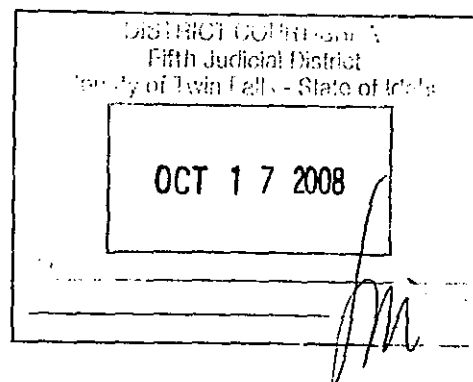


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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

Consolidated Subcase 00-92023

**UPPER SNAKE WATER USERS'
MOTION FOR SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM**

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

District, Magic Valley Ground Water District, and North Snake Ground Water District, acting for and on behalf of their member water users (collectively the "Upper Snake Water Users"), by and through counsel, respectfully move the Court pursuant to Rule 56 of the Idaho Rules of Civil Property for an order granting summary judgment on the following two issues:

1. The Swan Falls Settlement precludes Idaho Power Company from seeking delivery of water tributary to the Snake River above Milner Dam to supply the Company's hydropower water right under the Settlement.
2. Idaho Power is precluded under principles of equitable estoppel and quasi-estoppel from claiming a right to water above Milner Dam to supply the Company's hydropower water rights below Milner.
3. The Upper Snake Water Users should be awarded their reasonable attorney fees and costs pursuant to Idaho Code §§ 12-120(3) and/or 12-121 because Idaho Power's claim to dominion over water use for groundwater recharge above Milner Dam is in violation and breach of the Swan Falls Settlement and is without reasonable basis in law or fact.

INTRODUCTION

Thousands of Idaho water users divert from sources tributary to the Snake River above Milner Dam, commonly referred to as the "upper Snake River Basin." A large number of upper Snake water users were named as defendants in the infamous 1983 lawsuit by Idaho Power Company¹ that precipitated the Swan Falls Settlement². By that lawsuit, Idaho Power for the first time in its history sought to curtail water use above Milner Dam. The lawsuit was dismissed as a result of the Swan Falls Settlement, which permanently reinforced the cornerstone policy of

¹ *Idaho Power Company v. Idaho Dept. of Water Resources, et al.*, Ada County Case No. 81375.

² Settlement of the lawsuit produced instruments entitled "Agreement" and "Contract to Implement" and various legislative and administrative action. They are referred to collectively herein as the "Swan Falls Settlement" or "Settlement". The term "Agreement" as used herein refers to that specific instrument.

Snake River water rights management that hydropower water rights below Milner Dam have no claim to water above Milner.

Idaho Power's contemporary attempt to side-step that Settlement as it applies to water use for groundwater recharge purposes is an infuriating act of betrayal to water users in the upper Snake River Basin who offered their support of the Swan Falls Settlement only on express condition that Idaho Power retained no right or influence over water use above Milner Dam. Upper Snake water users have engaged in numerous recharge projects since the Settlement, without any protest from Idaho Power. This motion and supporting memorandum is made in defense of the Swan Falls Settlement and its protection of water users in the upper Snake River Basin from any Idaho Power delivery call above Milner Dam.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the "pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c). "All disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Robert Comstock, LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 571, 130 P.3d 1106, 1109 (2006). However, where "both parties file a motion for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the court from entering summary judgment." *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996). "As the trier of fact, the district court is free to arrive at the most probable inferences based upon the evidence before it and grant summary judgment, despite the possibility of conflicting inferences." *Id.*

ARGUMENT

For more than two decades the Swan Falls Settlement has barred Idaho Power Company from interfering with water use of any kind above Milner Dam. The Settlement affirmatively protects water use in the upper Snake River Basin from encroachment by Idaho Power via implementation of a minimum Snake River flow of zero cubic feet per second at Milner Dam—the so-called “zero flow” provision. Indeed, it was only upon the explicit, public assurances of both Idaho Power and the State of Idaho that Idaho Power would retain no influence over water use above Milner that the Settlement was ever reached. Now Idaho Power asks this Court to renegotiate the Settlement, arguing that it was intended to protect some beneficial water uses above Milner but not others.

