphasis added).

Idaho Power also argues that the term “consumptive” should be read into Paragraph 7(B) of the Swan Falls Agreement because the 1180 Contract expressly provides for subordination to certain “consumptive” uses.⁹¹ This argument has even less merit, because while the parties included the “consumptive” limitation in a contract negotiated under a statute enacted before the Swan Falls Agreement, they did not choose to include the same limitation in the Swan Falls Agreement itself. Further, the 1180 Contract dealt with immediate subordination to consumptive uses “existing at the time,”⁹² while Paragraph 7(B) of the Swan Falls Agreement dealt with “subordinatable” water rights and future uses.”⁹³ Nothing indicates the parties intended prospective subordination to future uses to be coextensive with immediate subordination to existing uses—there would have been no need for separate contracts or subordination provisions if they had so intended.

The Agreement specifically states that it “sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties.”⁹⁴ Idaho Power’s second and third counts for summary judgment are nothing more than requests for the Court to read a new, significant limitation on subordination of the “subordinatable” water rights held in trust by the State that does not appear in the unambiguous language the parties negotiated, and should therefore be denied. See *McKay v. Boise Project Bd. of Control*, 141 Idaho 463, 471, 111 P.3d 148, 156 (2005) (“The determination and legal effect of a contractual provision is a question of law where the contract is clear and unambiguous, and courts cannot revise the contract in order to change or make a better agreement for the parties.”).

⁹¹ See *Idaho Power’s Opening Brief* at 8-9; see also First Orr Aff., *Exhibit 31* at 2-3 (pages 2-3 of the 1180 Contract).

⁹² *Idaho Power’s Opening Brief* at 8.

⁹³ *Summary Judgment Order* at 41.

⁹⁴ First Orr Aff., *Exhibit 30* at 9 (page 9 ¶ 19 of the Swan Falls Agreement).

2. The Implementation Record For The Swan Falls Settlement Demonstrates That Subordination Of The "Subordinatable" Water Rights Held In Trust By The State Is Not Limited To "Consumptive" Uses.

The implementation record for the Swan Falls Agreement demonstrates that the omission of the term "consumptive" from Paragraph 7(B) was no accident: the parties intended to allow for subordination of the water rights held in trust by the State to both "consumptive" and "non-consumptive" uses. As evidenced by Idaho Power attorney Tom Nelson's statements in the IWRB public information meeting on the settlement on November 1, 1984, subordination to non-consumptive uses is "preferred" under the "public interest criteria" analysis:

UNKNOWN SPEAKER: Gentlemen, I presume we have 600 c.f.s. that, in effect, more or less, is the old Idaho water rights that we are going to sell to whatever is the most economically feasible development program that is brought forward to a Board. Now, the question I have, is there a priority list as to what you would consider one above the other? Would you consider possibly a fish farm above an agricultural farm, a community development above a recreational use? **Do you have outlined any priorities along that line?**

MR. NELSON: **I haven't seen any. I think it would depend -- that analysis as it's focused in the public interest criteria is initially largely economic. So on your examples, my guess is, on an economic basis, in other words, where you say an acre foot of hydropower will develop "X" kilowatt hours, which is worth so much money in this particular time period, that any non-consumptive use would result in a better economic analysis than a consumptive use. So obviously a fish farm would impinge less on hydro development than would a standard dirt farm. And recreation use wouldn't be -- if you're looking at a reservoir, for example, you get some evaporation, but it's not consumptive in the usual sense. So on your question, I would say if you had a priority economically, it would be that you're going to have to find non-consumptive uses have less of an economic detriment to hydropower. So they would be preferred that way.**⁹⁵

The central role of the State Water Plan in the settlement also demonstrates that the parties intended to allow for subordination of the water rights held in trust by the State to both "consumptive" and non-consumptive" uses. The Swan Falls Agreement provides that the

⁹⁵ First Orr Aff., Exhibit 46 at 13 (pages 42-43 of transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement) (Nov. 1, 1984) (Boise) (emphases added).

resolution of the disputed hydropower water rights, “together with the Idaho State Water Plan, provide a sound comprehensive plan for the management of the Snake River watershed.”⁹⁶ The first “Objective” of the State Water Plan as amended to implement the Swan Falls settlement was to support “both consumptive and nonconsumptive” uses:

Beneficial and efficient water use: The policy of the Idaho Water Resource Board is to follow a broader definition of the term ‘beneficial use of water’ to include all water uses, both consumptive and nonconsumptive (for example, stream resource maintenance flows) and to seek implementation of those water resource projects and programs which provide for this definition through efficient water use practices.⁹⁷

Similarly, Policy 32A of the implementing water plan amendments addressed reallocation of “Water Held in Trust by the State” and provided that both the “public interest criteria” of Section 42-203C and “the criteria set forth in Policy 1” of the State Water Plan were to be used together “for the reallocation of hydropower rights.”⁹⁸ The Policy 1 criteria, in turn, recommended amending to the Idaho water code to provide that “both consumptive and non-consumptive” uses would be deemed “to have equal desirability as beneficial uses subject to Article XV, Section 3, of the state Constitution.”⁹⁹ Thus, the settlement implementation record demonstrates that the parties explicitly contemplated subordination to both consumptive and non-consumptive uses.

3. The Parties Understood Recharge To Be “Consumptive” Use Because The Fourth Judicial District Court Had So Ruled In Ada County Case No. 62237.

⁹⁶ First Orr Aff., Exhibit 30 at 5 (page 5 of the Swan Falls Agreement). The Framework contained a similar provision: “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.” *Id.*, Exhibit 29 at 7 (page 7 of Framework).

⁹⁷ Fifth Orr Aff., Exhibit 3 at 14 (page 19 of 1982 Idaho State Water Plan) (first emphasis in original; second emphasis added).

⁹⁸ First Orr Aff., Exhibit 15 at 5 (page 3 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).

⁹⁹ Fifth Orr Aff., Exhibit 3 at 16 (page 21 of 1982 Idaho State Water Plan).

Idaho Power is also incorrect in asserting that the parties would have understood the term "consumptive uses" to exclude recharge, because this question was decided against Idaho Power in the Company's first Swan Falls lawsuit, Ada County Case No. 62237. The District Court's summary judgment decision in that case addressed "the overall effect" of the subordination provision in Article 41 of the FERC license for Idaho Power's Hells Canyon complex,¹⁰⁰ which among other things expressly barred the Company from operating the project so as to interfere with future upstream diversions "for the irrigation of lands and other **beneficial consumptive uses**."¹⁰¹ The Court noted that this provision did not apply to "**non-depletionary and non-consumptive uses**,"¹⁰² and stated that "[t]he effect of the subordination restriction" was such that "[t]he right might be better characterized as an open-ended right to use only such water as remains flowing in the river after upstream diversion and depletion."¹⁰³

Idaho Power moved to amend the summary judgment, arguing that proposals for diversions "to offstream storage for irrigation season use of water that otherwise flows down [the] Snake River in the winter time,"¹⁰⁴ including proposals "to form re-charge districts in accordance with statutory authority,"¹⁰⁵ which "would enable the diversion of flows that would otherwise be available for power generation" and that "winter water supply is critical to winter power generation."¹⁰⁶ The Company asserted 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

¹⁰⁰ Fifth Orr Aff., Exhibit 4 at 23 (page 376 of Memorandum Decision and Order, *Idaho Power Co. v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Dec. 10, 1979).

¹⁰¹ Id. at 19 (page 372 of Memorandum Decision and Order).

¹⁰² Id. at 17 n.1., 65 n.1 (pages 370 and 418 of Memorandum Decision and Order).

