

Defendants.

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Plaintiff Idaho Power Company ("Idaho Power"), by and through its undersigned counsel, hereby submits its Response in Opposition to the State of Idaho's and Upper Snake Water Users' Opening Briefs in this action ("Response Brief"). For the reasons set forth below and in Idaho Power's Opening Brief, the Court should grant Idaho Power's request for partial summary judgment and find that Idaho Power did not subordinate its water rights under the Swan Falls Agreement to the use or management of water for recharge and should deny the State's and the Water Users' Motions for Summary Judgment on all counts.

INTRODUCTION

This case is about the Swan Falls Agreement and how the Agreement must be interpreted based on the law in existence at the time of the Agreement. This existing law includes specific statutory direction regarding the relationship between recharge and hydropower, which remarkably, the State completely ignores in its Opening Brief. Instead, the State attempts to "define" Idaho Power's water right under the Swan Falls Agreement as including the State's "zero flow at Milner" policy as an "element" of the Idaho Power right. In doing so, the State does not refer to the subordination provisions of the Agreement which define the basic elements of Idaho Power's water right and the agreed upon terms of the subordination, but instead references an exhibit to the Agreement relating to the continuation of the State Water Plan zero flow policy, and post-Agreement developments such as promulgation of rules and legislative amendments which the State argues "clarify" but do not change the parties' signed contracts.

The State's primary argument rests upon the premise that the Company's water rights are defined to exclude as a source of the water rights water arising above Milner, with the result that the Company cannot object to recharge above Milner. This argument is an attempt to erect a smokescreen to obscure the fact that the State cannot mount any credible argument that recharge is included within the terms of Idaho Power's subordination under the Swan Falls Agreement.

As shown in Idaho Power's Opening Brief, the structure and language of the Framework and the Agreement make explicit that Idaho Power did not subordinate to recharge. Recharge was at the time of the Agreement already subordinate to hydropower, and was viewed as a water management tool under the State's Water Plan – not as a use to which the Company's rights could be subordinated under the public interest criteria agreed upon by the parties and included in the implementing legislation.

The State thus attempts to elevate its "zero flow" or "two rivers" policy of general applicability to an "element" of the Company's Swan Falls rights, and in the process to elevate recharge as a use to which the Company's rights could be subordinated. It can do neither. Instead, the Court's focus should be on whether Idaho Power agreed to subordinate its rights to recharge. The answer to that question is "no," and the Court can end its inquiry there without getting into the complex details of analyzing the parameters of the State's zero flow policy.

The State begins its Opening Brief with a historical discussion that is largely irrelevant to the issue before the Court, which is whether Idaho Power's water rights subject to the 1984 Swan Falls Agreement are subordinate to the use of water for recharge. Accordingly, Idaho Power does not respond to every fact and interpretation raised by the State in its introductory discussion. Even if it were relevant, however, the State's discussion is misleading in its attempt to portray the history of water development on the Snake River as one in which actions of all interested parties were invariably dictated by the so-called "Milner divide," a phrase which the State has apparently coined for purposes of this litigation.

The State's current insistence that preservation of the "zero flow" or "two-rivers" policy was a "primary goal" of the State and perhaps even the parties during the Swan Falls negotiations stands in stark contrast to the State's earlier briefing in this matter. *See* State's Opening Brief at

25. The State's brief filed in support of its original motion for partial summary judgment on January 11, 2008 opened with a lengthy, nineteen-page historical description of the Swan Falls controversy and settlement in general, and more specifically purported to describe "the subordination and trust legislation proposed thereunder and enacted by the Legislature – Idaho Code § 42-203B" Mem. in Support of State's Motion for Partial Summary Judgment (January 11, 2008) at 4. However, after initially focusing the Court's attention upon the historical genesis and significance of § 42-203B, the State went on to mention the word "Milner" only once, in a passing reference to the rights asserted by Idaho Power in 1983 in the 7500 Case. *Id.* at 7. There was no discussion of a zero flow policy, no distinction between subordination to rights either above or below Milner, and no reference whatsoever to any such policy being considered by the negotiating parties. The State now presents the zero flow policy as a central tenet of the overall Agreement and even an "element" of Idaho Power's water right. State's Opening Brief at 26. This disconnect between the State's earlier briefing and its present emphasis illustrates just how strained the State's interpretation and analysis has become, with the result that the State now ignores the plain language and structure of the Agreement and its subordination provisions.

The attempted portrayal of the Snake River as "an agricultural river above Milner and a hydropower river below Milner" by the State (State's Opening Brief at 9) is by any measure an oversimplification. It is true that considerable irrigation occurs above Milner and that most of Idaho Power's hydropower generation facilities on the mainstem Snake River are located below Milner. However, as shown by even a few of the State's own examples, it was not the intent of concerned interests to completely deplete the flow of the river above Milner irrespective of impacts on hydropower or other uses below Milner. For example, the 1920 Board of Engineers

report cited by the State was prepared not to enable the river to be depleted at Milner, but in order "to consider projects in the Snake River Valley, which may affect the proposed American Falls Reservoir."¹ Idaho Power had existing hydropower facilities at American Falls prior to the United States' completion of American Falls Reservoir in 1927,² as well as facilities below Milner which generated hydropower with flows released from storage at American Falls. Indeed, the 1923 Contract between the United States and Idaho Power, in addition to allowing the United States to construct the dam and reservoir, sought to create certainty that flows from American Falls Reservoir storage would continue to be released for hydropower generation at Idaho Power's mainstem Snake River facilities below Milner.

In discussing the 1923 Contract between Idaho Power and the United States, however, the State gives only a partial, and misleading, explanation of paragraph 21 of the Contract. The State indicates that paragraph 21 "explicitly limited '[t]he company's right to demand the turning out of water from the reservoir for release by and use below Milner Dam . . .'" presenting the impression that this limitation precluded Idaho Power using any other flows from above Milner. State's Opening Brief at 6-7. This is not the case. The State omits language from the 1923 Contract that follows the quoted passage which makes it clear that the limitation only applies to Idaho Power's rights to flows from storage in American Falls Reservoir. When read in its entirety, paragraph 21 of the 1923 Contract provides that Idaho Power's right to releases from American Falls Reservoir for use below Milner Dam is "limited" to "45,000 acre-feet of primary storage rights," as well as "such portion of the 255,000 acre-feet" of "secondary storage rights"

¹ Fourth Affidavit of Michael Orr ("Fourth Orr. Aff.") Ex. 4 (Report of Board of Engineers, U.S. Bureau of Reclamation (Apr. 10, 1920)) at 5.

² Fourth Orr. Aff. Ex. 8 (Tr. of Examination of Lynn Crandall, Fed. Power Comm'n (Jan. 12-13, 1952)) (hereinafter "Crandall Testimony") at 22.

referenced in paragraph 18 of the Contract "as is needed for beneficial use for power development at Shoshone Falls or Twin Falls" below Milner in the winter, at rates of flow specified in the 1923 Contract.³ Similarly, the State's reference to the provision in Idaho Power's 1922 federal license applications for its Twin Falls facility, that construction of American Falls Reservoir would reduce winter flows at the Twin Falls facility, must be considered together with the commitment by the United States the very next year in the 1923 Contract to provide flows from American Falls to that downstream facility. *See* State's Opening Brief at 7. In short, long before the State developed its "zero flow at Milner" policy, Idaho Power had rights which entitled it to flows for hydropower generation below Milner, and which continue to the present day.⁴

The State cites other provisions and statements to the effect that Idaho Power subordinated its hydropower water rights to the use of water for irrigation purposes. These citations are of no consequence to the issue before the Court, which is whether Idaho Power's hydropower water rights are subordinated to the use or management of water for recharge. As Idaho Power explained in its opening brief, the historical context leading up to the Swan Falls Agreement establishes that Idaho Power's use of water for hydropower generation was subordinated only to irrigation and other upstream consumptive and depletionary uses. *See* Idaho Power's Opening Brief at 19-26. Recharge, by contrast, is a non-consumptive and non-depletionary management tool to augment stream flows. *Id.* at 3-5.

³ Third Affidavit of Michael Orr ("Third Orr Aff.") Ex. 6 (Excerpt of Contract between United States and Idaho Power Company (June 15, 1923)) at 3-4.

⁴ Idaho Power's rights at American Falls are the subject of proceedings in federal court and elsewhere in the SRBA, and thus are not subject to determination in this case. As discussed by the parties previously with the Court, any discussion of the American Falls federal contract is solely for purposes of setting the historical context of the subsequent Swan Falls Agreement.

The State's discussion of the report and testimony of Lynn Crandall, USGS District Engineer and former watermaster, in Federal Power Commission hearings on the Hells Canyon Project does not demonstrate support by Idaho Power for the State's zero flow policy or contemplated recharge projects, as suggested by the State. *See* State's Opening Brief at 9-11. The report expressly recognizes that future spills past Milner will include "storage rights owned by the Idaho Power Company that usually require the discharge of about 155,000 acre-feet annually over Milner dam for downstream use by the Power Company,"⁵ contrary to the State's portrayal of the river as having always been managed for zero flow. Moreover, Idaho Power cannot be assumed to have agreed with everything in the report, since it was not prepared for Idaho Power.⁶ Indeed, it is not even clear whether Idaho Power introduced the report into evidence, as the Presiding examiner observed that FPC staff had adopted the report for its presentation, and there was discussion as to whether Idaho Power's attorney Mr. Parry had a right to cross-examine on it.⁷

The State asserts that Mr. Crandall was "questioned in some detail" about use of flows to recharge the Snake Plain aquifer. Not only was this questioning just a few pages sandwiched in four days of testimony by Mr. Crandall, but it was not even conducted by Idaho Power's attorney Mr. Parry. Mr. Parry asked only a few questions to establish that reservoir capacity above

⁵ Fourth Orr Aff. Ex. 7 (Lynn Crandall, Future Upstream Depletion Above Hells Canyon (Apr. 6, 1953)) at 7. While the State correctly indicates that Crandall was referring to Idaho Power's storage rights at American Falls Reservoir, the State omits the report's reference to those storage rights historically discharging 155,000 acre-feet annually past Milner Dam, which is inconsistent with the State's position in this case and other SRBA proceedings.

⁶ As Mr. Crandall testified, "the Commissioner of Reclamation ... requested the Secretary of the Interior to ask the Director of the Geological Survey to have me make this report." Fourth Orr Aff. Ex. 8 (Crandall Testimony) at 11. Mr. Crandall indicated his understanding that the Interior Department wanted it in connection with its consideration of the Hells Canyon Project, and the Interior Department and Idaho Power were competing at the time to construct the Hells Canyon Project. *Id.* at 13.

⁷ *Id.* at 16.

Milner Dam was filled annually in the spring to the extent that water was available.⁸ The witness Mr. Crandall was then cross-examined by a Mr. Hilmer on a number of topics including recharge. During that cross-examination, Mr. Crandall indicated his understanding that recharge "would occur at times when all prior water rights on the river were being filled,"⁹ thereby respecting other water rights including those for hydropower. For the State to attribute significance to the failure of Idaho Power's attorney to grill Mr. Crandall on tangential discussion of recharge when it obviously was not at issue in the proceeding is ludicrous.

The State cites a number of historical materials to support its view as to the *de facto* division of the Snake River at Milner. The State quotes from an undated Federal Power Commission report which observed that "from a power standpoint, the Snake River is divided into two sections, that above and that below Milner dam."¹⁰ This report proceeds to observe that the Snake River is "turned dry at the Milner Dam" through irrigation canal diversions "an average of two months every year *during the irrigation season*."¹¹ This history of river depletion during part of the irrigation season does not support the State's position in this case that recharge should be allowed to turn the river dry during the non-irrigation season as well, irrespective of impacts on downstream hydropower generation.¹²

Indeed, under the language of the Swan Falls Agreement, Idaho Power has the explicit right to make use of available water beyond the 3900 and 5600 cfs minimum average daily flows

⁸ *Id.* at 29.