To the Upper Snake Water Users, the idea that Idaho Power has any claim over water use above Milner Dam, whether for groundwater recharge or otherwise, is outrageous. A central, crucial component of the Swan Falls Settlement was its confirmation, through incorporation of the zero flow provision, that hydropower rights below Milner Dam cannot seek delivery of waters tributary to the Snake River above Milner. This memorandum first demonstrates that the Settlement unambiguously protects all beneficial uses of water above Milner, including water use for groundwater recharge, from interference from Idaho Power’s hydropower rights below Milner. Second, in the event the Swan Falls Settlement were deemed ambiguous, extrinsic evidence absolves any doubt that the Settlement was intended to confirm that Idaho Power has no claim to water above Milner. Third, Idaho Power is further precluded, under principles of equitable estoppel and quasi estoppel, from now claiming a right to waters above Milner in contravention of its prior express representations that the Swan Falls Settlement allowed the Company no influence over water use above Milner. Fourth, the Upper Snake Water Users

should be awarded their reasonable attorneys fees and costs because Idaho Power's claim to dominion over water use for groundwater recharge purposes is in violation and breach of the Swan Falls Settlement and is without reasonable basis in law or fact.

I. THE SWAN FALLS SETTLEMENT UNAMBIGUOUSLY PRECLUDES IDAHO POWER FROM SEEKING DELIVERY OF WATER ABOVE MILNER DAM TO SUPPLY ITS HYDROPOWER RIGHT BELOW MILNER DAM.

The issue of whether Idaho Power Company is entitled, under the Swan Falls Settlement, to interfere with water use above Milner Dam for groundwater recharge purposes can be decided by the plain language of the Settlement, a binding contract. "If a contract is unambiguous, the determination of the contract's meaning and legal effect is a question of law, and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." *Navarrete v. City of Caldwell*, 130 Idaho 849, 851 (Idaho Ct. App. 1997), citing *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 607, 888 P.2d 383, 386 (1995). A fundamental assumption of the Settlement is that the source of supply of Idaho Power's hydropower right under the Settlement is limited to waters arising below Milner dam. This is reflected in the plain meaning of the zero flow provision, the definition of trust water, and Idaho Code § 42-203B—all of which are elemental components of the Settlement.

The Swan Falls Settlement creates in favor of Idaho Power an unsubordinated water right of 3,900 cubic feet per second (cfs) during the irrigation season and 5,600 cfs during the non-irrigation season at the Company's Swan Falls hydropower facility.³ These figures represent minimum Snake River flows that are not subject to depletion by water rights with priority dates after October 1, 1984.⁴ Above these minimum flows, the Settlement creates a subordinatable right up to 8,400 cfs to be held in trust by the State of Idaho for the benefit of Idaho Power and

³ Agreement at ¶7.A. (Orr Aff., Exhibit 30 at 3.); Idaho Code § 42-203B(2).

⁴ *Id.* at ¶7.D. (Orr Aff., Exhibit 30 at 4.)

the people of the State of Idaho.⁵ The “trust water” is available for appropriation subject to certain criteria set forth in Idaho Code § 42-203C.⁶

The Settlement confines the source of supply of Idaho Power’s water right to those waters tributary to the Snake River from Milner Dam downstream to the Swan Falls Dam (the “trust water area”). This is a product of the zero flow provision, which reaffirms the historic policy of Idaho water rights management that hydropower rights below Milner had no claim to water above Milner. Section 12 of the Agreement affirmatively conditions Idaho Power’s entitlement to the unsubordinated flows and to its use of trust water upon the Company’s agreement to a zero flow at Milner: “The [minimum flow] provisions of paragraphs 7, ... shall not be binding and effective until each of the following conditions have been implemented: (i) Amendment of the State Water Plan to implement the provisions of Exhibit 6. ...”⁷ Exhibit 6 provides, “The minimum daily flow at the Milner gauging station shall remain zero c.f.s.”⁸ Use of the term “remain” reflects the fact that the zero flow provision was a continuation of the status quo rather than a change from historic water management practice.

The zero flow at Milner creates a barrier beyond which Idaho Power has no right to call for water to supply its hydropower right at Swan Falls. The meaning and effect of the provision is not ambiguous: “The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years.”⁹ The provision entitles upper Snake water users to develop the entirety of flows in the Upper Snake Basin, to the point that no water bypasses Milner. In other

⁵ Agreement at ¶7.B. (Orr Aff., Exhibit 30 at 4.)

⁶ Idaho Code § 42-203B(3), 42-203C.

⁷ Agreement at ¶13.A. (Orr Aff., Exhibit 30 at 7.)

⁸ *Id.* at Exhibit 6. (Orr Aff., page 26 of Exhibit 30.)

⁹ Resolution amending policy 32 the State Water Plan pursuant to the Agreement, *In the Matter of Policy 32 of the State Water Plan* at 2. (Second Aff. of Budge, Exhibit K at 2.)

words, the provision insulates upper Snake River Basin water users from any interference by Idaho Power. The zero flow provision does not discriminate; it protects water use for groundwater recharge above Milner just as it does any other beneficial water use.