¹⁰³ Id. at 35 (page 388 of Memorandum Decision and Order).

¹⁰⁴ Fourth Orr Aff., Exhibit 24 at 3 (page 3 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).

¹⁰⁵ Id. at 4 (page 3 of "Plaintiff's Memorandum in Support of Motion to Re-Consider . . .).

¹⁰⁶ Id.

subordination provisions.”¹⁰⁷ The Company also asserted that “[w]hile the subordination provisions suggest that Plaintiff may not object to diversions for **consumptive** uses in the Snake River watershed, 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.”¹⁰⁸ The District Court denied Idaho Power’s motion to amend, 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.”¹⁰⁹ The Company did not challenge this ruling in its appeal to the Idaho Supreme Court.¹¹⁰

Thus, in the very litigation the parties were attempting to settle, the District Court had determined that recharge fell within the scope of a subordination provision that applied to “**beneficial consumptive uses**”¹¹¹ but not to “**non-depletionary and non-consumptive uses.**”¹¹² Under this ruling, the parties would have understood recharge to be a “beneficial consumptive use” rather than a “non-depletionary and non-consumptive use.”¹¹³ Accordingly, Paragraph 7(B)

¹⁰⁷ Fourth Orr Aff., Exhibit 24 at 4. In fact, a development analysis Idaho Power submitted in support of its application for a Federal Power Commission license for the Hells Canyon complex expressly contemplated that future development would “practically eliminate spills past Milner,” including diversions for storage and ground water recharge purposes. *Id.*, Exhibit 53 at 7 (page 6 of “Future Upstream Depletion Above Hells Canyon”) (Apr. 6, 1953); see also State’s Opening Brief at 9-11.

¹⁰⁸ Fourth Orr Aff., Exhibit 24 at 4-5 (pages 4-5 of “Plaintiff’s Memorandum in Support of Motion to Re-Consider . . .”) (emphasis added).

¹⁰⁹ *Id.*, Exhibit 25 at 5 (page 432 of “Memorandum Decision,” *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County) (May 16, 1980).

¹¹⁰ *Id.*, 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).

¹¹¹ Fifth Orr Aff., Exhibit 4 at 19 (page 372 of Memorandum Decision and Order).

¹¹² *Id.* at 17 n.1, 65 n.1 (pages 370 and 418 of Memorandum Decision and Order).

¹¹³ This conclusion finds further support in the fact that, like the District Court, the parties viewed recharge as a type of “off-stream storage.” Both Idaho Power’s motion to amend, and the District Court decision denying the motion, discussed recharge as a subset of “Offstream Storage.” Fourth Orr Aff., Exhibit 24 at 3; *id.*, Exhibit 25 at 4. Moreover, during the winter flow negotiations phase of the Swan Falls negotiations, the parties understood “offstream storage” to be “anything other than storage within the natural channel of the Snake River and its

would have authorized subordination to recharge even if it had been limited to “beneficial consumptive uses.”

4. The Settlement Contemplated Recharge Subordination Because The Swan Falls Agreement Did Not Expressly Exclude Recharge And Accounted For It Through Higher Winter Minimum Flows.

For the same reasons, Idaho Power is incorrect in arguing that subordination to recharge was not contemplated simply because the term “recharge” does not appear in the Swan Falls Agreement. Under the District Court’s ruling on Idaho Power’s motion to amend, and given Mr. Nelson’s explanation that the water rights held in trust by the State could be subordinated to both consumptive and non-consumptive uses,¹¹⁴ it would have been necessary for the parties to expressly exclude “recharge” from the scope of subordination in Paragraph 7(B) if their intent had been to bar subordination to recharge. The absence of the term “recharge” from the Swan Falls Agreement means that subordination to recharge was contemplated and intended.¹¹⁵

This conclusion is consistent with the Framework, which provided that “[p]riority should be given to projects which promote Idaho’s family farming tradition and which will create jobs”¹¹⁶—a description that clearly encompasses many of recharge’s benefits¹¹⁷—without specifically excluding recharge. Further, Idaho Power’s contention that the Framework should be read as excluding subordination to recharge is contrary to its language and structure. The Framework identified six “judicial, legislative and administrative actions” the parties agreed

tributaries”). *Id.*, Exhibit 30b at 25 (memorandum from Patrick J. Kole to Thomas Nelson) (Sept. 18, 1984); *see also id. at 33* (responsive memorandum from Thomas G. Nelson to Pat Costello and Pat Kole) (Sept. 18, 1984)

¹¹⁴ First Orr Aff., Exhibit 46 at 13 (pages 42-43 of transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement) (Nov. 1, 1984) (Boise).

¹¹⁵ Idaho Power’s contention that the absence of the word “recharge” from Paragraph 7 and the implementing legislation assumes that the settlement exhaustively enumerated the specific uses to which the water rights held in trust by the State could be subordinated. This fallacy in this assumption is illustrated by the fact that the word “irrigation” also does not appear in Paragraph 7 of the Swan Falls Agreement, the corresponding exhibits (Exhibits 1, 7A and 7B) or Idaho Code §§ 42-203B or 42-203C, but it is undisputed that the State may subordinate the water rights held in trust to “irrigation” uses.

¹¹⁶ First Orr Aff., Exhibit 29 at 4 (page 4 of the Framework).

¹¹⁷ *See infra* pp. 39-40 (discussing consumptive use of recharge water for irrigation purposes).

should be taken in the public interest and to resolve the outstanding legal issues,¹¹⁸ and addressed each “action” in a separate section or article. The “action” pertaining to the approval of new uses and subordination under the “public interest criteria” is section 2,¹¹⁹ which is separated by three pages and two “action” sections from the “aquifer recharge” reference in section 5.¹²⁰ Section 5 pertains to State funding of hydrologic and economic studies to facilitate implementation of the State Water Plan and flow augmentation programs.¹²¹ The physical and topical separation between section 2 and section 5 demonstrates the “aquifer recharge” reference in the latter was not intended to operate as a limitation on the former. Idaho Power is reading into the Framework a restriction and an intent that is not present in its plain language and structure.

Moreover, as discussed in the State’s Opening Brief, the settlement included protection for Idaho Power from recharge diversions in the carefully negotiated higher minimum flow for November 1 to March 31, which Idaho Power demanded.¹²² In short, the parties viewed recharge as a component of the larger question of winter flows and non-irrigation season diversions. Indeed, Idaho Power specifically litigated recharge subordination as a question of “water that otherwise flows down [the] Snake River in the winter time” in its Motion to Re-Consider and Amend Summary Judgment in Ada County Case No. 62237.¹²³ Recharge was part and parcel of the settlement because it was an inherent component of, and subsumed in, the larger issue of winter diversions and winter minimum flows. Idaho Power’s motion is simply an

¹¹⁸ First Orr Aff., Exhibit 29 at 2 (page 2 of the Framework).

¹¹⁹ *Id.*, Exhibit 29 at 4 (page 4 of the Framework).

¹²⁰ *Id.*, Exhibit 29 at 7 (page 7 of the Framework).

¹²¹ *Id.* (“The State Should Fund Hydrologic and Economic Studies to Determine the Most Cost-Effective and Environmentally Sound Means to Implement the State Water Plan and to Augment Flows in the Snake River.”) (section header).

¹²² See generally State’s Opening Brief at 20-22; see also Fourth Orr Aff., Exhibit 29 at 6 (page 16 of WRNL Digest) (Summer 1984) (discussion of winter flow negotiations in “Commentary on Swan Falls Resolution”).