⁹ *Id.* at 34.

¹⁰ Third Orr Aff. Ex. 3 (George L. Hoffman, Report on Application Before Federal Power Comm'n) at 1.

¹¹ *Id.* at 1, 3 (emphasis added).

¹² In fact, the statement in the historic FPC report is consistent with the current State Water Plan's statement that "[t]he exercise of water rights above Milner Dam *has and may* reduce flow at the dam to zero." Second Gheleta Aff. Ex. A (1996 Idaho State Water Plan (Dec. 1996)) at 10 (emphasis added).

at the Murphy gauge which the State is obligated to insure under the Agreement. Paragraph 7(B) of the Agreement provides: "The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated" in the specified state water right license numbers.¹³ *See also Idaho Power Co. v. State*, 104 Idaho 575, 578, 661 P.2d 741, 744 (1983) ("It is undisputed that the Swan Falls power plant's hydroelectric capacity is 8400 cfs, and therefore the water rights at Swan Falls are limited to 8400 cfs"). Thus, additional water beyond the 3900 and 5600 cfs minimum flows, including whatever water passes Milner, is a source of Idaho Power's rights under the Swan Falls Agreement, and must be decreed as such.

The State also quotes 1957 congressional testimony of Idahoan Edward Ermine describing the Snake River above and below Milner. Mr. Ermine was actually before Congress in support of power development, advocating federal construction of Hells Canyon Dam, stating "we've got the land, we've got the water, and we need hydro-electric power."¹⁴ Addressing the notion that the proposed dam, below Milner, "would jeopardize the water rights of the farmers and ranchers on the Upper Snake," Mr. Ermine said that "[i]t is ridiculous, of course."¹⁵ Somewhat less balanced was John M. George in his 1957 letter to U.S. Senator Dworshak cited by the State. In addition to discussing his vision that the upper Snake River would someday become dry year round at Milner Dam, Mr. George stated "the Idaho Power Company has been the enemy of the irrigator," and "[i]t is my opinion that the Federal government should break the American Falls contract and should let that water go where it rightfully belongs, namely to the

¹³ *See* Gheleta Aff. Ex. F (Agreement) ¶ 7(B).

¹⁴ Fourth Orr Aff. Ex. 11 (Statement of Edward Emerine, Irrigation & Reclamation Subcomm., House Interior & Insular Affairs Comm. (Mar. 4, 1957)) (hereinafter "Ermine Statement") at 3.

¹⁵ *Id.*

irrigator."¹⁶ Such testimony, while perhaps reflecting the view of the commenter, is of little use in establishing an accurate historic record of the general tenor of public policy.

The State also cites a 1960 information bulletin of the U.S. Bureau of Reclamation and Army Corps of Engineers which the State asserts recognized the "two rivers" concept and related recharge potential. State's Opening Brief at 13. The information bulletin does little to support the State's portrayal of "zero flow" and the "Milner divide" as having deep historical roots. Indeed, immediately after one passage cited by the State, the bulletin observes that "[d]uring the period 1928 through 1957, with the present development in the Snake River Basin, estimated flows past Milner Dam would average 1,305,000 acre-feet a year."¹⁷ The bulletin also demonstrates that the federal agencies preparing it took a positive view of non-federal hydropower in the Snake River basin, including Idaho Power's facilities, with the bulletin stating that "[p]roduction of power is an important water-resource use in this basin and some 18 non-Federal hydroelectric plants . . . have been installed."¹⁸ Finally, in selectively quoting a paragraph discussing recharge, State's Opening Brief at 47, n. 10, the State omits a phrase indicating that through recharge "the flow of the river might be smoothed out to the benefit of downstream power."¹⁹ Thus, this nearly 50 year old bulletin also supports Idaho Power's present

¹⁶ Fourth Orr Aff. Ex. 12 (Letter from John M. George to Sen. Henry Dworshak (Apr. 22, 1957)) at 3.

¹⁷ Fourth Orr Aff. Ex. 13 (Information Bulletin, U.S. Bureau of Reclamation & U.S. Army Corps of Engineers (Sept. 29, 1960)) at 6.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 10. The written statement of District Engineer Crandall to the Columbia Basin Inter-Agency Committee, cited by the State at page 14 of its brief, also recognized that through recharge "the flow of the river would be smoothed out to the benefit of downstream power." Fourth Orr Aff. Ex. 14 (Statement by D.L. Crandall, Columbia Basin Inter-Agency Comm. Meeting (Jan. 11, 1961)) at 8. Mr. Crandall further stated that "we emphasize that all plans are based on the preservation of existing water rights." *Id.*

position that recharge is a flow augmentation or water management tool, and not a consumptive use or storage mechanism.

The State also cites a 1967 letter from the Assistant Regional Director of the Bureau of Reclamation to the Director of the Idaho Water Resource Board. The letter has a brief discussion of the advantages and disadvantages of recharge, but its focus appears to be on issues concerning the replacement of American Falls Dam,²⁰ well upstream of Milner. The letter makes no reference to a "zero flow" policy, but rather reveals that "[u]ncontrolled and unused surface flows of the Snake River passing Milner Dam average 1,250,000 acre-feet annually, *including Idaho Power Company primary and secondary rights passing the dam.* . . ."²¹ The letter also indicates that one of the effects of artificial recharge would be to "[i]ncrease the flow from the aquifer into [the] Snake River at various places between Idaho Falls and Bliss,"²² once again confirming that historically recharge was seen as a non-consumptive and non-depletionary flow augmentation tool.

The State also attempts to manufacture a historic link between recharge and its zero flow policy by mentioning both in a sentence in its brief discussing the first Idaho State Water Plan. State's Opening Brief at 16. No such link can be found in the referenced State Water Plan documents provided. Part One of the Plan issued in 1974 stated that "[v]arious state and federal studies [were] being made to explore the possibility of developing the Snake Plain aquifer to ...

²⁰ Fourth Orr Aff. Ex. 17 (Letter from Norman H. Moore to Dr. Robert E. Lee (Oct. 27, 1967)) at 4.

²¹ *Id.* at 2 (emphasis added). The reference to Idaho Power's primary and secondary rights is derived from provisions of the 1923 Contract between Idaho Power and the United States. *See* Third Orr Aff. Ex. 6 at 3-4. Also appended to the letter is a bar graph displaying that between 1928 and 1961, as much as 3 million acre-feet of water flowed past Milner annually. *Id.* at 5.

²² Fourth Orr Aff. Ex. 17 at 2.

store excess surface flows as recharge."²³ This supports Idaho Power's position that recharge was not well developed but merely the subject of study and pilot projects prior to the Swan Falls Agreement. Part Two of the Plan issued in 1976 referenced the State's goal of having a flow of 0 cfs at Milner.²⁴ The State Water Plan's reference to recharge and zero flow, in different sections of separate documents issued two years apart, certainly does not establish any link between recharge and the State's zero flow policy.

The discussion of the litigation that preceded the Swan Falls Agreement in the State's brief, both the first Ada County Case No. 62237, and the second Ada County Case No. 81375 (the "7500 case"), is not relevant to the issue presently before the Court. The parties ultimately resolved their different views concerning the scope of any historical subordination not through litigation, but through negotiation of the Swan Falls Agreement. The State observes that following the ruling and guidance provided by the Idaho Supreme Court in *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983), Idaho Power sought in the ensuing 7500 case to enforce its Swan Falls water rights against upstream users both above and below Milner. State's Opening Brief at 17-18. If anything, this indicates that Idaho Power believed its water rights were enforceable on the entire river upstream of Swan Falls regardless of any perceived "Milner divide," and not that Idaho Power historically conceded that its water rights were invariably subject to a State zero flow policy.

The State also attempts to attribute significance to Idaho Power not including in its complaint in Ada County Case No. 62237 a challenge to the use of non-irrigation season flows for recharge purposes. The absence of a challenge to recharge at that time should not be

²³ Fourth Orr Aff. Ex. 18 (Excerpts from the State Water Plan, Part I (June 1974) & Part II (Dec. 1976)) at 5.

²⁴ *Id.* at 14.

surprising. The complaint was filed in 1977 and amended in 1978. It was not until 1978 that the Legislature for the first time authorized water rights for recharge on a limited basis, providing for formation of aquifer recharge districts in a limited geographic area as a "pilot effort," and expressly making the use of water for recharge secondary to prior perfected water rights including hydropower. *See* Idaho Power's Opening Brief at 16. Given this timing, and the legislative protections to hydropower users such as Idaho Power against nascent recharge efforts, there was no reason for Idaho Power to challenge the use of water for recharge.

The State observes that in Ada County Case No. 62237, Idaho Power filed a motion to reconsider and amend the Court's summary judgment ruling. Through that motion, Idaho Power sought a determination that the subordination provision in its Federal Power Commission license for the Hells Canyon project did not subordinate Idaho Power's rights to non-irrigation season diversions for irrigation purposes.²⁵ The Company indicated its concern with two specific proposals that had arisen since the action was instituted: (1) the Idaho Water Resource Board's filing of an application for diversions at Milner Dam in the non-irrigation season for the Bruneau Plateau Project, which contemplated storage of 1,738,000 acre-feet; and (2) "[p]roposals *for other than irrigation* ... to skim waters as available from the Snake River" to recharge the aquifer and deprive Idaho Power of wintertime power generation.²⁶ The motion was filed only two weeks after the summary judgment ruling and with no factual record apparent.²⁷ Accordingly, Idaho Power asked the court to "limit its decision . . . so as to leave open for specific decision in an adversary proceeding" involving the parties proposing such projects whether the

²⁵ Fourth Orr Aff. Ex. 24 (Pl's. Mem. in Supp. of Mot. to Reconsider & Amend Summ. J. (Feb. 19, 1980)) (hereinafter "Plaintiff's Memorandum") at 3.

²⁶ *Id.* at 4.

²⁷ *Id.* *See also* Second Gheleta Aff. Ex. B (Summary Judgment entered in Idaho Power Company v. State of Idaho, Case No. 62237 (Feb. 4, 1980)).

subordination applies to a particular project. Instead, the court ruled on the limited record before it, finding 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" in the Hells Canyon license.²⁸

The Ada County court's ruling is of no consequence in the present case. The court held that diversions to "offstream storage" in the non-irrigation season, "if done for the purpose of providing waters for irrigation," fell within the Hells Canyon subordination provisions. The project fitting that description on the facts before the court was the Bruneau Plateau Project.²⁹ The proposals to form aquifer recharge districts raised by Idaho Power were expressly described as an example of "proposals for other than irrigation."³⁰ Idaho Power is not contesting here that its hydropower water rights are secondary to irrigation and other consumptive uses above Milner Dam. That issue is settled. At issue here is whether the Swan Falls Agreement subordinated those rights to a non-consumptive use, aquifer recharge.