That the source of water available to fill Idaho Power's right is confined to the trust waters tributary to the Snake River below Milner Dam is ultimately confirmed by Idaho Code § 42-203B. In addition to the zero flow provision, an express condition of the Agreement was, "Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement."¹⁰ Exhibit 7B was enacted verbatim as Idaho Code section 42-203B.¹¹ In response to some confusion as to the effect of the Settlement on water use above Milner, section 42-203B was amended one year later to clarify that source of Idaho Power's right does not extend to waters tributary to the Snake River above Milner Dam.¹² Subsection 2 of the Act was amended as follows:

(2) 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 users of the water for power purposes, and of the people of the state of Idaho; provided, however, that the 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 purpose of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered. ...¹³

This amendment unequivocally confirms that the source of Idaho Power's subordinated and unsubordinated water right is confined to those waters tributary to the Snake below Milner Dam.

¹⁰ Agreement at ¶13.A.vii. (Aff. of Orr, Exhibit 30 at 8.)

¹¹ Chapter 17, §2, p.23 and Chapter 224, § 1, p.537, Session Laws, 1985.

¹² *Id.*

¹³ Chapter 117, §1, p.208, 1986 Session Laws.

Only trust water is held for power purposes; non-trust water above Milner is not.¹⁴ And like the zero flow provision, Idaho Code § 42-203B makes no exception for ground water recharge above-Milner. Notably, the Settlement does make one exception, allowing Idaho Power the “ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam.”¹⁵ The exception creates only an option to make use of a separately-acquired water right above Milner, not to wield its right under the Settlement to prevent water use for groundwater recharge above Milner.

Summary judgment is warranted because the plain language of the Swan Falls Settlement unambiguously precludes Idaho Power from seeking delivery of water tributary to the Snake River above Milner Dam to supply the Company’s hydropower right at Swan Falls. As stated in Idaho Code § 42-203B(1), the purpose of the Settlement is to “assure an adequate supply of water for all future beneficial uses.”¹⁶ Water use for groundwater recharge is no exception.

II. THE SWAN FALLS SETTLEMENT RECONFIRMED THE CORNERSTONE PRINCIPLE OF SNAKE RIVER WATER RIGHTS MANAGEMENT THAT HYDROPOWER RIGHTS BELOW MILNER DAM CANNOT SEEK DELIVERY OF WATERS ABOVE MILNER.

In the event the Swan Falls Settlement were deemed ambiguous, extrinsic evidence absolves any doubt that the Settlement intended to confirm that Idaho Power had no right to seek delivery of water upstream from Milner Dam to supply its hydropower right below Milner. “If the contract is ambiguous, its meaning turns on the underlying intent of the parties.” *Navarrete*, 130 Idaho at 851, 949 P.2d at 599. “Intent is a question of fact to be determined by the fact finder in light of the language of the entire agreement, the parties’ conduct, the course of prior negotiations and other extrinsic information.” *Id.*

¹⁴ Idaho Code § 42-203B(1).

¹⁵ Agreement ¶7.E. (Aff. of Orr, Exhibit 30 at 4.)

¹⁶ Emphasis added.

A. The Snake River has historically been managed as two separate rivers, with the river above Milner Dam devoted to agricultural use and the river below Milner Dam supporting hydropower uses.

The topography of Idaho's Snake River Plain is such that the Snake River, from the point where it enters the state, to the point where it falls into a deepening canyon at Milner Dam, is extremely amenable to the diversion of surface waters. The ease of surface water irrigation in the upper Snake River Basin resulted in heavy agricultural development beginning in the late 1800's and continuing to the present. Once the river passes Milner Dam, however, the river enters into a deep canyon. Prior to the advent of pumping, water was largely unavailable for irrigation below Milner. As a result, in the 1920s the State and the United States agreed to a comprehensive plan centered around conserving the flows above Milner for irrigation and other uses while allowing use of the flows below Milner for hydropower generation.¹⁷

In the context of the prior appropriation doctrine, the very fact that the most efficient use of water upstream was for irrigation while the topography downstream necessitated in-stream uses could have created great tension between the irrigators in the upper Snake River Basin and Idaho Power Company. Instead, there was remarkable cooperation between the two regimes, with Idaho Power's stated policy one of complete subordination of its water rights to the use of water upstream for irrigation. It was in Idaho Power's interest to create power demand by facilitating maximum development of the Snake River Plain. Accordingly, Idaho Power agreed to limit the source of its hydropower rights to those waters below Milner Dam as part of the "Contract Between the United States and the Idaho Power Company Relative To Power Rights at American Falls, Idaho, Dated June 15, 1923" (the "1923 Contract").¹⁸

¹⁷ Carlson Aff. ¶ 8, at 4.