¹²³ Fourth Orr Aff., Exhibit 24 at 3-4 (page 3-4 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).

attempt to obtain additional protection from recharge, over and above that to which the parties explicitly agreed.

5. The 1999 Recharge Feasibility Report Does Not Support Idaho Power's Contention That Recharge Is A "Non-Consumptive" And "Non-Depletionary" Use.

Finally, Idaho Power relies heavily on the Department's 1999 study entitled "Feasibility of Large Scale Managed Recharge of the Eastern Snake Plain Aquifer System"¹²⁴ ("Recharge Feasibility Report") in asserting recharge is a "non-consumptive and non-depletionary" water use.¹²⁵ This reliance is misplaced. The Recharge Feasibility Report was not in existence at the time of the Swan Falls negotiations and did not inform the intent of the parties, the Legislature or the public about whether recharge constitutes a "consumptive" or "depletionary" use. In addition, none of the passages or pages Idaho Power cites in the Recharge Feasibility Report state that recharge is a "non-depletionary" or "non-consumptive" use. Contrary to Idaho Power's suggestion, the Recharge Feasibility Report simply does not characterize recharge as a "non-depletionary" or "non-consumptive" use, not even in the sections of the study entitled "Water Rights for Recharge Diversions" and "Hydropower."¹²⁶ Rather, the terms "non-depletionary" and "non-consumptive" are Idaho Power's, and nothing more than an argumentative gloss the Company grafts onto the Recharge Feasibility Report for purposes of this litigation.

¹²⁴ Second Gheleta Aff., Exhibit B.

¹²⁵ Idaho Power's Opening Brief at 3.

¹²⁶ *See generally* Second Gheleta Aff., Exhibit B at 49-53 (pages 40-44 of "Feasibility of Large Scale Managed Recharge of the Eastern Snake Plain Aquifer System") (IDWR, Dec. 1999) ("Recharge Feasibility Report"). Note that the "Hydropower" section of the Recharge Feasibility Report does state, however, that "diversions for managed recharge would likely satisfy the public interest criteria" and that "Section 42-203B excludes rights above Milner Dam from being regulated to satisfy rights below Milner Dam." *Id.* at 52 (page 43 of Recharge Feasibility Report).

Idaho Power's dissenting "narrative" in the Recharge Feasibility Report¹²⁷ further refutes the Company's current contention that recharge was viewed as a "non-depletionary" or "non-consumptive" use. In its "narrative," Idaho Power expressly characterized recharge diversions as causing significant "depletions" of the flows that would otherwise be available for hydropower purposes, and asserted that the "[d]ifference in diversion and return is negative, even after 60 years. 12% loss at Thousand Springs and 27% loss at Hells Half Acre."¹²⁸

Moreover, the analytical basis for Idaho Power's reliance on the Recharge Feasibility Report as demonstrating that recharge uses are "non-consumptive and non-depletionary" is shaky at best. Idaho Power admits that the Recharge Feasibility Report supports the Company's argument only "in the absence of a subsequent diversion [of recharged flows] for a consumptive use."¹²⁹ This wholly unrealistic assumption ignores the fact that recharge supports consumptive use diversions, such as irrigation.¹³⁰ Recharge is not simply a "non-depletionary water management tool"¹³¹ or an exercise in "moving water from one part of the hydrologic cycle to another, and back again,"¹³² as Idaho Power asserts. At the time of the Agreement, the Legislature had expressly acknowledged that recharge is a means to "increase the water available for beneficial use." Idaho Code §§ 42-4201(1), 42-4201A(1). The State Water Plan and the Recharge Feasibility Report also recognized that ground water pumping for consumptive uses

¹²⁷ See Second Gheleta Aff., Exhibit B at 52 (page 43 of Recharge Feasibility Report) (referring to Idaho Power's "narrative" in Appendix C); see also id. at 242 (page 233 of Recharge Feasibility Report) (page 1 of "Appendix C. Idaho Power Company Issues").

¹²⁸ Id. at 246 (page 237 of Recharge Feasibility Report) (attachment 1 to "Appendix C. Idaho Power Company Issues") (emphasis added).

¹²⁹ Idaho Power's Opening Brief at 4.

¹³⁰ See generally Fourth Orr Aff., Exhibit 79 at 38-49 (pages 38-49 of minutes of Senate Resources and Environment Committee) (Mar. 27, 2006) (testimony by farmers and irrigation district and canal company officials supporting recharge).

¹³¹ Idaho Power's Motion for Summary Judgment at 2.

¹³² Idaho Power's Opening Brief at 14.

such as irrigation contributed to ground water declines,¹³³ and that recharge was intended, in part, to maintain ground water levels or reverse ground water declines.¹³⁴

1993 House Concurrent Resolution No. 26, which was the genesis of the 1993 Recharge Committee, explicitly recognized this connection: "WHEREAS, any decline in an aquifer impacts industry, drinking water supplies, municipalities and agriculture; and WHEREAS, in order to protect the existing beneficial uses of water, there is a need to investigate ground water recharge . . ."¹³⁵ As Department employee Norm Young explained to the Recharge Committee: "Currently, when recharge districts or irrigation districts put water into the ground, that recharge becomes part of the natural water supply and is doled out under the priority list of 'First in Time, first in right.'"¹³⁶ In the same meeting, it was explained to the Recharge Committee that the Lower Snake Aquifer Recharge District had been formed principally to address steep declines in ground water levels and spring flows.¹³⁷ From both a legal and practical standpoint, Idaho Power's contention that recharge is a "management tool" that simply moves water "from one part of the hydrologic cycle to another" is a narrow, unrealistic view that ignores the hydrologic and economic facts, the broad scope of recharge purposes and benefits, and is entirely out of step with the intent and purposes of the Swan Falls Agreement.

¹³³ See Fifth Orr Aff., Exhibit 3 at 12-13 (pages 16-17 of 1982 Idaho State Water Plan) (discussing ground water trends and pumping); see also *id.*, Exhibit 5 at 13 (page 16 of 1986 Idaho State Water Plan) ("Irrigated agriculture uses roughly 65% of the ground water withdrawn in an average year"); see also *id.*, Exhibit 6 at 6 (page 12 of 1992 Idaho State Water Plan) (same); see also Second Gheleta Aff., Exhibit B at 21 (page 11 of Recharge Feasibility Report) (reporting that 14% of discharges from the ESPA are due to "Net Pumpage" and stating that during the 1950s and 1960s, "irrigation sources were shifting from surface to ground water").

¹³⁴ See Fifth Orr Aff., Exhibit 3 at 17 (page 39 of 1982 Idaho State Water Plan) (stating that one area "needing immediate attention" was "Investigate dry or unsaturated aquifer systems which could be used for long-term water storage and evaluate methods of recharging dry aquifers for water storage for multiple uses including low flow augmentation"); see also Second Gheleta Aff., Exhibit B at 11 (page ix of Recharge Feasibility Report) ("Restoring ground-water levels in the central part of the Plain and spring discharges in the Thousand Springs and American Falls reaches of the Snake River are two key hydrologic objectives . . .")

¹³⁵ Fifth Orr Aff., Exhibit 7 at 3 (page 1 of 1993 House Concurrent Resolution No. 26 at 1).

¹³⁶ *Id.* at 42 (page 6 of minutes of Recharge Committee for July 1, 1993).

¹³⁷ *Id.* at 47-48 (page 11-12 of minutes of Recharge Committee for July 1, 1993).

Idaho Power also argues that the Recharge Feasibility Report demonstrates that recharge is “non-consumptive” and “non-depletionary” because “[i]f these model runs [analyzed in the report] were run out to infinity, virtually all of the water recharged would return to the river.”¹³⁸

This argument proves too much. If one draws the time scale to out to infinity, “virtually all of the water” diverted for any use—including irrigation—eventually returns to the river. Under Idaho Power’s analysis, all uses of water are “non-depletionary” or “non-consumptive,” not just recharge.