As demonstrated by Idaho Power in its opening brief, and as recognized by the parties in the Framework, recharge in Idaho's Eastern Snake Plain Aquifer ("ESPA") is a management tool to augment spring and stream flow and generally increase surface and ground water to make water available for water right holders in priority for a variety of purposes of use. Given the interconnection between the ESPA, springs and Snake River, recharge of the ESPA is not

²⁸ Fourth Orr Aff. Ex. 25 (Memorandum Decision, Case No. 62237 (May 16, 1980)) at 5. The Court issued an Amended Summary Judgment expressly referencing its Memorandum Decision on the matter. *See* Second Gheleta Aff. Ex. C (Amended Summary Judgment entered in Idaho Power Company v. State of Idaho, Case No. 62237 (June 3, 1980)). Idaho Power filed a Notice of Appeal on that final Amended Summary Judgment. *See* Fourth Orr Aff. Ex. 26 (Notice of Appeal, Case No. 62237 (June 14, 1980)) at 4. The Idaho Supreme Court did not address this aspect of the Ada County Court's ruling in its decision in *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

²⁹ Fourth Orr Aff. Ex. 24 (Plaintiff's Memorandum) at 3.

³⁰ *Id.* at 4.

consumptive nor does it "store" water for irrigation in the sense that storage reservoirs do.³¹

Indeed, recharge of the ESPA is not "storage" at all. In *AFRD #2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007), the Idaho Supreme Court defined "storage water" as "water held in a reservoir to assist the holder of a water right in meeting their decreed needs," *id.*, at 449.. The Court then went on to say that water, when stored, "becomes the property of the appropriators... impressed with the public trust to apply it to a beneficial use," *id.* at 450. The concept of storage necessarily involves the ability to maintain control over the water so that the person or entity storing the water might later apply the water to a beneficial use. Aquifer recharge, at least with regard to recharge of the Eastern Snake Plain Aquifer, has none of these attributes.³²

Idaho Power established at pp. 3-5 of its Opening Brief that recharge a non-consumptive and non-depletionary water use which nevertheless impacts hydropower use, using IDWR's own 1999 Feasibility Study of large-scale managed recharge in the ESPA system. This report also reveals that recharge in the ESPA has long been understood to be non-consumptive and non-depletionary given that water recharged into the ESPA exits the aquifer and is discharged to the Snake River through springs: "Spring discharge to the Snake River also increased in response to increased incidental aquifer recharge *during the first half of the century*."³³ In light of this historic context, it is consistent with Idaho Power's historic subordination to irrigation and other

³¹ This is evidenced by a 1995 Resolution of the Idaho Water Resource Board that references the benefits of recharge: "[T]he benefits of groundwater recharge include increasing spring flows to the benefit of spring ecosystems, increasing stream flows to the benefit of stream system habitat, and increasing surface and ground water supplies to meet water diversion demands or to mitigate for the effects of junior water diversions upon the availability of water for diversion under more senior rights." Second Gheleta Aff. Ex. D (IWRB Resolution In the Matter of the Application by the Idaho Water Resource Board for the Rental of Water from the Upper Snake River Rental Pool for Recharge Purposes in the Snake River Plain Aquifer Area (Apr. 21, 1995)) at 2.

³² In the report entitled *Feasibility of Large Scale Managed Recharge of the Eastern Snake Plain Aquifer System* (1999), the Idaho Department of Water Resources described the purpose of a managed recharge program for the ESPA to be to "sustain or increase ground-water levels and the outflow from springs discharging to the Snake River. Gheleta Aff. Ex. B (Feasibility Study) at 1.

³³ *Id.* at 13 (emphasis added).

consumptive uses that Idaho Power would not have subordinated to recharge of the ESPA, a non-consumptive water management activity. *See* Idaho Power's Opening Brief at 19-26.

Recharge of the ESPA can be contrasted with aquifer recharge programs in other states where aquifers are confined and not interconnected with spring discharge and stream flow as is the ESPA. Where hydrologic conditions permit, underground "storage" in aquifers may occur, as evidenced by statutory programs in some western states.³⁴ In contrast to these statutory programs involving storage in aquifers, recharge in Idaho's ESPA does not constitute "storage," but rather results in stream flow augmentation given the interconnectivity of the ESPA, springs and the Snake River.

In short, the State's Statement of Facts does not establish a consistent history regarding maintenance of a zero flow at Milner, pursuit of recharge projects, or support by Idaho Power for either irrespective of impacts on hydropower. Accordingly, there is no foundation for the State's apparent position that the parties had zero flow or recharge in mind as integral components of the Swan Falls Agreement when they negotiated and signed the Agreement.

³⁴ Statutes in Nevada and New Mexico authorize the underground "storage" and "withdrawal" of water by the same project operator and contemplate recharge and recovery within the same geographic area. Nevada's Underground Water and Wells statute defines "stored water" as "water which has been stored underground for the purpose of recovery" pursuant to a permit specifically issued for a Project for Recharge, Storage and Recovery of Water. Nev. Rev. Stat. 534.016, 534.250. The Nevada statute limits withdrawals under such projects to the "recoverable amount," which is defined as the amount of water stored under the project that has reached the aquifer and "remains within the area of active management." *Id.* 534.300(3). New Mexico has adopted an identical definition of "stored water," and withdrawal of water is also limited to that "recoverable amount" which has "reached the aquifer, remained within the area of hydrologic effect and is conducive to recovery without impairment to existing uses." *See* N.M. Stat. Ann. §§ 72-5A-3(E), 72-5A-9.

ARGUMENT

I. IDAHO POWER DID NOT "AGREE" OR "CONCEDE" IN THE SWAN FALLS AGREEMENT THAT ITS WATER RIGHTS WOULD BE SUBORDINATE TO RECHARGE, ABOVE OR BELOW MILNER.

A. The Signed Agreement Called for Study of Recharge Impacts to Hydropower, and Did Not Abolish the Existing Statutory Subordination of Recharge to Hydropower.

The first component of the Swan Falls Agreement was the "Framework for Final Resolution of Snake River Water Rights Controversy" ("Framework"), which was signed on October 1, 1984 by Governor Evans, Attorney General Jones, and Idaho Power CEO James Bruce. In its opening brief, the State makes only a passing reference to the Framework. State's Opening Brief at 21-22. For purposes of this motion, the Framework is one of the most significant components of the Swan Falls Agreement because it is the only part of the Agreement that expressly mentions recharge. It does so by indicating that "aquifer recharge projects" are one of a "number of methods ... suggested to enhance stream-flows in the Snake River," which "*deserve study to determine their economic potential, their impact on the environment, and their impact on hydropower generation.*"³⁵ While the State may prefer the simple approach of relying on its zero flow policy to address the recharge subordination question, it cannot avoid the fact that the parties dealt directly with recharge in the Framework, calling for study and later consideration of the impact of recharge not subordination to it.

The State's brief is also surprising in its complete failure to acknowledge state statutory law directly governing the relationship of recharge and hydropower which was in place at the time the parties signed the Swan Falls Agreement. As discussed in Idaho Power's Opening Brief

³⁵ Gheleta Aff. Ex. A (Framework for Final Resolution of Snake River Water Rights Controversy (Oct. 1, 1984)) (hereinafter "Framework") at 7 (emphasis added).

at pp. 15-19, existing legislation including the pre-Agreement 1982 enactment of I.C. § 42-4201A included a clear legislative mandate that water rights for recharge purposes:

shall be secondary to all prior perfected water rights, including those held by any privately owned electrical generating company to appropriate waters in the reaches downstream from a recharge project diversion for purposes of hydroelectric power generation.

I.C. § 42-4201A (emphasis added). It is axiomatic that a contract must be interpreted in accordance with the law in effect at the time of its execution. Idaho Power's Opening Brief at 5-7. Yet the State fails to acknowledge, much less explain, this directly applicable legislation, instead focusing solely on 1986 legislation enacted after the parties' execution of the Framework and Agreement.

Significantly, in the Swan Falls Agreement, the parties agreed to specifically worded legislative proposals. That proposed legislation did not include changing the existing law that established that water rights for recharge were secondary to those for hydropower. The Agreement should be interpreted accordingly.

B. The Specific Statutory Provisions Expressly Making Recharge Secondary to Hydropower, In Place Both Before the 1986 Amendments and Presently, Control Over the 1986 Amendments Pertaining to Water Rights Administration in General.

The directly applicable law governing the relationship between recharge and hydropower -- as it was in place at the time of the 1984 Swan Falls Agreement, as it was amended and strengthened in 1994 well after the 1986 Milner administration amendments, and as it exists today -- has consistently provided that recharge water rights are secondary to hydropower water rights. Idaho Power discussed the relevant statutes in some detail in its opening brief. *See* Idaho Power's Opening Brief at 15-19, 28-35. However, the State has now argued that the Legislature's 1986 amendments to I.C. § 42-203B(2) concerning administration of water rights above and

below Milner control resolution of the recharge subordination question. While the State avoids addressing the directly applicable recharge authorization statutes, Idaho Power will demonstrate below that based on well-recognized rules of statutory construction, the recharge authorization statutes control over the 1986 legislative amendments concerning Milner administration. The three legislative provisions are set forth below.

At the time the parties negotiated and executed the Swan Falls Agreement in 1984, an aquifer recharge district or an irrigation district was authorized to obtain a permit or license recognizing the right to appropriate water for aquifer recharge under I.C. § 42-4201A(2). The 1982 legislation, which amended a prior 1978 statute, contained the following provision:

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

I.C. § 42-4201A(2) (1982) (emphasis added) ("*1982 recharge authorization legislation*").

In 1986, the Legislature amended the original Swan Falls Agreement implementing legislation agreed to by the parties as part of the 1984 Agreement, adding the following provision:

[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.

I.C. § 42-203B(2) (1986) ("*1986 Milner administration legislation*").

In 1994, the Legislature amended and broadened the *1982 recharge authorization legislation*, authorizing the issuance of a water right permit for aquifer recharge to individuals,

aquifer recharge districts, irrigation districts, and canal companies. The amended statute provided in 1994, and continues to provide today, as follows:

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

I.C. §§ 42-234(2), 4201A(2) (emphasis added) ("*1994 recharge authorization legislation*").

The law in existence at the time of contracting becomes part of the contract in Idaho, as if the contract itself contained an express provision to that effect. *See Fidelity Trust Co. v. State*, 72 Idaho 137, 149, 237 P.2d 1058 (1951) ("[I]t is axiomatic that extant law is written into and made a part of every written contract."); *Robinson v. Joint School Dist. No. 150*, 100 Idaho 263, 265, 596 P.2d 436 (1979) (recognizing that the Idaho rule "appears to be the law in almost every state, if not all"). The *1982 recharge authorization legislation* was the existing law when the 1984 Swan Falls Agreement was executed. The *1986 Milner administration legislation* was not.

It is a fundamental rule of statutory construction in Idaho that, when construing a statute, it is the duty of the court to adopt a construction that "harmonizes and reconciles" it with other statutory provisions. *See Sampson v. Layton*, 86 Idaho 453, 456, 387 P.2d 883 (1963). The court's objective is to interpret the statutory provisions to give meaning and effect to every provision in order to avoid, whenever possible, the nullification of a legislative enactment. *See id.*; *see also DeRousse v. Higginson*, 95 Idaho 173, 176, 505 P.2d 321 (1973).

The *1982 recharge authorization legislation* can be harmonized and reconciled with the *1986 Milner administration legislation*. The 1982 legislation specifically addressed the relationship between water rights for recharge and hydropower, authorizing recharge water rights so long as those water rights were "secondary" or subordinated to all prior perfected water rights,

including those for hydropower purposes. The 1986 legislation mandated that there would be no trust water above Milner and no consideration of water above Milner in administration of water rights below Milner, but did not affect the continuing "secondary" status of recharge water rights under the 1982 legislation. Both statutes can be given effect, and there is no indication that the 1986 legislation repealed the 1982 legislation. Repeal by implication is disfavored by Idaho courts, and it will be presumed that the legislature when enacting a new law did not intend to repeal any prior law if effect can be given to both. *See Tetzlaff v. Brooks*, 130 Idaho 903, 904, 950 P.2d 1242 (1997); *State v. Boyle*, 67 Idaho 512, 523-24, 186 P.2d 859 (1947).