¹⁸ Orr Aff., Exhibit 6. Idaho Power reiterated that limitation in a stipulation included in the Company's federal power license for the Twin Falls hydropower facility, stating that the Company's right to call for water above Milner Dam for hydropower generation below Milner Dam was limited to "the 45,000 acre feet of primary storage capacity

Idaho Power Company made numerous public statements after 1923 that reaffirmed the Company's view that hydropower water rights below Milner Dam cannot demand delivery of water from above Milner:

- 1947: "The principles which have been practiced in the coordination of the use of water for both irrigation and power purposes in the Snake River Valley are simple. They are based on the premise that the most valuable use for water is for the irrigation of land. It logically follows that hydroelectric power development is of secondary consideration."¹⁹
- 1947: "[a]t no place on the Snake River have we ever taken the position that where our water rights for power were developed have we in any way deprived irrigation people what we believe to be the first and most important use of water. And in connection with any present water rights that we now have or for any right for which we are making application, we will be agreeable to language that is reasonable and business-like, that reserved to irrigators upstream right in which they are entitled or for which they have filed either before 1906 or after that time. So that we will only be using water after it has performed its function for irrigation, whether or not that gives use the full amount of water each day for which we have water rights. We will submit to the commission the records of the State of Oregon and the State of Idaho, to show that at no time have we ever taken any other position"²⁰
- 1951: "The Idaho Power Company for over thirty years has recognized the importance of irrigation to the economic development of southern Idaho and has consistently developed its own projects on the basis of irrigation having prior rights to the water."²¹
- 1952: "Idaho Power Company fully recognizes the primary importance in southern Idaho of the use of water for reclamation and irrigation purposes, and over more than 35 years of its existence has cooperated fully with water users in the Snake River valley. **Our system has been planned and built accordingly, and in the entire history of the Company, I know of no instance where the**

which the Licensee holds in American Falls Reservoir under paragraph 16 of that certain contract between the United States of America and Idaho Power Company, dated June 15, 1923." (Orr Aff., Exhibit 9 at 7.)

¹⁹ Page 4 of *Facts About Idaho Power Company*, a pamphlet enclosed with a letter from C.J. Strike, President and General Manager of Idaho Power Company, to the Honorable Henry Dworshak, United States Senate (Feb. 14, 1947). (Second Budge Aff., Exhibit A.)

²⁰ *In the Matter of the Application of the Idaho Power Company*, a corporation, for temporary permit for low dam construction at the Ox Box location on the Snake River, Before Hydroelectric Commission of the State of Oregon, September 15, 1947 at 12-13. (Second Budge Aff., Exhibit L at 15.)

²¹ Statement by Idaho Power Company Submitted to Congressional Appropriations Committees – 1951, signed by T.E. Roach, President and General Manager of Idaho Power Company. (Second Budge Aff., Exhibit B at 9.)

Company has ever protested a water appropriation filing, or raised any objection to diversion or use of water, for such purpose.”²²

- 1952: “... in all of its long history Idaho Power Company has never—not even once—protested or filed objection to subsequent water permit filings for the diversion of water for irrigation or reclamation. This is in conformity with the Company’s long-established and well-known policy of recognizing that the first and most important use for the waters of the Snake River is for the irrigation of the land. ... which policy makes the use for power purposes subordinate to irrigation and reclamation.”²³
- 1953: “Well, our company for a period of 37 years or more has had a very firm and fixed policy of complete coordination of the use of the Snake River waters for the development of hydroelectric power with the needs of that water for irrigation and has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydroelectric development.”²⁴
- 1959: “The Company, as part of its continuing program of aiding irrigation and reclamation, has recognized that use of the waters of this area by other than irrigators should be subordinate to irrigation use.”²⁵
- 1966: “Idaho Power Company has consistently recognized that the use of water for reclamation should obtain a higher priority than the use for other purposes.”²⁶
- 1967: “Our position with respect to this permission [to divert from the backwaters of the Lower Salmon power plant] is in conformity with the Company’s long established policy of subordinating the need of water for power to that of water for irrigation.”²⁷
- 1968: “These rights of Idaho Power Company have been voluntarily subordinated by the Company to present and future irrigation and other consumptive uses in the Snake River watershed.”²⁸

²² Letter from A.C. Inman, Vice-President and Secretary, Idaho Power Company, to the Honorable Len Jordan, Governor of the State of Idaho (Mar. 14, 1952). (Second Budge Aff., Exhibit C (emphasis added)).