Idaho Power’s assertion that recharge is “non-consumptive” and “non-depletionary” is also inconsistent with the Company’s basis for asserting that recharge adversely affects hydropower. The Company asserts in this litigation that “hydropower generation is immediately affected by diminished river flows.”¹³⁹ In other words, Idaho Power analyzes recharge on a time scale of decades or “infinity” for purposes of demonstrating that recharge is a “non-depletionary use,” but points to the “immediate” depletionary effects of recharge for purposes of arguing that recharge has adverse effects on hydropower.¹⁴⁰ Idaho Power is simply trying to have it both ways and ends up arguing, nonsensically, that recharge is a “non-consumptive and non-depletionary” use while simultaneously complaining that recharge diversions immediately deplete flows that would otherwise be available for hydropower generation at the Company’s

¹³⁸ Idaho Power’s Opening Brief at 5 n. 6.

¹³⁹ Id. at 4.

¹⁴⁰ Idaho Power’s contention that recharge diversions would “immediately” reduce the flows available at its facilities reflects the more generally accepted definition of what constitutes a “depletion,” and in particular the Recharge Committee’s understanding of the term, as reflected in the definition Water District 1 watermaster Ron Carlson gave to the Recharge Committee in its meeting on August 5, 1993:

Mr. Carlson advised the committee that, in regard to consumptive use or depletions, he defines depletion as that which is: “. . . just human actions that result in an immediate reduction in the water supply in an area where it is based.” Anything that is done to reduce the water supply in the Upper Snake is classified as a depletion.

Fifth Orr Aff., Exhibit 7 at 68 (page 4 of minutes of Recharge Committee for August 5, 1993) (ellipsis in original) (emphasis added).

facilities. The Recharge Feasibility Report, and Idaho Power's strained interpretation of it, do not support the contention that recharge uses are "non-consumptive and non-depletionary."¹⁴¹

6. Rather Than Limiting Subordination Of The Subordinatable Water Rights Held In Trust By The State To "Depletionary Uses" As Idaho Power Defines Them, Idaho Code § 42-203B(2) Provides That The Water Rights Held In Trust Are "Subject To Depletions" Resulting From Diversions Under Any Lawfully Acquired Water Right.

In a related argument, Idaho Power asserts that the water rights held in trust by the State may not be subordinated to recharge water rights because recharge uses are "non-depletionary," and that Idaho Code § 42-203B limits subordination of the water rights held in trust to "future depletionary uses." Idaho Code § 42-203B(1).¹⁴² This argument fails because, as discussed above, recharge uses cannot be viewed as "non-depletionary." Further, Idaho Power's argument is contrary to the intent of the Swan Falls Agreement and sections 42-203B(2) and 42-203C.

While the preamble of Idaho Code § 42-203B refers to "depletionary uses," the term is not defined in the statute (or in the Swan Falls Agreement). The operative subordination language in subsection (2) of that statute, as well as the complimentary language in section 42-203C and the Swan Falls Agreement, demonstrate that "depletionary uses" is not a term of art but simply refers to actual flow reductions that result from upstream uses. Rather than limiting subordination of the water rights held in trust to "depletionary uses," Idaho Code § 42-203B(2) simply provides that the water rights are "subject to subordination to and depletion by" by future upstream beneficial uses under water rights acquired pursuant to State law. Idaho Code §

¹⁴¹ As previously discussed, Idaho Power's current contention that recharge uses are "non-consumptive and non-depletionary" is contrary to the parties' understanding of that term at the time of the Swan Falls negotiations, because in Ada County Case No. 62237 the District Court determined that recharge fell within the scope of a subordination provision that did not apply to "non-depletionary and non-consumptive uses." *See supra* pp. 34-35; *see also* Fifth Orr Aff., Exhibit 4 at 17 n.1., 65 n.1 (pages 370 and 418 of Memorandum Decision and Order, *Idaho Power Co. v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Dec. 10, 1979) ("We are not concerned with subordination for navigation or other non-depletionary and non-consumptive uses . . .").

¹⁴² *See generally* Idaho Power's Opening Brief at 1, 3-4, 13 (arguing that recharge diversions are "non-depletionary").

42-203B(2) (emphasis added). Although the statute subjects water rights held in trust “to depletion” caused by upstream uses, this does not mean that the upstream uses must be “depletionary uses” to trigger subordination of the water rights held in trust. It simply means that Idaho Power may not challenge flow reductions due to diversions under lawfully acquired water rights to which water rights held in trust have been subordinated.

The language of Idaho Code § 42-203C supports this conclusion. Section 42-203C does not require the Director to determine whether a new application is for a “depletionary use,” but only whether it would “significantly reduce” the flows available for power generation under the water rights held in trust. Idaho Code § 42-203C(1).¹⁴³ Similarly, under the Swan Falls Agreement, Idaho Power’s waiver of claims for damages and compensation is not limited to “depletionary uses,” but broadly encompasses “any diminution in water available to the Company at its facilities as a result of this Agreement.”¹⁴⁴

Nothing in the applicable statutes or the Swan Falls Agreement limits subordination of the water rights held in trust to “depletionary uses” or contemplates Idaho Power’s implausible notion of a “non-depletionary” use that nonetheless “immediately” diminishes river flows.¹⁴⁵ To the contrary, the Agreement and its implementing legislation take a much more natural and straightforward approach, by providing that the water rights held in trust are subordinated to any upstream use under a lawfully acquired water right, and subject to any resulting depletions, diminutions or reductions in the flows that would otherwise be available for hydropower generation at Idaho Power’s facilities. Idaho Power’s argument that the water rights held in trust by the State may not be subordinated to recharge because it is a “non-consumptive and non-

¹⁴³ The corresponding exhibits in the Swan Falls Agreement use the same language. See First Orr Aff., Exhibit 30 at 15 (page 3 of Exhibit 1 to the Swan Falls Agreement); id. at 29 (Exhibit 7B to the Swan Falls Agreement).

¹⁴⁴ First Orr Aff., Exhibit 30 at 5 (Paragraph 11 of the Swan Falls Agreement) (“Damages Waiver”).

¹⁴⁵ Idaho Power’s Opening Brief at 4.

depletory” use must be rejected not only as a matter of the language and intent of the Swan Falls Agreement and its implementing legislation, but also as a matter of plain logic and common sense. The second and third counts of Idaho Power’s Motion for Summary Judgment should therefore be denied.

IV. IDAHO POWER’S FOURTH COUNT FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE PARTIES DID NOT INTEND TO INCORPORATE IDAHO CODE §§ 42-234(2) AND 42-4201A(2) AS THEY EXISTED IN 1984 INTO THE AGREEMENT AND BECAUSE THE 1984 PROVISIONS OF THESE STATUTES DID NOT APPLY TO THE WATER RIGHTS HELD IN TRUST BY THE STATE.

Idaho Power’s fourth count for summary judgment seeks a ruling that the Legislature deemed recharge to be subordinate and secondary to the hydropower water rights at issue in this case at the time of the Swan Falls Agreement under Idaho Code §§ 42-234 and 42-4201A, and that these statutory provisions must be read into the Agreement as one of its fixed terms.¹⁴⁶ Idaho Power’s arguments fail under the Agreement, its implementing legislation and the recharge statutes, and are contrary to the parties’ statements in the ratification and implementation record for the settlement. Further, the plain language of the relevant provisions of Idaho Code §§ 42-234 and 42-4201A as they existed in 1984 did not apply to the water rights held in trust by the State.