The *1994 recharge authorization legislation* can also be harmonized and reconciled with the *1986 Milner administration legislation* under the same analysis. Both statutes can be given effect, and the latter did not repeal the former. Moreover, the Legislature reaffirmed that among the hydropower water rights to which recharge was secondary were Idaho Power's water rights otherwise subordinated under the Swan Falls Agreement. To the extent that the 1986 and 1994 legislation cannot be harmonized, the 1994 legislation would control because it is the most recent enactment. If a conflict is inherent and the court is unable to construe the separate provisions in harmony, then the provisions of the later-enacted statute govern. *See State Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 445, 530 P.2d 924, ___ (1974) ("where two statutes conflict the latest expression of the legislative will must prevail").

The *1994 recharge authorization legislation* would also control over the *1986 Milner administration legislation* since it is more specific of the two statutes on the question of whether Idaho Power's hydropower water rights are subordinate to water rights for recharge. When faced with separate statutory provisions that are *in pari materia*, or related to the same subject, the more specific or particular statute may be construed to prevail over the more general, but only

when the two statutes are in "irreconcilable conflict." *See Christensen v. West*, 92 Idaho 87, 91, 437 P.2d 359 (1968). The 1994 legislation deals directly with the issue of subordination between water rights for recharge and hydropower purposes, including Idaho Power's water rights under the Swan Falls Agreement specifically. The 1986 legislation deals with administration of water rights above and below Milner generally, as well as the location of trust water, and does not refer to recharge. The 1994 legislation is more specific, more recent, and still in effect. The Court should not override the Legislature's confirmation that water rights for recharge are secondary or subordinate to Idaho Power's water rights encompassed by the Swan Falls Agreement. *See Idaho Power's Opening Brief* at 33-35.

C. The Plain Language of the Agreement Did Not "Define" Idaho Power's Water Rights to Include an "Element" Concerning the State Policy Regarding Zero Flow at Milner.

The State asserts that plain language of the Swan Falls Agreement makes the current State policy of maintaining a zero flow at Milner part of the "definition" or an "element" of Idaho Power's water right under the Agreement. In making this argument, however, the State relies not on the subordination provisions of the Agreement or any other plain language within it, but on Exhibit 6 to the Agreement, where the State and Idaho Power agreed to recommend that the "following positions be incorporated into Policy 32 of the State Water Plan... 2) The minimum daily flow at the Milner gauging station shall remain at zero c.f.s."

As outlined by the Court in its Memorandum Decision on the earlier Motions for Summary Judgment, Paragraph 7 of the Agreement "*defines Idaho Power's various hydropower rights.*" Mem. Decision, April 18, 2008, at 28 (emphasis added). Paragraph 7 is entitled "Company's Water Right," and begins by stating in plain language that "State and Company

agree that Company's water right shall be as follows."³⁶ Paragraph 7(A) defines Idaho Power's right, represented by the applicable license numbers, as unsubordinated up to the agreed upon minimum flows at the Murphy gauge. Paragraph 7(B) defines Idaho Power's right in excess of those flows as "subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with state law."³⁷ Nothing in Paragraph 7 references an administrative zero flow policy as an "element" of Idaho Power's defined right.

Rather than focusing on the plain language of the subordination provision in Paragraph 7, however, the State argues that the issue of whether the Agreement subordinated Idaho Power's water rights to recharge is resolved by the Agreement's reference to the State Water Plan's "zero flow" policy. The State's argument attempts to convert language in Exhibit 6 to the Agreement into "an element of the definition of the hydropower water rights." State's Opening Brief at 25-26. In Exhibit 6, the parties agreed to "recommend" that various positions be included in the State Water Plan.³⁸ They did *not* agree to legislative enactment of the "zero flow" or "two rivers" concept as a part of the legislative language that was attached to the Agreement as Exhibits 7A and 7B, and enacted in the 1985 legislative session as I.C. § 42-203B.³⁹ The "two rivers" language that now appears in I.C. § 42-203B was enacted subsequently, in the 1986 session. The proposed statutory language of the implementing legislation agreed upon by the parties, as set forth in Exhibits 7A and 7B, provided that the water held in trust would be subject

³⁶ Gheleta Aff. Ex. F (Agreement (Oct. 25, 1984)) ¶ 7.

³⁷ *Id.* ¶ 7(B).

³⁸ *Id.* at 26, ex. 6.

³⁹ *Id.* at 27-30, exs. 7A, 7B.

to "subordination to and depletion by future upstream beneficial users," without reference to zero flow, two rivers or any other water rights administration policy.⁴⁰

The State Water Plan does not establish "elements" of any party's water rights, including Idaho Power's, and has no applicability to the adjudication or administration of water rights. Rather, the State Water Plan is a "comprehensive" management plan establishing "statewide policies, goals and objectives." I.C. §§ 42-1734A(1). It is limited in its application to the management of unappropriated waters only, and may not be implemented in a manner adverse to existing rights and relative priorities of water. *See* I.C. §§ 42-1734A(1), 1734A(1)(a).⁴¹ The State Water Plan is thus a statement of policy, and is subject to being periodically updated and revised in accordance with the governing statutes, such as the State Water Plan revision proceeding ongoing presently. Therefore, the State Water Plan and the zero flow provision itself have no applicability to the adjudication of water rights.

The nature of the State Water Plan as a management policy document is recognized in the Swan Falls Agreement. In Paragraph 11 the parties agreed that the "recognition" by the State of Idaho Power's water rights under the Agreement "together with the State Water Plan" represent a "sound comprehensive plan for the management of the Snake River watershed."⁴² This provision of the Agreement stands in direct conflict with the argument now advanced by the State, that the parties intended to and in fact defined Idaho Power's water rights to include the zero flow provision of the State Water Plan, and that the zero flow policy negates or supersedes the

⁴⁰ *Id.*

⁴¹ The Idaho Water Resource Board's own rules clearly reflect this: "Pursuant to the provisions of Sections 42-1734A and 42-1734B, Idaho Code, the board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of *all unappropriated water resources* and waterways of the state in the public interest." Second Gheleta Aff. Ex. E (IWRB Comprehensive State Water Plan Rules) § 37.02.01.030 (emphasis added).

⁴² Gheleta Aff. Ex. F (Agreement) ¶ 11 ("Status of State Water Plan").

specific subordination provisions agreed upon by the signatory parties. Paragraph 11 would have been one more obvious place, in addition to the subordination provision in Paragraph 7, where the parties could have made any such intent plain, and they did not. The only reasonable interpretation of Paragraph 11, when the Agreement is considered as a whole, is that the parties regarded the zero flow policy as providing guidance concerning water rights management or administration, and not as a defined element of Idaho Power's water rights.

It would be improper to lock in the State Water Plan's zero flow policy as an element of Idaho Power's water right in the SRBA Decree. As the State and this Court are well aware, the term "element" has a very precise statutory meaning in the Snake River Basin Adjudication. The Director of IDWR is required to initially determine and set forth the enumerated "elements" of the water rights being recommended, and may separately include such "general provisions" as he deems appropriate. *See* I.C. §§ 42-1411(2), (3). The elements recognized under the statute include the name of the claimant, the source and quantity of the water, the priority date, the point of diversion, and the purpose, period, and place of use, along with any conditions or remarks deemed necessary by the Director. I.C. §§ 42-1411(2)(a)-(j). As a mirror image of the elements set forth in section 42-1411(2), the SRBA Court has adopted a document entitled "Standard Form 1 – Objection," a standardized check-the-box form that enables any claimant to object to recommended water right elements or to a general provision included in the Director's report. *See* SRBA Administrative Order 1; I.C. § 42-1412(1). After those objections are resolved by settlement or litigation, the SRBA Court is thereafter directed to enter a partial decree that incorporates a statement of each element – and only those elements – that are stated in section 42-1411. *See id.* § 42-1412(6).

Neither the Director's report statute, the SRBA objection form, nor the partial decree statute specify or allow a statutory provision, a State Water Plan policy, or any administrative rule or regulation to be listed as an element of a water right. This is for good reason, because while statutes, policies and regulations for the administration of water rights may necessarily change, the elements of a water right are meant to be static in order to give finality and certainty to what is, after all, a property right. *See Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984) ("A water right is tantamount to a real property right, and is legally protected as such.").

Nor would it be appropriate for the State Water Plan's zero flow policy to be included as a general provision associated with Idaho Power's water rights in the SRBA Decree. Idaho's adjudication statutes distinguish between the elements of a water right discussed above and "general provisions" that are not elements, but which relate to the definition and/or administration of water rights. The statute does not define "general provisions," but the Idaho Supreme Court has held that a general provision "is a provision that is included in a water right decree regarding the administration of water rights that applies generally to water rights, is not an element of the water right, or is necessary for the efficient administration of the water rights decreed." *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 414, 958 P.2d 568 (1997). The Court must determine that such provisions are "necessary" either to define or to efficiently administer water rights in order to include them in a partial decree. *See* I.C. § 42-1412(6); *see also A&B Irrigation*, 131 Idaho at 414 (stating that "necessary" means "required").

In this instance, the State and Idaho Power agreed to recommend that the Idaho Water Resource Board retain the zero flow provision in the State Water Plan. The Board subsequently did so, in accordance with the joint recommendation called for under the Agreement. But the

Board may change the State's policy at any point in the future – due to a change in State priorities regarding water use and location, a physical event such as an earthquake which affects spring discharges or the ability of the aquifer and river system to regenerate surface flows if flow is cut off at Milner, or some other reason which cannot be predicted at the present time.

In fact, the "zero flow" policy under state water plans has changed over time. Pursuant to the Swan Falls Agreement, in 1985 the Water Resource amended Policy 32 of the State Water Plan to provide:

It is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gaging station... The establishment of a zero minimum flow at the Milner gaging station allows for existing uses to be continued and for some new uses above Milner. The zero flow established at Milner Dam means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years.⁴³

In 1986, the Board moved this statement of policy to Policy 5A, which provided: "[i]t is the policy of Idaho that the ground water and surface water of the basin be managed to meet or exceed a minimum average daily flow of zero measured at the Milner gauging station...."⁴⁴ The other provisions of the 1985 Policy 32 were moved to comments below the policy. The 1986 Plan provides:

The establishment of a zero minimum flow at Milner gauging station allows for existing uses to be continued and for some new uses above Milner. It also means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-flow years.⁴⁵

Interestingly, both the 1985 Resolution and 1986 Policy 5A provide that water above Milner is to be managed to "meet or *exceed* a minimum average daily flow" of zero at Milner (emphasis

⁴³ Second Gheleta Aff. Ex. F (IWRB Resolution In the Matter of Policy 32 of the State Water Plan (Mar. 1, 1985)) at 1-2.

⁴⁴ Second Gheleta Aff. Ex. G (State Water Plan, Policy 5A (Dec. 12, 1986)) at 47.

⁴⁵ *Id.*

added), not to maintain a zero flow at all times.