²³ Letter from T.E. Roach, Idaho Power Company, to Ed Ermine, Editor, Idaho Farm Journal (July 31, 1952). (Second Budge Aff., Exhibit D at 2 (emphasis added)).

²⁴ Statement of Thomas E. Roach, President, General Manager and Chairman of the Board of Directors, Idaho Power Company, page 1419 of Official Stenographer’s Report Before the Federal Power Commission, *In the Matter of: Idaho Power Company* (Project Nos. 1971, 2132, 2133) (July 8, 1953). (Second Orr Aff., Exhibit 2 at 8).

²⁵ Statement of Idaho Power Company Before the Senate Select Committee on National Water Resources at Boise, Idaho on October 13, 1959. (Second Budge Aff., Exhibit E at 3.)

²⁶ Statement of Idaho Power Company To Irrigation And Reclamation Subcommittee, House Interior and Insular Affairs Committee Regarding H.R. 13914, Southwest Idaho Water Development Project, September 9, 1966. (Second Budge Aff., Exhibit F at 1.)

²⁷ Letter from James E. Bruce, Secretary, Idaho Power Company, to Bell Rapids Irrigation Company (Apr. 6, 1967). (Budge Aff., Exhibit G; *See also generally* Second Orr Aff., Exhibit 4 at 10-13.)

²⁸ Statement of Idaho Power Company to the Technical Advisory Committee of the Idaho Water Resource Board, January 15, 1968. (Second Orr Aff., Exhibit 4 at 8.) The understanding that Idaho Power had voluntarily

- 1972: “In response to your request of August 24, there is enclosed a tabulation of the major Water Permits held by Idaho Power Company for its various hydro-electric power plants. ... You will note that the ‘power right’ is subordinate to irrigation use in each case.”²⁹

Idaho Power’s policy of subordinating its hydropower rights to water use for irrigation purposes allowed the Company to grow its hydropower capacity with the support of upper Snake water users who reaped the benefit of inexpensive power provided by the Company. The irrigators acted as a powerful lobbying force in support of Idaho Power’s efforts to defeat the federal high dam project at Hells Canyon in favor of its own complex of three smaller power plants. Likewise, when it came time to rebuild the American Falls Dam, the upper Snake water users agreed to a partnership with Idaho Power after receiving assurances that the Company would subordinate any power production to uses of water for irrigation purposes. Thus, the history of the development of the Snake River had at its heart the collaboration and cooperation of these two powerful interests—agriculture and hydropower.

The historic protection of water use above Milner was more than a matter of Idaho Power policy, it was a central tenet of State water policy.³⁰ When the first State Water Plan was adopted in 1976, it incorporated the longstanding policy by providing for a “protected flow” at Milner of 0 c.f.s.³¹ The Idaho Department of Water Resources even developed a computerized

subordinated its hydropower rights to future depletions for other uses was so widespread and unremarkable that the 1983 interim legislative committee formed to address the water rights issues raised by the Swan Falls controversy stated in its final report that “Idaho Power has historically operated all power plants subject to upstream depletions by irrigation, industrial and municipal uses.” (Second Budge Aff., Exhibit H at 2.)

²⁹ Letter from R.A. Hogg listing Idaho Power Company hydropower water rights for the Bliss, Lower Salmon, Upper and Lower Malad, Swan Falls, Twin Falls, Upper Salmon, American Falls, Clear Lakes and CJ Strike. (Second Orr Aff., Exhibit 4 at 11.)

³⁰ Carlson Aff. ¶¶ 6-9, at 2-3.

³¹ 1976 Idaho State Water Plan – Part 2, at 116. (Carlson Aff. Exhibit A at 116.)

system as early as 1977 to aid in the management and delivery of water in the upper Snake to provide for zero spillover past Milner except during flood control operations.³²

B. The 1983 Supreme Court decision on Swan Falls and resulting lawsuit by Idaho Power against upstream water users threatened to extinguish all future water development in the Upper Snake River Basin.

The 1983 Idaho Supreme Court decision on Swan Falls threatened to turn the historic relationship between agriculture and hydropower on its head, holding that that Idaho Power's hydropower right at Swan Falls Dam was not subordinate to water use for irrigation purposes.³³ In response, Idaho Power abandoned its longstanding alliance with upstream irrigators and filed a lawsuit against more than 7,500 water right holders upstream from its Swan Falls facility.³⁴ That decision placed the two driving forces of development along the Snake River—irrigation above Milner and hydropower below Milner—in direct conflict with one another, throwing into question the economic future of agriculture in Southern Idaho.