A. The Plain Language Of The Swan Falls Agreement And The Implementation Record Demonstrate That The Parties Did Not Intend To Incorporate The Relevant Provisions Of Idaho Code §§ 42-234 and 42-4201A Into the Settlement.

While the general rule in Idaho is that existing law becomes part of a contract, this rule is qualified by an important exception that Idaho Power ignores: existing law becomes part of a contract “**unless a contrary intent is disclosed.**” *Primary Health Network, Inc. v. State*, 137 Idaho 663, 667, 52 P.3d 307, 310 (2002) (emphasis added). With respect to the water rights held in trust by the State, such a contrary intent is part and parcel of the Agreement, because Idaho

¹⁴⁶

Idaho Power’s Opening Brief at 5-7.

Power “was simply conceding to and agreeing not to challenge the State’s regulatory authority”, Summary Judgment Order at 31, which by definition contemplates future changes. See Illinois Cent. R.R. Co. v. State of Illinois, 146 U.S. 387, 460 (1892) (“The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances”).

The Agreement does not purport to limit the State’s regulatory authority, and could not lawfully do so. “[A] a state governmental entity cannot contract away its police powers.” Southern California Gas Co. v. City of Santa Ana, 336 F.3d 885, 893 (9th Cir. 2003); see also U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 23-24 (1977) (“the police power and the power of eminent domain were among those that could not be ‘contracted away’”). The Idaho Supreme Court has also held that the Legislature cannot delegate or share its regulatory authority with a private entity such as Idaho Power Company. See Local Union 283, Intern. Broth. of Elec. Workers v. Robison, 91 Idaho 445, 448, 423 P.2d 999, 1002 (1967) (“The city council, like the legislature, cannot delegate its legislative power to any other authority. It cannot share that power with any private organization.”). This principle applies with particular force with respect to the reallocation of water pursuant to the subordination of the water rights held in trust by the State, because “[t]he decision as to how the optimum development of water resources in the State of Idaho can best be achieved is a policy decision exclusively within the province of the legislature.” Parker, 103 Idaho at 512, 650 P.2d at 654.

Thus, the very nature and structure of the Swan Falls Agreement demonstrates that the parties did not intend to make existing water allocation and administration statutes—such as Idaho Code §§ 42-234, 42-4201 and 42-4201A—fixed terms of the Agreement. Idaho Power simply conceded to and agreed not to challenge application of the State’s regulatory authority,

which the State could change or modify at any time. Indeed, Paragraph 17 of the Agreement explicitly addresses changes in State law:

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining the respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement.¹⁴⁷

Idaho Power attorney Tom Nelson explained to the House Resources and Conservation Committee that under this provision the Legislature retains the power "to undo this whole thing," and the **only** thing it cannot do is change the contractual recognition of the Company's water right as measured at the Murphy gauging station:

[T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have the power to do, would be to change the contractual recognition of the company's water rights at the Murphy gauge.¹⁴⁸

The Attorney General also explained in his written comments to the Senate Resources and Environment Committee that the State was free to change the subordination standards of the "public interest criteria" and that doing so would not affect the agreement or the trust: "If the public interest criteria is not, after trial and error, precisely what the legislature desires, the **standards can be changed without affecting this agreement, state legal ownership of the water rights involved and the trust arrangement established.**"¹⁴⁹ The Senate's "Statement of Legislative Intent" for Senate Bill 1008, which Idaho Power reviewed and approved, similarly

¹⁴⁷ First Orr Aff., Exhibit 30 at 8 (Paragraph 17 of the Swan Falls Agreement).

¹⁴⁸ *Id.*, Exhibit 20 at 1 (page 1 of minutes of House Resources and Conservation Committee) (Feb. 11, 1984); *see also* Summary Judgment Order at 36.

¹⁴⁹ First Orr Aff., Exhibit 8 at 18-19 (pages 5-6 of "Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008) (attachment to minutes of Senate Resources and Environment Committee) (Jan. 18, 1985) (emphasis added).

explained that the settlement retained the State's legislative "flexibility" and did not "freeze"

State water policy:

This 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 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.**¹⁵⁰

Moreover, Idaho Power expressly agreed to subordinate all the hydropower water rights at issue to recharge water right 37-7842 by dismissing it from the 7500 Case,¹⁵¹ even though the Company had previously asserted in a letter to the Department that Idaho Power's hydropower water rights were superior by virtue of one of the same statutory provisions the Company now asserts must be read into the Agreement: Idaho Code § 42-4201(2).¹⁵² The fact that the Company agreed to subordinate to recharge water right 37-7842 demonstrates that the Company did not at the time view Idaho Code § 42-4201(2) as a term of the settlement or as barring subordination to recharge.

Thus, the plain language of the Swan Falls Agreement and the parties' statements establish that they intentionally rejected incorporation of the relevant provisions of the recharge statutes as they existed in 1984 into the Agreement. Because the Agreement and the record show an unambiguous "contrary intent," the recharge statutes should not read into the Agreement.

Primary Health Network, Inc., 137 Idaho at 667, 52 P.3d at 310.

B. Even If The 1984 Provisions Of Idaho Code §§ 42-234 and 42-4201A Were Deemed To Be Terms Of The Swan Falls Agreement, They Do Not Apply To The Water Rights Held In Trust By The State.

¹⁵⁰ First Orr Aff., Exhibit 28 at 5-6 (pages 60-61 of JOURNAL OF THE STATE SENATE – ORGANIZATIONAL SESSION AND FIRST REGULAR SESSION OF THE FORTY-EIGHTH LEGISLATURE OF THE STATE OF IDAHO – 1985) ("Statement of Legislative Intent – S 1008") (emphases added).

¹⁵¹ See *supra* Part II of "Argument."

¹⁵² See Fourth Orr Aff., Exhibit 84 (letter from Paul L. Jauregui, Vice President, Secretary and General Counsel, Idaho Power Company, to State of Idaho, Department of Water Resources) (Oct. 7, 1981).

Even assuming, *arguendo*, that the Swan Falls Agreement did incorporate the 1984 versions of Idaho Code §§ 42-234, 42-4201 and 42-4201A as fixed terms of the settlement, their provisions would not bar subordination of the water rights held in trust by the State to recharge uses. The relevant statutory provisions of Idaho Code §§ 42-4201(2) and 42-4201A(2) as they existed in 1984 made recharge rights acquired by aquifer recharge districts secondary only to senior hydropower water rights “held by any privately-owned electrical generating company.” 1978 Idaho Sess. Laws 726 (Idaho Code § 42-4201(2)); 1982 Idaho Sess. Laws 539 (Idaho Code § 42-4201A(2)).¹⁵³ Under the Swan Falls settlement, however, the hydropower water rights for the flows exceeding the seasonal minimum flows established at the Murphy gauging station are no longer “held by” a privately-owned electrical generating company. Rather, as this Court has ruled, these water rights are “held by” the State, in trust for the shared benefit of the people of the State of Idaho, and of Idaho Power Company:

This Court holds that Exhibit 7B clearly and unambiguously provides that any portion of Idaho Power’s water rights in excess of the minimum flows **are held in trust by the State**, by and through the Governor, for the use and benefit of Idaho Power for power purposes and of the people of the State of Idaho.

Summary Judgment Order at 31 (emphasis added).¹⁵⁴ Thus, even if Idaho Code §§ 42-4201(2) and 42-4201A(2) as they existed in 1984 became fixed terms of the Agreement, the water rights held in trust by the State fall outside the plain statutory language.