This reference to the Milner flow was changed significantly in Policy 5A of the 1992 State Water Plan, which provides: "The State recognizes that the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero."⁴⁶ No longer was it state policy to manage water to meet or exceed that minimum. In fact, comments to Policy 5A explain that a zero flow was not necessarily a desirable target:

The zero flow at Milner Dam is not a target or goal to be achieved, and may not necessarily be desirable. It is rather, a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time. The state should seek to acquire water whenever it becomes available in order to mitigate the impacts of low flow below the dam.⁴⁷

In the 1996 State Water Plan (the most current Plan, which is currently being reviewed by the Board for revision), the Board again modified, albeit slightly, the zero flow policy to read:

"The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero."⁴⁸

It also changed the comments to read:

In licensing the Milner hydropower project, the Federal Energy Regulatory Commission (FERC) specified 'target flows' for the Snake River at Milner. The target flows must be satisfied only when water in excess of prior irrigation rights is available. Water for target flows may be acquired from storage or may be leased from the Upper Snake Rental Pool. The State should seek to acquire water whenever it becomes available in order to mitigate the impacts of low flow below the Dam.⁴⁹

Clearly, State policy changes, and as such, the SRBA Decree should not lock in a zero flow policy, in Idaho Power's water rights or elsewhere. In addition, not all provisions of the Swan Falls Agreement are necessarily "elements" of Idaho Power's water rights. The elements

⁴⁶ Second Gheleta Aff. Ex. H (State Water Plan, Policy 5A (Jan. 1992)) at 33.

⁴⁷ *Id.*

⁴⁸ Second Gheleta Aff. Ex. A (State Water Plan, Policy 5B (Dec. 1996)) at 10.

⁴⁹ *Id.*

of Idaho Power's water rights are defined as set forth in the original water right licenses, as modified by Paragraph 7 of the Agreement. The issue of whether Idaho Power subordinated its hydropower water rights to recharge should be resolved and permanently decreed based on the subordination provisions of the Agreement signed by the parties, not based on a recommendation regarding a State Water Plan policy of general applicability that may be modified in the future.

D. References by Interested Parties to the Zero Flow Policy Made During Post-Agreement Proceedings Do Not Establish that the Signatory Parties Intended to Define Idaho Power's Water Rights to Make this Policy an Element of the Water Rights.

The State cites select statements made by Idaho Power representatives and other interested parties during the proceedings that followed the execution of the Swan Falls Agreement as demonstrating Idaho Power's intent to exclude flows upstream of Milner Dam, regardless of the designated use of those flows, from its hydropower rights under the Agreement. But these random, out of context statements, made after the execution of the Agreement, prove nothing with respect to the signatory parties' intent regarding the meaning and scope of the Agreement.

First, the State cites to discussions during IDWR's public information meetings in 1985 concerning the Agreement which referenced the zero flow at Milner policy. For instance, the State cites testimony by Tom Nelson at the hearings in which he recognizes that the minimum flow numbers in the Agreement "were based on zero flow at Milner," and that the Agreement "does not contemplate any change in that minimum flow." *See* State's Opening Brief at 30. Idaho Power does not dispute that, in setting the minimum flow levels in Paragraph 7 of the Agreement, the parties considered the fact that at certain times of the year, due to upstream irrigation and other consumptive use diversions, that the flows at Milner were zero. The Company also does not deny that a topic of discussion at various public information meetings

was whether the Agreement would affect either those historic upstream uses or the development of new irrigation or consumptive uses upstream of Milner that might perpetuate the zero flow at Milner. But this recognition of the zero flow and Idaho Power's historic deference to upstream irrigation and consumptive uses hardly establishes, as the State contends, that Idaho Power agreed, as a *term of the Swan Falls Agreement*, that its hydropower water rights under the Agreement were subordinate to all future uses above Milner Dam.

The State's rendition of the "legislative implementation" of the Agreement also fails to support its contention that the zero flow at Milner policy is an element of Idaho Power's hydropower rights, as defined by the Agreement. For instance, the State cites to a statement by Senator Mike Crapo at a public hearing on the proposed rules for water appropriation in 1986 in which he opines that the zero flow at Milner policy "was very heavily discussed and was the basis on which the [Swan Falls Legislation] was passed." State's Opening Brief at 31. But the Senator's statement referred to the legislation, not the Agreement, and thus has no bearing on whether Idaho Power agreed to define its water rights under the Agreement to include the zero flow policy. Indeed, if the zero flow policy was so heavily discussed and integral to the Agreement as to make it an "element" of Idaho Power's water rights, one would expect the Swan Falls legislation attached to the signed Agreement to reference the policy, and it does not.

Additionally, nothing in the Statement of Legislative Intent, the official document drafted by Senator Crapo to describe the legislative intent behind the Swan Falls implementing legislation, speaks to the zero flow policy as an element of Idaho Power's water rights. Nor does the Statement refer to recharge as a beneficial use to which Idaho Power subordinated its water rights.⁵⁰ Instead, the legislative history focuses on the need to protect upstream irrigation and

⁵⁰ See Gheleta Aff. Ex. G (Statement of Legislative Intent, S.B. 1008 (Feb. 1, 1985)).

other consumptive uses – not non-consumptive uses such as recharge.⁵¹ The Agreement's subordination to upstream irrigation and consumptive uses, but not to non-consumptive and non-depletionary uses such as recharge, is consistent with Idaho Power's historic subordination at other projects on the Snake River. *See* Idaho Power's Opening Brief at 19-26.

Lastly, the State quotes random third party statements from the Idaho Water Resource Board hearings on the proposed State Water Plan amendments as evidence that the zero flow policy was intended to become an element of Idaho Power's water rights. But these statements again prove nothing more than the fact that all parties to that proceeding recognized the existence of the State's zero flow at Milner policy and its potential impact on Idaho Power's hydropower water rights due to upstream and irrigation and other consumptive uses. Nothing in the language of the State Water Plan document makes Idaho Power's water rights subject to the zero flow policy irrespective of other applicable law, including the longstanding statutes authorizing recharge uses while making them secondary to hydropower.⁵²

⁵¹ The State also cites to a Resolution adopted by the Committee of Nine supporting the settlement on the condition that the zero flow at Milner policy be reaffirmed. *See* Fourth Orr Aff. Ex. 60 (Letter from Ronald D. Carlson, submitting Committee of Nine Resolutions (Jan. 31, 1985)). But this Resolution is specifically directed at protecting the "long established rights of *irrigators* to continue using Snake River water," and shows nothing more than a request by a third party entity that the State's zero flow policy remain the guiding management policy for future upstream allocation of water for irrigation uses. *Id.* at 1 (emphasis added). This Resolution did not cause the parties to change the structure of the Agreement to include the zero flow policy as an element of Idaho Power's water rights.

Similarly, the letters cited by the State from the Great Feeder Canal Company and Idaho Water Rights Defense, Inc., expressing concerns that the Agreement not impact the zero flow at Milner policy, were based on those organizations' concerns with protecting irrigation and other upstream consumptive interests. *See* Fourth Orr Aff. Ex. 61 (Letter from Great Feeder Canal Co. to Members of the Idaho State Legislature (Feb. 4, 1985)); ex. 62 (Letter from Kent W. Foster, Idaho Water Rights Defense, Inc., to Gov. John Evans (Sept. 26, 1984)) at 2 (expressing concern that the Agreement not disturb the right of upstream "*consumptive*" uses) (emphasis added). None of these letters proves that anyone understood surface flows above Milner to be off limits to Idaho Power regardless of whether those flows were being used for irrigation or non-irrigation uses. And certainly no one in their comments spoke to whether the zero flow at Milner policy was an element of Idaho Power's water rights.

⁵² The State also claims that Idaho Power is attempting to "chip away" at the Agreement by arguing in this action that it did not subordinate its rights to recharge rights upstream of Milner Dam and in so doing is violating the "Good Faith" provision of the Agreement. *See* State's Opening Brief at 34-35. The "Good Faith" provision that the State points to in support of its position, however, prevents Idaho Power from taking a position before the legislature or any court, board or agency that is inconsistent with the terms of the Agreement. Idaho Power did not in 1985 nor

The legislative history of the Agreement contains no statements or documents taking the position, much less establishing, that the zero flow policy was an element of Idaho Power's water rights. The implementing legislation itself contains no such language. The subordination language in the Agreement and implementing legislation attached to it and agreed upon by the signatories is clear and unambiguous. The fact that the Legislature decided to add additional statutory language in 1986 to facilitate State implementation of the Agreement, as discussed in the section below, did not change that.

E. The 1986 Amendments to I.C. § 42-203B Subsequent to the Agreement Did Not Amend the Parties' Prior Signed Contracts or Existing Statutes Authorizing Recharge on Limited Terms.

The State argues in its Motion for Summary Judgment that Idaho Power's rights under the Agreement are subordinate to all water rights diverting water upstream from Milner, by virtue of its trust authority under I.C. § 42-203B. The basis of the State's argument is the sentence in § 42-203B (2) that states: "[f]or 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 groundwater tributary to the Snake river upstream from Milner dam shall be considered." However, the "two rivers" language in § 42-203B(2) was not part of the Agreement, is a legislative provision of general applicability throughout the Snake River Basin, and does not control over directly applicable law making recharge secondary to hydropower. *See* Argument Section II.B. above.

The State contends that the Legislature's 1986 amendment of I.C. § 42-203B(2) demonstrates that the parties to the Swan Falls Agreement intended to exclude flows above

does it now take a position that is inconsistent with the terms of the Agreement. As already discussed, the terms of the Agreement do not include the zero flow policy as an element of Idaho Power's hydropower rights. Moreover, the Agreement specifically allows Idaho Power to defend its position with respect to the meaning of the Agreement and protect its water rights against actions of the State to broaden the scope of the Agreement, which is precisely what it is trying to do in this action. *See* Gheleta Aff. Ex. F (Agreement).

Milner from the "definition of the source" of Idaho Power's hydropower right under the Agreement, and maintains that Idaho Power cannot seek curtailment or administration of water rights upstream of Milner. The upshot of the State's argument is that even though the Agreement failed to directly address subordination to recharge, application of this legislative water rights administration provision to Idaho Power's Swan Falls Agreement water right redefines that water right and effectively subordinates it to recharge.

In asserting this position, the State ignores relevant provisions in the signed Agreement documents and legislation in place at the time of the Agreement directly addressing the relationship between hydropower and recharge. As discussed above, the Framework signed by the parties expressly provided that recharge, as a method of augmenting river flows, would need to be studied to determine impact on other uses, including hydropower. The Agreement, in paragraph 6(D) and Exhibit 3, described funding for hydrologic and economic studies consistent with the Framework's call for the study of recharge and its impacts. *See* Idaho Power's Opening Brief at 12-13. There was no need for the Agreement to further address recharge in light of the provisions of the Framework bearing directly on the matter, as well as then existing Idaho statutes providing that water rights for recharge are secondary or subordinate to the use of water under other prior perfected water rights, including those for hydropower.

The Legislature amended I.C. § 42-203B(2) in 1986 by adding the language relating to the use of waters above Milner to satisfy water rights downstream from Milner. *See* 1986 Idaho Sess. Laws ch. 117; S.B. 1358, § 1. Idaho Power acknowledges that the Company's principal negotiator Tom Nelson attended at least one of the committee hearings on the bill and agreed with Senator Crapo's characterization of the legislation.⁵³ At that meeting, Senator Crapo

⁵³ *See* Second Gheleta Aff. Ex. I (Minutes, Senate Res. & Env't Comm. (Feb. 19, 1986)) at 1.

explained that the legislation was intended to address a number of issues raised by IDWR's proposed rules to implement the Agreement, that "nothing was changed in the agreement," and that the legislation was merely a "clarification." *Id.* The clarification was necessitated by proposed rules drafted by the IDWR that gave the impression that water tributary to the Snake River above Milner was part of the trust water established by the Agreement. It was not, which is what Mr. Nelson sought to clarify. But the bill did nothing to change the Agreement signed by the parties, including the fact that Idaho Power's water rights were not to be subject to recharge under the Framework and existing law. Indeed, it could not, as the legislative program contemplated by the Agreement had already been adopted. By not objecting to the legislation, Idaho Power was not agreeing to modify or amend the bargain it had entered into with the State in 1984.⁵⁴

The State also attempts to attribute significance to Mr. Nelson's statement commenting on an example involving recharge raised by a gentleman during a public information meeting on proposed administrative rules. Mr. Nelson volunteered his view that he didn't think surface water diversions for recharge above Milner were part of the trust waters, and so would not be subject to the public interest criteria.⁵⁵ Mr. Nelson's response to the question is limited to the issue of whether the diversion would take trust water under the Agreement, but it is not dispositive of whether the Swan Falls Agreement subordinated Idaho Power's water rights to recharge. Mr. Nelson was obviously familiar with the provisions of the Framework in which the

⁵⁴ The State argues that the 1986 legislation and the zero flow provision in Exhibit 6 constitute an absolute block to Idaho Power having any interests in water management matters above Milner Dam. Exhibit 6 belies this argument by providing that new storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is "fully utilized." This provision is not limited to only below Milner Dam.