Water users above Milner viewed Idaho Power's action as a betrayal of the promises the Company had made to them. They immediately began a vigorous campaign, through litigation and proposed legislation, to safeguard the flows above Milner Dam and ensure that there could be future development of water resources in the Upper Snake Basin by fully subordinating Idaho Power's Swan Falls hydropower rights.³⁵ Eight bills aimed at full subordination failed to pass in the 1983 session, primarily due to fear that the State may be charged for effecting a taking. The legislature eventually passed Senate Bill 1180, authorizing the governor to negotiate a compromise settlement with Idaho Power. The upper Snake water users adamantly opposed any

³² Carlson Aff. ¶ 7, at 3.

³³ *Idaho Power Company v. State of Idaho, et al.*, 104 Idaho 575, 590; 661 P.2d 756, 741 (1983); case remanded back to the district court to determine whether Idaho Power's water rights at Swan Falls were subordinated under equitable theories.

³⁴ *Idaho Power Company v. Idaho Dept. of Water Resources*, Ada County Civil Case No. 81375.

³⁵ Carlson Aff. ¶ 14, at 6-7.

settlement unless water use upstream from Milner remained absolutely insulated from interference by Idaho Power. Ray Rigby, a water attorney in Rexburg, wrote to Governor Evans in 1983, advising that “[t]o release the waters upstream for non-consumptive use downstream is a complete reversal of wise resource management.”³⁶ In a 1990 deposition Idaho Power lobbyist Gregory Panter recalled the participation of upper Snake water users in the efforts to resolve the controversy: “[y]ou know, our discussions with the Committee of Nine were fairly acrimonious throughout the legislative debates. They obviously were totally in support of full subordination of the water rights.”³⁷ In sum, the upper Snake water users viewed the 1180 contract as a sellout and waged a war for full subordination of Idaho Power’s hydropower rights in relation to water use above Milner.

The State and Idaho Power fought to a standstill in the legislature, and litigation was mounting. Idaho Power, seeing its support from the water users erode during this process, finally approached Governor Evans about negotiating a settlement. The Governor agreed, and the State and Idaho Power eventually negotiated the Framework For Final Resolution of Snake River Water Rights Controversy.³⁸

C. The upper Snake water users’ essential support of the Swan Falls Settlement was conditioned upon assurances by Idaho Power and the State that the Settlement allowed IPCo no influence over waters above Milner.

Water users in the upper Snake River Basin actively sought assurance that any agreement entered into by the State and Idaho Power would not impact the use of water above Milner. In a September 1984 letter, Kent Foster, counsel for Idaho Water Rights Defense, Inc, a group of some 1200 upper Snake water users, weighed in on the proposed Framework agreement, stating:

³⁶ Rigby letter, August 19, 1983, page 2. (Budge Second Aff., Exhibit J at 2.)

³⁷ Budge Aff., Exhibit A at 98-99.

³⁸ Orr Aff., Exhibit 29.

One of the most important points to us is that there must be no minimum flow requirements at Milner. We were assured this has been agreed upon, but we find no such assurance in the draft.... Remember that the State and Idaho Power Company are only two of the parties to the second law suit and we are speaking on behalf of some 1200 other parties who are just as vitally concerned about the outcome of this controversy as you.³⁹

Both Idaho Power and the State provided the necessary assurances, aware that any agreement that did not satisfy the upper Snake water users was unlikely to gain adequate legislative support. For example, Idaho Power Company's chief negotiator assured the public at a Water Board meeting that "you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner. ...what goes on above Milner is not affected by this agreement."⁴⁰ Idaho Power lobbyist Greg Panter recalled giving his own assurances to the Committee of Nine:

I can recall myself personally giving assurances to various members of that committee that, when the ultimate agreement was struck, that Idaho Power Company would do their part. And we would abide by the terms of that agreement and in all ways work to make sure it was implemented.⁴¹

The upper Snake water users trusted the State and Idaho Power to keep their promise that the Snake River would retain is "split personality" such that hydropower rights below Milner would have no claim over water use above Milner. On that assurance the water users in Water District 01 grudgingly resolved to conditionally support the Swan Falls Settlement:

NOW, THEREFORE, BE IT RESOLVED that the Committee of Nine encourage the Idaho Legislature to pass requisite legislation to implement the Swan Falls Agreement.

BE IT FURTHER RESOLVED that in implementation it be clear that the following conditions prevail:

³⁹ Foster letter, September, 26, 1984, page 4. (Budge Second Aff., Ex. M at 4.)

⁴⁰ Nelson statements in transcript of Water Board public information meeting of Oct. 25, 1984 (Twin Falls). (First Orr Aff., Exhibit 44 at 27.)

⁴¹ Budge Aff., Exhibit A at 98-99.