This makes sense, because the trust was designed to balance the often-adverse interests of Idaho Power and applicants seeking “trust water” appropriations by subordinating the water rights held in trust only if doing so would serve the public interest, such as through promoting “the family farming tradition” or “full economic and multiples use development of the water

¹⁵³ Idaho Code § 42-4201(2) retains this language, but the relevant provision of Idaho Code § 42-4201A(2) was amended in 1994. This amendment is discussed in the next section.

¹⁵⁴ This Court has also held that the trust arose by operation of law upon enactment of Exhibit 7B under 1985 Senate Bill 1008. Summary Judgment Order at 38.

resources of the state of Idaho.”¹⁵⁵ If Idaho Code §§ 42-4201(2) and 42-4201A(2) had been amended to include hydropower water rights “held by the State,” they would have circumvented the carefully constructed trust framework, ignored the public interest as defined in section 42-203C, and summarily favored the interests of one beneficiary (Idaho Power) over the other (the people of the State). This would have been directly contrary the goal of “weigh[ing] the benefits to be obtained from each development against the possible impact it will have on the Company’s hydropower resources,”¹⁵⁶ particularly when recharge promotes the family farm tradition and economic development by augmenting ground water supplies,¹⁵⁷ and the Legislature had determined that recharge “advance[s] the multiple use water policy of this state.” Idaho Code § 42-4201(1). Thus, the fact that the Agreement did not call for amending Idaho Code §§ 42-4201(2) and 42-4201A(2) to apply to the water rights “held in trust by the State” is consistent with the overall structure and purposes of the settlement.

The record also demonstrates that leaving Idaho Code §§ 42-4201(2) and 42-4201A(2) intact was no oversight. The same Senate and House committees that considered the Swan Falls settlement also considered the question of aquifer recharge in multiple meetings during the same legislative session in which the settlement was at issue.¹⁵⁸ In at least one Senate committee meeting, aquifer recharge legislation was considered with Idaho Power’s attorney Tom Nelson in attendance, immediately before the committee turned to the Swan Falls settlement and Mr.

¹⁵⁵ First Orr Aff., Exhibit 30 at 16 (page 4 of Exhibit 6 to the Swan Falls Agreement); *see also* Idaho Code § 42-203C(2)(a)(iii), (iv).

¹⁵⁶ *Id.*, Exhibit 29 at 4 (page 4 of the Framework).

¹⁵⁷ *See supra* Part III.C.5 of “Argument” section.

¹⁵⁸ *See* First Orr Aff., Exhibit 7 at 1 (page 1 of minutes of Senate Resources and Environment Committee) (Jan. 16, 1985) (“RS 10982 - Aquifer Recharge Districts”); *see id.*, Exhibit 10 at 1 (page 1 of minutes of Senate Resources and Environment Committee) (Jan. 25, 1985) (“SB 1018 - Aquifer Recharge Districts”); *see also id.*, Exhibit 16 at 3 (page 3 of minutes of Senate Resources and Environment Committee) (Mar. 6, 1985) (“HB 266 - Relating to the Recharge of Ground Water Basins”); *see also id.*, Exhibit 21 at 2 (page 2 of minutes of House Resources and Conservation Committee) (Feb. 18, 1985) (“S 1018 - Aquifer Recharge Districts, Directors”); *see also id.*, Exhibit 24 at 2 (page 2 of minutes of House Resources and Conservation Committee) (Feb. 25, 1985) (“H 266 - Ground Water Basins Recharge Authority”).

Nelson handed out the "Statement of Idaho Power Company in Support of Senate Bill 1008."¹⁵⁹

Given the prominence and visibility of recharge issues during the 1985 legislative session, it is unlikely that the parties simply overlooked the aquifer recharge statutes when identifying the legislative changes necessary to implement the settlement. The number and variety of the exhibits to the Swan Falls Agreement bolsters this conclusion: clearly the parties worked diligently to ensure the Agreement included all the proposed legislation necessary to effectuate the settlement.

For these reasons and others previously discussed, the Company's fourth summary judgment count should be denied.

V. IDAHO POWER'S FIFTH COUNT FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE STATE MAY REPEAL OR AMEND THE 1994 AMENDMENTS TO IDAHO CODE §§ 42-234(2) AND 42-4201A(2) WITHOUT CAUSING ANY LEGALLY COGNIZABLE INJURY TO IDAHO POWER.

Idaho Power's fifth count for summary judgment asserts the 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) preclude the State from subordinating the water rights held in trust by the State to recharge uses. The amendments provide, in relevant part, 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 company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

Idaho Code §§ 42-234(2), 42-4201A(2). Idaho Power mischaracterizes the State as urging the Court to "override" these amendments and second-guess the Legislature's 1994 policy decision to make recharge uses secondary to the water rights held in trust by the State. The State concedes that as long as the 1994 amendments remain in effect, any recharge water right

¹⁵⁹ See First Orr Aff., Exhibit 10 at 1 (page 1 of minutes of Senate Resources and Environment Committee) (Jan. 25, 1985); see also id. at 15 ("Statement of Idaho Power Company in Support of Senate Bill 1008, Presented to the Senate Resources and Environment Committee, January 25, 1985") (attachment to minutes).

diverting below Milner and above Swan Falls, except for those covered by the 1180 Contract, are secondary to the water rights held in trust by the State, even if the recharge uses otherwise satisfy the “public interest criteria” analysis of Idaho Code § 42-203C. The plain language of the statutes is controlling on this point.¹⁶⁰

The actual question presented by both parties’ summary judgment motions is whether the State may repeal or amend the 1994 amendments. The State’s position is that because the 1994 amendments are not part of the definition of the hydropower water rights at issue, the Legislature may repeal the amendments without causing any legally cognizable injury to Idaho Power. Idaho Power seeks a ruling from this Court to support its representations to the Legislature that repealing the amendments and authorizing subordination of the water rights held in trust to recharge uses would impair Idaho Power’s water rights and require compensation.¹⁶¹

¹⁶⁰ As previously discussed, the 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) cannot be viewed amending or repealing the 1986 Milner amendment to Idaho Code § 42-203B(2) by implication because repeal or amendment by implication is disfavored absent “clear, unequivocal legislative intent.” Thomas, 138 Idaho at 209, 61 P.3d at 566. There is no hint of any intent to repeal, amend or modify the effect of the 1986 Milner amendment in the plain language of the 1994 amendments, the legislative history of the amendments, or the Recharge Committee minutes. To the contrary, the 1994 amendments were intended to “protect and verify” the Swan Falls Agreement, including its incorporation of the Milner Divide.

¹⁶¹ For instance, Idaho Power vigorously opposed 2006 House Bill 800, which proposed to amend the relevant provisions of Idaho Code §§ 42-234(2) and 42-4201A(2) to “correct a decision that was made by the Legislature in 1994,” Fourth Orr Aff., Exhibit 79 at 4 (page 4 of minutes of the Senate Resources and Environment Committee) (Mar. 27, 2006), on grounds that the proposed amendment would impair the Company’s water rights as defined by the Swan Falls Agreement. See id. at 17 (page 17 of minutes) (Idaho Power representative Greg Panter stating that “[w]e didn’t give up any rights at all, we retained all of our water rights”); see also id. at 19 (page 4 of minutes) (Idaho Power attorney Jim Tucker stating that “[w]hat we’re talking about here is Idaho Power’s water rights”). Idaho Power asserted that the State had to pay Idaho Power in order to allow recharge:

Senator Cameron: . . . wasn’t your actual communication with the Second Floor was, in essence, a buyout from the state of Idaho so that we could do recharge? Why should the state be forced to do that when we hold that water in trust?