⁵⁵ Fourth Orr Aff. Ex. 48 (Transcript of Public Information Meeting, Twin Falls (May 23, 1985)) at 7.

parties agreed to the further study of recharge, and the legislation then in effect providing that recharge was subordinate to existing hydropower water rights. There was simply no need for him address the recharge subordination issue to respond to the question at hand.

The State's suggestion that the 1986 amendments even negated Idaho Power's entitlement, and the State's obligation to provide, the 3900 and 5600 cfs minimum flows at the Murphy gauge to the extent that water above Milner is a necessary source of those guaranteed minimum flows is particularly egregious. *See* State's Opening Brief at 45-46. Such a position flatly contradicts the plain language of the Swan Falls Agreement, which provides in Paragraph 7(A) that Idaho Power's enumerated state water right licenses:⁵⁶

entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at [the Murphy gauge]. *These flows are not subject to depletion.*

The parties agreed that the 3900 and 5600 cfs minimum flows were "not subject to depletion." To suggest that these guaranteed minimum are subject to depletion, whether the depletion is based on uses above or below Milner, would be directly contrary to the parties' signed contract and by no means could be considered a "clarification " of the signed Agreement.

The State's argument in this regard also contradicts the plain language of I.C. § 42-203B(2). The original 1985 implementation legislation including language providing:

A water right for power purposes which is defined by agreement with the state as *unsubordinated to the extent of a minimum flow* established by state action shall remain unsubordinated as defined by the agreement. *Any portion of the water rights for power purposes in excess of the level so established shall be held in trust* by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho.

I.C. § 42-203B(2) (1985) (emphasis added). Under this original legislative implementation language agreed to by the parties, the 3900 and 5600 cfs minimum flows

⁵⁶ Gheleta Aff. Ex. F (Agreement) ¶ 7(A).

were defined as "unsubordinated." The portion of the water rights "in excess of" these minimum flows was defined as the "trust" water, which is subject to subordination.

The 1986 amendments added a proviso that applied to the "trust" water, i.e., the water "in excess of" the 3900 and 5600 cfs minimum flows, qualifying the original implementing legislation by providing that water upstream of Milner would not be considered part of this "trust" water:

provided, 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 of 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.

I.C. § 42-203B(2) (1986) (emphasis added). The 1986 amendments did not undo the provisions of the Agreement or the original implementing legislation that defined the "trust" water as being only that water above the 3900 and 5600 cfs minimum flows. The State's argument otherwise must fail accordingly, and demonstrates the unreasonableness of the State's overall interpretation of the 1986 amendments and their impact on the parties' signed contract.

Finally, the language added to section 203B is not limited to Idaho Power's rights, nor is it limited to just hydropower rights. Rather, the language applies broadly to "rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam." I.C. § 42-203B(2). The statutory directive therefore represents language of general applicability, and the 1986 amendments affect administration of all water rights on the Snake River, an interpretation with which the State agrees.⁵⁷ Accordingly, while the Court may consider the effect of the

⁵⁷ See State Opening Brief at 27, n. 114 ("While the State will contend in the appropriate proceedings that the 1986 amendments to Idaho Code § 42-203B(2) applies to *all water rights* diverting downstream of Milner Dam, the State seeks no such determination in this proceeding.") (emphasis added).

amendments on administration of water rights in appropriate circumstances, it should not merge the legislative provisions into Idaho Power's or any other SRBA decree.

Including this legislative language in SRBA decrees may tie the hands of the Legislature to modify or amend policy choices regarding management and administration of the river, or at least raise questions as to whether any later amendments apply to decrees which may reference or incorporate the 1986 amendments. The § 42-203B provision adopted in 1986 is an administrative statute that can be subsequently "clarified" or amended by the Legislature, not a fixed element of Idaho Power's or any other water right. The State agreed to an express definition of Idaho Power's water rights under the Agreement, and may not now redefine and impair those rights by ignoring the structure of the Agreement in order to include new "elements" that alter the definition previously agreed upon.

F. The 1994 Amendments to the recharge authorization legislation confirm that recharge has always been secondary to hydropower water rights otherwise subordinated under the Swan Falls Agreement.

As demonstrated in Section II.C. of Idaho Power's Opening Brief, and as discussed in Section II. B. above, the 1994 amendments to I.C. §§ 42-234(2) and 42-4201A(2) explicitly reaffirm that Idaho Power's rights under the Swan Falls Agreement are not subject to recharge. Once again, the 1994 amendments provide:

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

I.C. §§ 42-234(2), 42-4201A(2) (emphasis added). This language has no geographic limitation and thus places recharge rights upstream and downstream of Milner Dam in a subordinate position to Idaho Power's hydropower rights. The State ignores the plain language of the 1994

amendments, however, and claims that the amendments apply only to recharge water rights diverting below Milner Dam.

But the State's argument in this regard rests entirely on its flawed position that the Agreement defines Idaho Power's hydropower rights as "having no legal effect on any flows or water rights diverting upstream from Milner." *See* State's Opening Brief at 48. For the reasons previously discussed, this argument lacks merit. There is no limitation in the Agreement, geographic or otherwise, on the source of Idaho Power's hydropower water rights. In fact, the only limitation on the rights is the subordination provision in Paragraph 7(B) of the Agreement. Contrary to the State's position, the subordination provision makes no distinction between beneficial uses above Milner Dam and those below Milner Dam – it clearly applies to both. And it is this provision alone that defines the priorities of the hydropower rights with respect to all beneficial uses diverting above the Swan Falls hydropower facility.

The State next claims that the legislative history of the 1994 amendments supports its conclusion that the 1994 amendments have no effect on recharge rights diverting above Milner Dam. In fact, the one legislative history reference cited by the State supports Idaho Power's position and not the State's. In testifying regarding SB 1574, amending I.C. § 42-4201A, Sherl Chapman of the Idaho Water Users Association "noted language was added, referring to privately owned electrical generating companies, *to protect and verify the agreement on Swan Falls.*"⁵⁸ The State asserts that the provision the Legislature intended to "protect and verify" was the zero flow at Milner requirement. This not only strains credibility, but makes no sense. The fundamental purpose of the 1994 amendments was to expand the scope of recharge uses, while still preserving the priority of Idaho Power's hydropower rights. *See* I.C. § 42-4201A(2)

⁵⁸ *See* Gheleta Aff. Ex. AA (Minutes, Senate Res. & Env't Comm. (Mar. 11, 1994)) at 1 (emphasis added).

(Statement of Purpose).⁵⁹ There is no reference in the Statement of Purpose or other legislative history of the 1994 Amendments to the zero flow at Milner policy. Moreover, in 1994 the zero flow policy under the 1992 State Water Plan was simply that "the State recognizes that the exercise of water rights above Milner Dam has and may reduce flow at the dam to zero."⁶⁰

In light of the fact that the 1994 amendments – consistent with previous recharge legislation in 1978 and 1982 – explicitly make recharge secondary or subordinate to Idaho Power's hydropower water rights, there should be no question as to the primacy of Idaho Power's rights. These amendments demonstrate, better than any other evidence raised by the State, how Idaho and its Legislature views recharge with respect to Idaho Power's rights under the Swan Falls Agreement, as well as how the parties viewed the issue during the negotiations on the Agreement. Recharge is, and has always been, subordinate to hydropower water rights on the Snake River.

II. THE STATE DOES NOT HAVE A RIGHT TO RETROACTIVELY SUBORDINATE IDAHO POWER'S WATER RIGHTS TO RECHARGE, ABOVE OR BELOW MILNER, IRRESPECTIVE OF IDAHO POWER'S CONTRACT RIGHTS UNDER THE SWAN FALLS AGREEMENT.

The State's second ground for summary judgment is that it retains the right to amend existing state law to subordinate Idaho Power's hydropower water rights to recharge water rights

⁵⁹ Notably, the language specifically subordinating recharge to hydropower rights was *removed* in an early version of the legislation *and replaced* in a later version with the specific language subordinating recharge to Idaho Power's rights under the Agreement. At a November 1993 meeting of the Legislative Council Committee on Aquifer Recharge ("Committee"), Sherl Chapman, Executive Director of the Idaho Water Users Association, presented a draft policy statement and proposed statutory amendments to the Committee to assist in amending the recharge policy of the State. Gheleta Aff. Ex. W (Minutes, Legislative Council Interim Comm. on Aquifer Recharge (Nov. 10, 1993)) at 2. While cautioning that drafters had not had the opportunity to "confer with privately owned electrical generating companies," Mr. Chapman noted that the draft deleted the phrase from the existing statute that recognizes the priority of hydropower water rights over water rights issued for recharge purposes. *Id.* at 3.

⁶⁰ See Second Gheleta Aff. Ex. H (State Water Plan, Policy 5A (Jan. 1992)). The comment to the policy further explained: "The zero flow at Milner Dam is not a target or goal to be achieved, and may not necessarily be desirable. It is rather a recognition of the current condition in which zero flow passes Milner Dam during certain periods of time. The state should seek to acquire water whenever it becomes available in order to mitigate the impacts of low flow below the dam." *Id.* at 33.

diverting below Milner Dam. In presenting this argument, the State takes two internally inconsistent positions. Neither of the State's arguments have merit.

The 1994 recharge authorization legislation explicitly makes recharge subordinate to Idaho Power's "*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.*" I.C. §§ 42-234(2), 42-4201A(2) (emphasis added). The State first takes the position that the "may otherwise be subordinated" language of the 1994 Amendment empowers it to affirmatively subordinate Idaho Power's hydropower rights to recharge in the future. *See* State's Opening Brief at 49-50. This argument is flatly wrong when this language is read in context of the full text of the 1994 amendments. The "may otherwise be subordinated" passage is clearly not an affirmative authorization to the State to subordinate as it sees fit Idaho Power's rights to any lawfully acquired water right regardless of type of use. Instead, as discussed above, the language provides that Idaho Power's water rights under the Agreement, that may "otherwise be subordinated" pursuant to the terms of the "contract entered into by the Governor and Idaho Power Company on October 25, 1994," are not subordinate to recharge. Contrary to the State's position, the Agreement alone establishes the circumstances under which Idaho Power's rights may be subordinated, and the Agreement does not authorize subordination to new beneficial uses such as recharge that were not beneficial uses at the time the Agreement was executed.

The State next claims that at any time "[t]he Legislature may amend or repeal" the statutory language subordinating recharge to hydropower, and "the State retains the prerogative [to] change the subordination criteria," thus allowing the State to subordinate Idaho Power's water rights resolved under the Swan Falls Agreement to recharge in the future. State's Opening Brief at 53. In essence, the State is asking the Court to issue it a blank check to amend the law

and thus revise the Swan Falls Agreement at any point in the future. Not only is this argument not ripe, but it flies in the face of established contract principles and the plain language of the Agreement. If played to its logical conclusion, the argument allowing changes in the terms of subordination would essentially render the Agreement and its negotiated subordination provision meaningless.