1. That there is, and will continue to be, no obligation to provide surface flows for water rights established below Milner Dam and that the “zero” flow at Milner Dam be reaffirmed. ...⁴²

Incorporation of the zero flow provision, coupled with express representations by Idaho Power and the State of Idaho, adequately confirmed to upper Snake water users that the Settlement allowed Idaho Power no claim over water use above Milner. The State and Idaho Power secured the upper Snake water users’ vital support, enabling the Settlement to be accomplished.

D. Idaho Code § 42-203B(2) was amended in 1986 to clarify that water use above Milner is insulated from claims by hydropower rights below Milner, absolving any doubt concerning the meaning and effect of the Settlement.

Upon execution of the Settlement, the Idaho Department of Water Resources (IDWR) drafted Proposed Water Allocation Rules, which mistakenly sought to include waters above Milner as trust water. Upper Snake water users were incensed by what appeared to be another act of betrayal. They immediately demanded legislation to bring the Swan Falls Settlement in conformance with the representations made by the State and Idaho Power that hydropower rights below Milner retained no claim over water use above Milner.⁴³ The palpable discontent of the upper Snake water users is reflected in the poignant statement of Eldred Lee made at a hearing before the Idaho Department of Water Resources on January 14, 1986, describing the feeling among upper Snake water users that the parties to the Settlement had engaged in “pure deception”:

Mr. Lee: My name is Eldred Lee. I am the secretary of the Great Feeder. I just have a couple of comments. I agree with those that have been made. In my memory—and I can’t verify this—it appears to me that I’ve been at two meetings in which I specifically asked the question of whether the Swan Falls Agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls Agreement affect any of the diversion of water under any circumstances above Milner. ... The water users that I have talked to feel as if they have been deceived by action—and I don’t know who is

⁴² Resolution of the Committee of Nine adopted January 17, 1985. (Second Budge Aff, Exhibit I at 1.)

⁴³ Carlson Aff. ¶ 15, at 7.

responsible... There is really—you know, after being promised one thing and here we come and we find that all of our water rights may be in jeopardy—or some of them, at least—or that new development may be minimized because of the rules and regulations and the laws that are now made, it appears to us that its pure deception. And I think, in my opinion, that that should be corrected and clarified. And I would like to see the department propose legislation that would clarify that principle. Because if not, then there is going to be a lot of fault-finding, unrest, dissatisfaction with the whole procedure...⁴⁴

Rigby attorney Blair Gover expressed similar sentiment at the same hearing on behalf of various canal companies in the upper Snake River Basin:

Mr. Grover: My name is Blair Grover. I am an attorney from Rigby, Idaho, and I am appearing today on behalf of the Protective Union which is an organization of canal companies located in the Upper Valley between Blackfoot and Rexburg. ... It's my understanding that several of Eastern Idaho legislators believed, when the legislation was passed, that they were not passing it for application above Milner. And perhaps legislative effort should be made to clarify the legislation so that it does not apply above Milner. ... I don't think that the legislation was intended to upset the procedures that have been followed in the practice that's been followed here.⁴⁵

Rupert attorney Roger Ling testified at a second hearing held January 15, 1986, that water users he represented likewise understood that Idaho Power held no influence over water use above Milner Dam:

Mr. Ling: ...Finally, I'd like to mention—and I believe my comments do—that we object to the understanding in the proposal that all waters above Milner, and particularly surface waters, are, in fact, and will be considered trust waters if they have no been previously appropriated. Under the Swan Falls agreement, it is our understanding and I believe the understanding of many in that agreement, that all waters—surface waters, at least—and instream waters above Milner were, in fact, not trust waters; **were, in fact, not subject to any water rights of Idaho Power Company.** And development within that stretch of the river, to the extent there was water to be developed, would not come within the Swan Falls agreement...⁴⁶

That understanding was further verified by Senator Mike Crapo at the January 16 hearing:

Senator Crapo: ...My first concern, about that is that, as far as surface flows, I think that is directly contrary to the legislation. Because it was the understanding

⁴⁴ Second Budge Aff., Ex. N, starting at 25:48.

⁴⁵ *Id.*, Ex. N, starting at 13:26.