Mr. Panter: Mr. Tucker will get to that whole issue, holding that water in trust. It’s clearly a difference of opinion.

Id. at 16 (page 16 of minutes); see also id. at 31 (page 31 of minutes) (“I read in the newspaper that the Governor [Kempthorne] was negotiating with Idaho Power to use taxpayers money, \$1.6 million I believe, to compensate Idaho Power for what I believe to be trust water. . . . From my understanding of what occurred in Swan Falls . . . there would be no compensation due . . .”) (statements of former Senator Noh).

The issue ultimately hinges on the parties' intent at the time of the Agreement.¹⁶² For reasons previously discussed in this memorandum, it is clear that the original intent of the parties, the Legislature, the water user community and the interested public was that the State would hold legal title to the "subordinatable" water rights for flows exceeding the seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at Murphy, and that these water rights would be subordinated in accordance with subordination criteria in State law, which the State was free to change pursuant to its regulatory authority. Idaho Power's contention that the State may not repeal or amend the 1994 amendments directly contradicts the letter and intent of the Swan Falls Agreement, its implementing legislation, and the implementation record.

Moreover, nothing in the amendments "confirms" that the hydropower water rights held in trust by the State may not be subordinated to recharge under the Swan Falls Agreement. To the contrary, the amendments apply to "water rights for power purposes **that may otherwise be subordinated**" by the Swan Falls Agreement and its implementing legislation. Idaho Code §§ 42-234(2) and 42-4201A(2) (emphasis added). Thus, the amendments explicitly acknowledge that the water rights held in trust by the State may "otherwise be subordinated" but for the 1994 amendments. The 1994 amendments must be read as **changing** the subordination relationship between recharge and the water rights held in trust by the State, not confirming it.

This view is consistent with the comments of Sherl Chapman of the Idaho Water Users Association, who explained to the Senate Resources and Environment Committee that the 1994 amendments were intended "to protect and verify the agreement on Swan Falls."¹⁶³ One of the Swan Falls Agreement's most important elements, especially from the perspective of upper

¹⁶² Idaho Power apparently agrees that the parties' original intent is controlling because the Company repeatedly argues the 1994 amendments "confirm" the original intent. Idaho Power's Opening Brief at 28-29.

¹⁶³ Fourth Orr Aff., Exhibit 78 at 23 (page 1 of minutes of Senate Resources and Environment Committee) (Mar. 11, 1994).

SNAKE RIVER water users, was that it defined the source flows of the hydropower water rights in question—Idaho Power's water right to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at Murphy, and also the water rights held in trust by the State—as being strictly limited to surface water and ground water flows arising downstream from Milner Dam.¹⁶⁴

When the Department's draft rules and regulations for water appropriation triggered an uproar in late 1985 and early 1986 by proposing that flows upstream from Milner Dam would be encumbered by the water rights held in trust by the State, Mr. Chapman responded forcefully in writing on behalf of the Idaho Water Users Association: **"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 discussions before the Legislature in 1985 and is the subject of presently proposed legislation."**¹⁶⁵

This crucial element of the settlement was codified in the 1986 amendment to Idaho Code § 42-203B(2), which Idaho Power negotiated, supported, and conceded to as regards the hydropower water rights subject to the Swan Falls Agreement.¹⁶⁶ Mr. Chapman deemed these amendments important enough to attend both the Senate and House committee meetings on the amendment and express his organization's support.¹⁶⁷ Thus, from the perspective of Mr. Chapman and the Idaho Water Users Association, the 1994 amendments did indeed "protect and verify" one of the most important elements of the Swan Falls settlement—the Milner divide.

¹⁶⁴ See generally *supra* Part I of "Argument" section; see also *State's Opening Brief at 16-47*.

¹⁶⁵ 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) (emphasis added). The "presently proposed legislation" to which Mr. Chapman referred was undoubtedly 1986 Senate Bill 1358, which among other things amended section 42-203B(2) to expressly limit the trust to flows downstream from Milner, and to provide that no portion of Snake River upstream from Milner, or surface or ground water tributary thereto, may be considered for purposes of the determination and administration of water rights diverting downstream from Milner Dam. First Orr Aff., *Exhibit 60 at 2* (page 2 of 1986 Senate Bill 1358).

¹⁶⁶ See *supra* Part I.C of "Argument" section; see also *State's Opening Brief at 44-47*.

¹⁶⁷ See First Orr Aff., *Exhibit 62 at 1* (page 1 of minutes of Senate Resources and Environment Committee) (Feb. 5, 1986); see also *id.*, *Exhibit 63 at 1* (page 1 of minutes of House Resources and Conservation Committee) (Feb. 13, 1986).

Similarly, the 1994 amendments' alteration of the hydropower-recharge subordination relationship downstream from Milner also "protected and verified" the settlement, because the parties intended to preserve the Legislature's authority to make water policy, as previously discussed.

Idaho Power also mistakenly asserts that Senator Laird Noh understood the 1994 amendment as "confirming" that the Swan Falls Agreement barred subordination of the water rights held in trust by the State to recharge, as his testimony before the Senate Resources and Environment Committee in 2006 on House Bill 800 demonstrates:

Now, in '94, there's been a lot of discussion about that. It appears to me, at least from what I know, that the Legislature was within its authority to make that determination at that time of the trust water and is within its authority today to reverse that determination within the bounds of other Idaho law. There may be litigation to determine that, but I don't believe it should constitute a taking of the rights of Idaho Power.¹⁶⁸

The minutes of 2006 Senate committee hearing do include "a lot of discussion" about the 1994 amendments, their legal effect, and what the 1994 Legislature had intended, and demonstrate that no clear consensus emerged on these points. Senator Dean Cameron, who had been a member of the 1993 Recharge Committee, pointed out that Idaho Power never testified before the Recharge Committee, and that language referencing the Swan Falls Agreement was added to the bill after it left the Recharge Committee:

Senator Cameron: As a committee member that was here in 1994 and served on the Interim Committee, I can tell you that Idaho Power did not testify at any point, either during the Interim Committee or in front of the committee. . . . It's my understanding that that language was inserted at the request of Idaho Power with the water users, unbeknownst really to the legislators, and in between when the Interim Committee met and when Representative Bell and I made the motion [to amend 42-4201A]. . . .¹⁶⁹

¹⁶⁸ Fourth Orr Aff., Exhibit 79 at 31 (page 31 of minutes of the Senate Resources and Environment Committee) (Mar. 27, 2006).

¹⁶⁹ Fourth Orr Aff., Exhibit 79 at 23 (page 23 of minutes of the Senate Resources and Environment Committee) (Mar. 27, 2006).

I guess the trouble I have with this [is that] I sat through those committee hearings. We wanted recharge. The whole motive behind that piece of legislation . . . was recharge. We approved language in the interim committee for recharge. When that language was brought forward to the main body, it was adjusted.¹⁷⁰

Contrary to what Idaho Power would have the Court believe, these passages suggest that the 1994 amendments received very little legislative consideration and were not explained or understood as a routine affirmation of a clearly-established subordination limitation in the Swan Falls Agreement itself.

The legislative history of the 1994 amendments leads to the same conclusions. The amendments had their genesis in the Recharge Committee, which proposed a package of aquifer recharge legislation to the Legislature.¹⁷¹ The minutes of the Recharge Committee confirm that Idaho Power did not testify before the Committee in any of its many meetings.¹⁷² Further, neither of the two principal legal analyses provided to the Recharge Committee—Department employee Norm Young’s oral presentation on “the statutes and policies in place relative to and concerning state recharge efforts” that covered, among other authorities, the Swan Falls Agreement,¹⁷³ and a legal memorandum from a Legislative Council staff attorney entitled “Laying the Basis for Considering Artificial Recharge Policy for the Snake Plain Aquifer”¹⁷⁴—stated or implied that the Swan Falls Agreement barred subordination to recharge.