First, the State's argument in this regard cuts directly against the established principle of contract law that a contract must be interpreted in accordance with the law in effect at the time of its execution. *See Idaho Power's Opening Brief* at 5. The law in existence at the time of contracting becomes part of the contract, as if the contract itself contained an express provision to that effect. *See Fidelity Trust Co. v. State*, 72 Idaho 137, 149, 237 P.2d 1058 (1951). The statutory law in effect at the time the parties entered into the Swan Falls Agreement, and thus the law controlling the Court's interpretation of the Agreement now, limited recharge projects to a specific geographic area, limited application for recharge project permits to aquifer recharge districts, and subordinated all water appropriated for such limited purposes to downstream hydropower water rights.⁶¹ The State was very much aware of the status of recharge statutes in 1984, and the limited degree of actual recharge, when the parties entered into the Swan Falls Agreement, and should not now be allowed to rewrite the law to suit its newfound desire to promote large-scale recharge projects in the Snake River Basin. *See Torrance v. Worker's Comp Appeals Board*, 32 Cal. 3d 371, 378 (1982) (Under Idaho law, parties to a contract are presumed

⁶¹ *See Idaho Power's Opening Brief* at 6. In fact, Tom Nelson specifically explained to the legislature at the House Resources and Conservation Committee meeting on February 11, 1985, that the Legislature had the prerogative to make changes to state law if changes become necessary in the future, but such changes would not modify the operation of the Swan Falls Agreement. *See Second Gheleta Aff. Ex. J* (Minutes, House Res. & Conservation Comm. (Feb. 11, 1985)) at 1. The State attempts to twist this statement to its advantage, claiming this shows that the Agreement provided flexibility to accommodate future changes in State law. But the State ignores entirely the second half of Mr. Nelson's statement, and paragraph 17 of the Agreement, of which both specifically recognize that any subsequent changes in the law cannot impact the terms of the Agreement.

to have known of and "to have had in mind" those existing laws and regulations that were in existence at the time of contracting.).

Second, contrary to the State's arguments, Idaho Power did not give the State the flexibility to rewrite the Swan Falls Agreement as it deems appropriate and thus subordinate Idaho Power's hydropower water rights to an infinite number of new beneficial uses the State designates in the future. In fact, Paragraph 17 of the Agreement declares that any subsequent change in the law does not impact the validity of the Agreement's provisions.⁶² This paragraph illustrates that although the State is free to change the law and thus change the priorities and policies that apply to other water rights holders in the State, the Swan Falls hydropower rights, as defined by the Agreement, remain intact and unaffected.

Importantly, the Court recognized the primacy of the Agreement and the fact that the terms of the Agreement controlled in the face of inconsistencies or changes in state law in its April 18, 2008 Memorandum Decision on the parties' cross motions for summary judgment. *See* Mem. Decision at 23 ("to the extent there is an alleged discrepancy or ambiguity between the agreement and the legislation, the starting point is the agreement, not the legislation"). Thus, to the extent that the terms of any future legislation "vary from the terms of the Agreement [the State] would not be able to [enforce the terms of the statute] without implicating claims for breach of contract or takings." *Id.*

In support of its assertions that recharge was contemplated by the parties, the State cites to the Framework as contemplating aquifer recharge projects as part of the settlement. But the State grossly misconstrues how this document treats the issue of recharge. The only reference in the Framework to recharge is the recognition in Section 6 of the document that methods such as

⁶² *See* Gheleta Aff. Ex. F (Agreement) ¶ 17.

recharge deserve further study as an option "to enhance stream-flows in the Snake River."⁶³ In providing for further study of methods such as recharge to augment stream flows, as well as their impact on hydropower and other uses, the parties specifically chose not to include recharge as a type of new development upstream of Idaho Power's Swan Falls project to which the State could subordinate the hydropower rights.

The State also claims that the "structure" (not the terms) of the Swan Falls Agreement supports its position that the subordination was intended to encompass recharge. In particular, the State argues that the "higher minimum flow in the non-irrigation season" demonstrates that the subordination provision was intended to include recharge uses because recharge involves diversion of non-irrigation season flows. *See* State's Opening Brief at 50. The State then makes the logic leap that Idaho Power's demand for higher winter flows was to protect it against such future upstream winter depletions. But the State cites no document or statement indicating that the motivation behind the higher winter flow number was to allow the State to ultimately develop upstream recharge projects on the Snake River while still allowing Idaho Power higher flows during non-irrigation months.⁶⁴

The terms of the Agreement limited subordination to beneficial uses existing at the time of the execution of the Agreement, and recharge was at most a qualified beneficial use in 1984 made expressly secondary to hydropower. Idaho Power had no reason to contemplate it was subordinating its rights to recharge at the time it entered into the Agreement, and nothing in the

⁶³ *See* Gheleta Aff. Ex. A (Framework).

⁶⁴ The State claims that Idaho Power's failure to object to other parties' discussions with respect to recharge during post-Agreement legislative proceedings also shows Idaho Power's intent to subordinate its rights to recharge. State's Opening Brief at 49-50. Idaho Power had no reason to suggest that water rights held in trust by the State could not be subordinated to recharge water rights, or that recharge uses had any special or disfavored status under the settlement because the Agreement as construed under the law at the time did not subordinate its rights to recharge and neither the state nor any other party suggested otherwise.

terms of the Agreement gives the State the authority to amend or revise the Agreement to include recharge by changing the status of recharge under state law, as it stood at the time of the Agreement and as it stands today.

III. IDAHO POWER'S SUBORDINATION TO TWO EXISTING RECHARGE PERMITS IN ITS DISMISSAL OF THE SWAN FALLS LITIGATION AND IN A 2006 STIPULATION DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY.

The State requests a ruling that "the water rights at issue in this consolidated subcase are subordinate to ground water recharge water rights 01-7054 and 37-7842, as finally licensed." State's Opening Brief at 54-55. In 2006, Idaho Power and the Idaho Attorney General signed a Stipulation stating that these two recharge permits that existing when the Swan Falls Agreement was executed are subject to the Agreement, on the basis that the original holders of those existing permits were among the parties dismissed from Ada County Case No. 81375 (the "7500 case").⁶⁵ These two permits are now held by the Idaho Water Resource Board. While the State seeks a ruling from the Court on summary judgment as to the status of these two unlicensed water rights for recharge, the Court need not and should not make any pronouncements as to these specific water rights since they do not present a justiciable case or controversy and are not ripe for judicial determination.

The Swan Falls Agreement unambiguously provides in Paragraph 7(C) for Idaho Power's subordination to existing users dismissed from the 7500 case pursuant to the SB 1180 Contract, stating: "The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed

⁶⁵ See Second Gheleta Aff. Ex. K (Stipulation between Idaho Power Company and State of Idaho (Apr. 11, 2006)) (hereinafter "Stipulation").

between the State and Company implementing the terms of I.C. §§61-539 and 61-540."⁶⁶

Accordingly, Idaho Power and the State stipulated that "[t]he 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."⁶⁷

The inclusion of the holders of water right permit nos. 01-7054 and 37-7842 in Idaho Power's complaint in the 7500 case, and their dismissal from that case along with all others joined therein, proves nothing for purposes of the instant litigation. The two recharge permits were included in the 7500 case complaint because they fell within the criteria used by Idaho Power to identify all persons and entities claiming water rights in conflict with the Company's Swan Falls water rights.⁶⁸ Similarly, the two recharge permits were dismissed from the 7500 Case by notice of dismissal filed on October 25, 1984, the first of six rounds of group dismissals that were filed pursuant to the terms of the SB-1180 contract.⁶⁹ By signing the SB-1180 contract, the parties agreed to dismiss with prejudice those defendants who had either beneficially used water pursuant to a valid permit, license or decreed water right prior to November 19, 1982, or had made substantial investment in an irrigation project based on an application for a water filed prior to November 19, 1982.⁷⁰ Therefore, just like the thousands of

⁶⁶ See Gheleta Aff. Ex. F (Agreement) ¶ 7(C).

⁶⁷ See Second Gheleta Aff. Ex. K (Stipulation) at 1.

⁶⁸ Idaho Power named as defendants those claiming rights which: (i) were subsequent in time and junior in right to the Swan Falls rights; (ii) relied on surface or underground water tributary to the Snake River above the Swan Falls facility; (iii) if filled would diminish flows at the Swan Falls facility; and (iv) thereby damaged Idaho Power. See Second Gheleta Aff. Ex. L (Complaint, Case No. 81375 (Mar. 30, 1983)) at 6-7. Idaho Power identified the named defendants and the underlying water right claims by reviewing IDWR records related to decreed rights, statutory claims, licenses, permits and applications for water rights. See Second Gheleta Aff. Ex. M (Affidavit of Cynthia Cranston-Felton, Case No. 81375 (Feb. 7, 1984)) at 2.

⁶⁹ See Second Gheleta Aff. Ex. N (Notice of Dismissal of Certain Defendants, Case No. 81375 (Oct. 25, 1984)) at 30.

⁷⁰ See Second Gheleta Aff. Ex. O (Contract to Implement Chapter 259, Sess. Laws, 1983 (Oct. 25, 1984)) ¶ 2(b).

other water rights claims identified in the 7500 Case, the two recharge permits were included on the basis of their junior status to the Company's Swan Falls rights, and were dismissed in accordance with the express terms of the SB-1180 contract.

However, the Court need not even reach this issue, and should decline to issue any ruling as to these specific recharge permits, as there is no justiciable case or controversy as to them. The State's third issue in its summary judgment motion seeks a ruling: "[t]hat the water rights at issue in this consolidated subcase are subordinate to ground water recharge water right permits nos. 01-7054 and 37-7842, *as finally licensed*." State's Opening Brief at 54 (Emphasis added). There is no dispute that the holders of water right permit nos. 01-7054 and 37-7842 were existing users dismissed from the 7500 case. There is no question that Idaho Power stipulated to the subordination of its water rights to these permits pursuant to the terms of the 2006 Stipulation. The Complaint filed by Idaho Power in this case does not put such existing uses at issue.⁷¹

With respect to the State's request that the Court find the water rights at issue in this case are subordinate to the two recharge permits "as finally licensed," these recharge water rights have not yet been licensed, with proof of beneficial use on the permits not due until June 1, 2009.⁷² Until these recharge water rights have been licensed, it is impossible to predict what the final license terms might say. Accordingly, any pronouncement regarding the nature or terms of subordination to these recharge water rights is not only premature, but would be an impermissible advisory opinion on a non-justiciable question. *See Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984) (A "justiciable controversy ... must be a real and

⁷¹ As recited in Paragraph 25 of the Complaint filed in the instant action, Idaho Power subordinated the water rights subject to the Swan Falls Agreement to the uses of those persons dismissed from Ada County Case No. 81375, and "does not challenge here this subordination to existing uses 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."

⁷² *See* Second Gheleta Aff. Ex. P (IDWR order approving Request for Extension of Time (Aug. 25, 2004)).

substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (internal citation omitted); *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, 52 P.2d 141, 144 (1935) (A judgment on a question raised in an adversary proceeding "must involve actual and existing facts," otherwise it is "advisory on questions not yet justiciable).

Moreover, the State's position that it should be able to litigate the terms of this unlicensed water right runs squarely counter to the Court's ruling and the State's position regarding ripeness and exhaustion in the earlier Milner permit case. As the Court observed in its capacity as district court judge for Jerome County in *North Side Canal Co. v. Tuthill*, Case No. CV 2007-1093, concerning an unlicensed permit for hydropower generation at Milner, the Director and IDWR argued, and the Court found, that the Canal Companies must wait until the license is issued and then pursue administrative remedies before seeking judicial relief.⁷³ Similarly, the State cannot obtain immediate judicial relief regarding the license terms of the unlicensed recharge permits that it holds.

Even if these water rights were licensed and presented a justiciable or ripe issue, the referenced water right permits are the subject of the 2006 Stipulation, which describes the terms of subordination of Idaho Power's water rights to these particular permits. Because the terms of subordination to these two permits are governed by the 2006 Stipulation, issues concerning subordination of the two permits are not material to the issue properly before the Court, which is

⁷³ See Second Gheleta Aff. Ex. Q (Order Granting Motion to Dismiss Petition for Writ of Mandate (Jan. 25, 2008)) at 5, 13.

whether Idaho Power subordinated its water rights to recharge pursuant to the Swan Falls Agreement.⁷⁴

Idaho Power does not deny that it agreed to the Stipulation, and is aware of no need for its interpretation, enforcement, or administration. The Company will continue to adhere to the terms of the 2006 Stipulation under which the parties agreed to a negotiated resolution regarding subordination of the State's two recharge water rights. Idaho Power does not understand why the State insists on proceeding to litigate what the parties previously negotiated. The Court should deny the State's third ground for summary judgment concerning the two recharge permits whose subordination was resolved by Stipulation.

IV. THE UPPER SNAKE WATER USERS' ATTEMPTED APPLICATION OF PRINCIPLES OF EQUITABLE AND QUASI-ESTOPPEL IS WITHOUT MERIT, GIVEN THE ABSENCE OF A SUBORDINATION PROVISION ADDRESSING RECHARGE IN THE AGREEMENT, AND CONSISTENT LEGISLATIVE DIRECTIVES MAKING RECHARGE SECONDARY TO HYDROPOWER.

The Upper Snake Water Users ("Upper Snake") assert that Idaho Power Company is precluded under the doctrines of equitable estoppel and/or quasi-estoppel from "asserting a claim to water above Milner Dam" because of the Company's alleged historic representations and the water users' alleged reliance upon these historic representations in conjunction with the negotiation and adoption of the Swan Falls Agreement. Upper Snake's Opening Brief at 19-21. This argument lacks merit entirely. Idaho Power is not asserting a water right or other "claim" to

⁷⁴ Indeed, to the extent that the State raises the 2006 Stipulation to support its arguments before this Court on the issue of alleged subordination of hydropower water rights to recharge, the State is acting in violation of the Stipulation, which provides in Paragraph 6:

Nothing in this Stipulation shall be construed as an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding, other than that those seeking approval of the Stipulation, for interpretation, enforcement or administration of this Stipulation or for a purpose contemplated by Idaho Rule of Evidence 408.

Second Gheleta Aff. Ex. K (Stipulation) ¶ 6.

water above Milner Dam under the Swan Falls Agreement. Rather, Idaho Power is merely seeking to establish that it did not subordinate its hydropower water rights to aquifer recharge under the Swan Falls Agreement, a position that is entirely consistent with both Idaho statutory law and the Agreement itself. Moreover, in making this argument the Water Users completely ignore the decades of dispute over the scope and extent of Idaho Power's rights to use Snake River water for its hydropower facilities.

Under Idaho law, equitable estoppel arises:

[w]hen a party makes a false representation or concealment of a material fact with actual or constructive knowledge of the truth; it is made with the intent that it be relied upon; the party asserting estoppel does not know or could not discover the truth; and the party asserting estoppel relies on it to the party's prejudice.

Allen v. Reynolds, 186 P.3d 663, 668 (Idaho 2008) (quoting *Hecla Min. Co. v. Star-Morning Min. Co.*, 839 P.2d 1192, 1196 (1992)). Similarly, under Idaho law, quasi-estoppel “prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken.” *Atwood v. Smith*, 138 P.3d 310, 314 (Idaho 2006) (quoting *C & G, Inc. v. Canyon Highway Dist. No. 4*, 75 P.3d 194, 198 (2003)). To prove quasi-estoppel, “there must be evidence that it would be unconscionable to permit the offending party to assert allegedly contrary positions.” *Id.* (quoting *Thomas v. Arkoosh Produce, Inc.*, 48 P.3d 1241, 1246 (2002)).

Neither estoppel doctrine applies under the facts of this case. There has been no false representation or unconscionable conduct. As this Court has recognized, this case is about the nature and extent of Idaho Power's water rights under the Swan Falls Agreement. The Agreement has no provision directly subordinating Idaho Power's hydropower water rights to recharge. Thus, both the State and Idaho Power have asked the Court to determine whether Idaho Power otherwise subordinated its rights to recharge water uses under the Agreement.

Additionally, Idaho Power has established through the current briefing that legislation existing at the time the Swan Falls Agreement was being negotiated and executed authorized use of water for recharge provided that recharge was "secondary" or subordinate to prior perfected water rights for hydropower and other uses. *See* I.C. § 42-4201A(2). That legislation made no provision for differential treatment of recharge based on whether it occurred above or below Milner. Moreover, the secondary status of recharge to Idaho Power's Swan Falls Agreement hydropower water rights in particular was expressly confirmed by the Legislature in 1994. *See* I.C. §§ 42-234(2), 4201A(2).

It is the State, and not Idaho Power, which has raised issues concerning whether the State's zero flow policy became an element of Idaho Power's hydropower water right or somehow negated the recharge authorization statutes. The 1986 amendments to I.C. § 42-203B, upon which the State bases much of its argument regarding zero flow, were not enacted when the Agreement was signed and the actions by Idaho Power as alleged in the Water Users' brief occurred. Moreover, Idaho Power has acknowledged that it has subordinated its hydropower water rights at various facilities to irrigation and other consumptive and depletionary uses. *See* Idaho Power's Opening Brief at 19-26. The parties are now engaged in briefing revealing legitimate differences over whether Idaho Power also subordinated to recharge, a non-consumptive and non-depletionary use. Upper Snake's overly dramatic reference to Idaho Power's legitimate defense of its water rights in this litigation as "an infuriating act of betrayal," *see* Upper Snake's Opening Brief at 3, is not supported by the history of the Company's consistent defense of its water rights against attempts to subordinate hydropower to ground water recharge.

Moreover, contrary to Upper Snake's argument, Idaho Power has on numerous occasions in the past contended that its hydropower water rights are not subordinate to recharge, above or below Milner. For example, the language specifically subordinating recharge to hydropower rights was removed in an early version of the 1994 Amendments. Idaho Power submitted a comment letter strongly objecting to the removal of this subordination language and asserting that any attempt to subordinate its rights under the Agreement to recharge "would raise due process and compensable taking issues."⁷⁵ Additionally, IDWR's 1999 Feasibility Study on recharge has a section on the availability of water for recharge projects. In this section, the drafters discuss the impact on the feasibility of large scale recharge projects *if* Idaho Power's hydropower rights are senior to recharge.⁷⁶ Similarly, a report prepared in 1998 on the availability of water for recharge projects references the potential impact of superior hydropower water rights on the feasibility of future recharge development.⁷⁷ In short, the Water Users' perceptions that Idaho Power willingly subordinated its hydropower water rights to recharge, based on the State's zero flow policy or otherwise, do not support an estoppel claim.

V. THE WATER USERS HAVE NO RIGHT TO AN AWARD OF ATTORNEYS' FEES AND COSTS IN LIGHT OF THE PARTIES' LEGITIMATE DIFFERENCES OVER WHETHER IDAHO POWER'S WATER RIGHTS ARE SUBORDINATE TO RECHARGE, ABOVE OR BELOW MILNER.

Upper Snake also asserts that it should be awarded reasonable attorneys fees and costs because Idaho Power has allegedly made a "claim of dominion over water use above Milner Dam for groundwater recharge" in violation of the Swan Falls settlement and without a reasonable basis in law and fact. Upper Snake's Opening Brief at 22. In support of this claim to

⁷⁵ See Gheleta Aff. Ex. Y (Idaho Power's Comments to Interim Committee on Aquifer Recharge (Jan. 19, 1994)).

⁷⁶ See Gheleta Aff. Ex. B (Feasibility Study).

⁷⁷ See Second Gheleta Aff. Ex. R (ESPA Managed Aquifer Recharge Project, Interim Report on Water Availability (Aug. 1998)) at 37 ("There are at least three locations [on the Snake River] where hydropower rights may limit recharge . . .").

attorneys fees, Upper Snake relies on I.C. §§ 12-120(3) "and/or" 12-121. *Id.* at 22. Because Upper Snake fails to establish how Idaho Power's defense of its Swan Falls Agreement water rights in this action has no reasonable basis in law or fact, the Court should reject its argument.

As an initial matter, I.C. § 12-120(3) is inapplicable to the current action. That provision authorizes the award of reasonable attorneys fees to a prevailing party in a contract recovery action. The provision applies to

... any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.... The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes. The term "party" is defined to mean any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Contrary to Upper Snake's position, a civil action involving water rights does not fit "squarely" within this provision. *Id.* at 23. While this action does involve an Agreement, or contract, the contract does not relate to a commercial transaction, making I.C. § 12-120(3) inapplicable in this instance.

Further, while I.C. § 12-121⁷⁸ authorizes a court to award reasonable attorneys fees to a prevailing party, Idaho R. Civ. P. 54(e)(1) limits any such award "only when [the court] finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation" Therefore, in order to be eligible for attorney's fees

⁷⁸ I.C. § 12-121 provides that "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees."

under I.C. § 12-121, Upper Snake must establish that the case was "pursued frivolously, unreasonably or without foundation."

For the reasons discussed in the section directly above, which Idaho Power incorporates by reference for purposes of this argument, Upper Snake cannot establish that Idaho Power has pursued its arguments regarding recharge subordination frivolously or without foundation. The recharge authorization statutes make recharge secondary to hydropower, the Swan Falls Agreement has no subordination provision directly addressing recharge, and the parties have legitimate differences over the interplay between the recharge authorization statutes, the Agreement, and the State's zero flow policy. For the first time, the State and Upper Snake have attempted to make the zero flow at Milner policy a term of the Agreement and element of Idaho Power's hydropower water rights under the Agreement, attempting to establish a tie to recharge in the process. Idaho Power has every right to ask this Court to interpret its water rights consistent with State law governing the relationship between recharge and hydropower use, and to defend against the State's and Upper Snake Water Users' attempts to redefine the terms of the Swan Falls Agreement and Idaho Power's water rights under the Agreement. The Court should reject Upper Snake's request for attorneys fees, regardless of the outcome of the cross-motions for summary judgment.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in Idaho Power's Opening Brief, Idaho Power respectfully requests that the Court deny the State's and the Upper Snake Water Users' Motions for Summary Judgment on all grounds. Idaho Power further requests that the Court grant its Motion for Partial Summary Judgment, and hold that Idaho Power did not subordinate its water rights under the Swan Falls Agreement to the use or management of water for recharge.

Dated this 7th day of November, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S RESPONSE IN OPPOSITION TO STATE OF IDAHO'S AND SNAKE RIVER WATER USERS' OPENING BRIEFS ON THE ISSUE OF RECHARGE SUBORDINATION** via the method indicated below, and addressed to each of the following:

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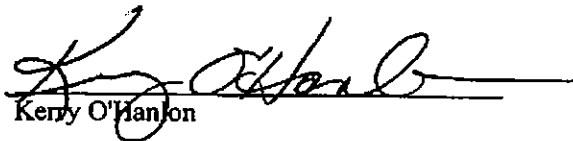
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