Idaho Power’s written comments to the Recharge Committee in 1994 are fully consistent with subordination to recharge and demonstrate that the Company is taking a new position in this

¹⁷⁰ Fourth Orr Aff., Exhibit 79 at 51 (page 51 of minutes of the Senate Resources and Environment Committee) (Mar. 27, 2006) (brackets and ellipses in original).

¹⁷¹ See Fifth Orr Aff., Exhibit 7 at 5 (page 2 of Legislative Council Committee on Aquifer Recharge Summary of 1993-1994 Biennial Final Report).

¹⁷² See generally *id.*, Exhibit 7 (complete set of minutes of Recharge Committee, including attachments). It should be noted that the written comments Idaho Power asserts that it provided to the Recharge Committee, see Second Gheleta Aff., Exhibit Y, are not part of the official record of the Recharge Committee’s proceedings.

¹⁷³ See Fifth Orr Aff., Exhibit 7 at 38-42 (pages 2-6 of minutes of Recharge Committee) (July 1, 1993).

¹⁷⁴ See *id.* at 27 (Appendix C to minutes of Recharge Committee) (May 27, 1993).

litigation. While the Company's written comments discussed the proposal to simply strike from section 42-4201A(2) the language making recharge secondary to hydropower water rights "held by any privately owned electrical generating company,"¹⁷⁵ Idaho Power conspicuously failed to assert that the proposal would strike a term of the Swan Falls Agreement, or that deletion would alter or impair the Company's rights under the settlement.¹⁷⁶

Rather, Idaho Power explicitly acknowledged that the Swan Falls Agreement allows for subordination of water rights held in trust by the State to recharge uses by stating that new recharge applications should conform to established administrative review processes, **"including the process contemplated by the Swan Falls Agreement and legislation."**¹⁷⁷ The water right application approval "process" contemplated by the Swan Falls settlement under the "public interest criteria" analysis of section 42-203C and the implementing administrative rules has only one purpose: to determine whether an application should be approved for purposes of subordinating the water rights held in trust by the State under section 42-203B. Idaho Power's comment that recharge applications should be evaluated under the "process contemplated by the Swan Falls Agreement and legislation" would have been pointless if the Company had viewed the settlement as categorically barring subordination to recharge.¹⁷⁸ Thus, Idaho Power's written comments to the Recharge Committee demonstrate that in 1994 the Company viewed the Agreement as allowing for subordination of the water rights held in trust to recharge uses.

¹⁷⁵ See *id.* at 174 (page 4 of Appendix A to minutes of Recharge Committee) (Nov. 10, 1993) ("Attachment A" to "Idaho Water Users Association, Inc., Recommendations for an Idaho State Artificial Recharge Policy") (proposing to delete language referring to hydropower water rights "held by any privately owned electrical generating company").

¹⁷⁶ See generally Second Gheleta Aff., Exhibit Y ("Memorandum" from Larry Taylor of Idaho Power to Committee on Aquifer Recharge, Re: Comments to Comm. On Aquifer Recharge) (Jan. 19, 1994).

¹⁷⁷ *Id.*, Exhibit Y at 3 (page 3 of "Memorandum" from Larry Taylor of Idaho Power to Committee on Aquifer Recharge, Re: Comments to Comm. On Aquifer Recharge) (Jan. 19, 1994) (emphasis added).

¹⁷⁸ Idaho Power's subsequent comment that subordinating all hydropower uses to recharge under an amendment to section 42-4201A(2) could raise "takings" and/or due process claims, see *Id.* ("any such subordination provision would raise due process and compensable taking issues"), is also consistent the Swan Falls Agreement. The Agreement did not provide for blanket subordination of the Company's water right to the seasonal minimum flows at Murphy to all recharge rights, but only to those Idaho Power dismissed from the 7500 Case.

Idaho Power argues, however, that Department employee Norm Young's comments on the Idaho Water Users Association's original proposal to simply delete the provision making recharge secondary to hydropower water rights "held by any privately owned electrical generating company" demonstrate that the Swan Falls Agreement barred subordination to recharge. This argument mischaracterizes Mr. Young's comments, which stated, in pertinent part, as follows:

The purpose for striking the subordination to existing hydropower rights (Subsection (2)) is not clear. If the intent is to subordinate hydropower to recharge, a definite statement of that intent needs to be made. If that is not the purpose, the existing language needs to be retained to avoid confusion with the subordination of hydropower rights in Section 42-203B, Idaho Code.¹⁷⁹

As with the rest of the legislative history for the 1994 amendments, this noteworthy passage simply does **not** state that "the hydropower water rights subject to the Swan Falls Agreement may not be subordinated to recharge," nor anything substantially similar. Rather, Mr. Young's comments explicitly recognized that the subordination of the hydropower water rights held in trust by the State was a separate issue controlled by section 42-203B, not section 42-4201A(2). Mr. Young also cautioned against merely deleting the subordination provision without further explanation because it could lead to confusion over whether section 42-203B also controlled subordination of hydropower water rights "held by any private company," rather than only those held in trust by the State. Mr. Young's comments explicitly contemplate that Agreement established a separate subordination framework that did **not** preclude subordination to recharge.¹⁸⁰

¹⁷⁹ Fifth Orr Aff., Exhibit 7 at 186 (page 3 of Appendix A to minutes of Recharge Committee) (Nov. 10, 1993) (memorandum from Norm Young to Wayne Haas) ("Proposed Recharge Policy and Draft Legislation") (Nov. 10, 1993) (parenthetical in original).

¹⁸⁰ Moreover, and contrary to what Idaho Power appears to argue, Mr. Young's comments did not propose or endorse the language enacted in the 1994 amendments, nor were they the impetus for the amendments, because the Recharge Committee apparently ignored Mr. Young's suggestion to insert clarifying language. It was only after the proposed legislation left the Recharge Committee that the current language appeared in the bill. *See* Fourth Orr Aff.,

Finally, as a matter of law, the 1994 amendments cannot be viewed as impliedly repealing, amending or otherwise altering the effect of the 1986 Milner amendment to Idaho Code § 42-203B(2). There is no clear and unequivocal evidence of such intent in the 1994 amendments or their legislative history. See Thomas, 138 Idaho at 209, 61 P.3d at 566 (disfavoring statutory amendment by implication "absent clear, unequivocal legislative intent.")

CONCLUSION

For the reasons set forth herein, the State respectfully requests the Court to deny Idaho Power's Motion for Summary Judgment in its entirety.

DATED this 7th day of November 2008.

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Exhibit 79 at 23 (page 23 of minutes of the Senate Resources and Environment Committee) (Mar. 27, 2006) ("It's my understanding that that language was inserted at the request of Idaho Power with the water users, unbeknownst really to the legislators, and in between when the Interim Committee met and when Representative Bell and I made the motion [to amend 42-4201A] . . .") (Senator Cameron) (brackets and ellipses in original); id at 51 (page 51 of minutes of the Senate Resources and Environment Committee) (Mar. 27, 2006) ("We approved language in the interim committee for recharge. When that language was brought forward to the main body, it was adjusted") (Senator Cameron).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November 2008, I caused a true and correct copy of the STATE OF IDAHO'S MEMORANDUM IN RESPONSE TO IDAHO POWER COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON RECHARGE SUBORDINATION to be served on the following parties by the indicated methods:

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