⁴⁶ *Id.*, Ex. O, starting at 21:07.

of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner. And I don't even think Idaho Power would take the position that above Milner they are entitled to any trust water in the flow of the river.⁴⁷

Idaho Power attorney Tom Nelson and Sherl Chapman of the Idaho Water Users Association both agreed with Senator Crapo's explanation that the amendments clarified the original intent of the parties to the Settlement.⁴⁸ Further, in written comments on the proposed rules, an attorney in Tom Nelson's firm expressed the same concern, stating, "its been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam."⁴⁹

In response, Attorney General Jim Jones asked the Idaho Department of Water Resources to revise the Rules, in part because "[o]ne of the critical points of the negotiations was that water above Milner Dam should not be subject to the new allocation criteria. To include water above Milner as trust water is directly contrary to the intent of the negotiation parties."⁵⁰ In addition to revision of the rules, the state legislature amended Idaho Code § 42-203B to "clarify the original intent of the parties"⁵¹ that water rights above Milner would not be subject to Idaho Power's water rights. The Committee of Nine and the water users of Water District 01 passed a resolution in support of the amendment on March 4, 1986:

WHEREAS, it has been agreed by all parties involved in the Swan Falls negotiations that it was never their intent to force water arising above Milner Dam to be released to fill downstream water rights; and

WHEREAS, the upper Snake has always been managed separately from the lower Snake; and

WHEREAS, the trust water provisions of the Swan Falls settlement would adversely affect both natural flow and storage supplies of existing users and could

⁴⁷ Second Budge Aff., Ex. P, starting at 10:30.

⁴⁸ *Id.*

⁴⁹ Letter from John A. Rosholt to Mr. Kenneth Dunn re: Proposed Rules at 1 (Oct. 30, 1985) (emphasis added). (Third Orr Aff., Exhibit 38 at 1.)

⁵⁰ "News Release," Idaho Office of the Attorney Jan. 29, 1986. (Third Orr Aff., Exhibit 41 at 2.)

⁵¹ Minutes of Senate Resource & Environment Committee meeting, Feb. 19, 1986. (First Orr Aff., Exhibit 62 at 1; *See also*, Exhibit 62 at 1.)

actually reduce the amount of water available for hydropower generation below Milner Dam during the summer months.

NOW, THEREFORE, BE IT RESOLVED by the Committee of Nine and the water users of Water District 1 meeting in regular annual session on the 4th day of March, 1986, that the Idaho State Legislature be encouraged to enact into law Senate Bill 1358.⁵²

There can be no doubt that the 1986 amendment of Idaho Code § 42-203B reconfirmed the longstanding policy of Idaho water rights management that precluded hydropower rights below Milner Dam from seeking waters from above Milner Dam. The amendment memorialized the terms on which water users in the upper Snake River Basin had conditioned their support of the Swan Falls Settlement from the start. It effectively codified the practice of managing the river separately for the agricultural interests above Milner and the hydropower interests downstream, and clarified what the parties to the Settlement had always intended with regard to existing and future development upstream from Milner. Although other aspects of the Swan Falls Settlement were novel to water users in Idaho, the 1986 amendments represented a confirmation of the status quo that had existed for nearly a century.

III. IDAHO POWER IS PRECLUDED UNDER PRINCIPLES OF EQUITABLE ESTOPPEL AND QUASI-ESTOPPEL FROM ASSERTING A CLAIM TO WATER ABOVE MILNER DAM.

Idaho Power and the State of Idaho induced the upper Snake water users to pledge their essential support of the Swan Falls Settlement by making express representations that the Settlement precluded Idaho Power from claiming any right to water above Milner Dam. Those assurances were given to the upper Snake water users without condition.⁵³ Idaho Power's contemporary effort to renegotiate the Settlement and carve out an exception for groundwater recharge is impermissible under principles of equitable estoppel and quasi-estoppel.

⁵² Resolution attached to minutes of Water District No. 1 Annual Meeting, Mar. 4, 1986. (Third Orr Aff., Exhibit 43 at 2.)

⁵³ Carlson Aff. ¶ 14, at 6-7.

Equitable estoppel precludes relief “(1) [w]hen a party makes a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) it is made with the intent that it be relied upon; (3) the party asserting estoppel does not know or could not discover the truth; and (4) the party asserting estoppel relies on it to the party's prejudice.” *Allen v. Reynolds*, 186 P.3d 663, 665 (Idaho 2008) (quoting *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992)). Similarly, “[q]uasi-estoppel prevents a party from successfully asserting a position inconsistent with a previously-taken position, with knowledge of the facts and of its rights, to the detriment of the person seeking to invoke it.” *Christensen v. City of Pocatello*, 142 Idaho 132, 139 (Idaho 2005) (citing *Sun Valley Hot Springs Ranch v. Kelsey*, 131 Idaho 657, 662, 962 P.2d 1041, 1046 (1998)). The doctrine “applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.” *Allen v. Reynolds*, 186 P.3d 663, 665 (Idaho 2008) (quoting *C&G, Inc.*, 139 Idaho at 145, 75 P.3d at 199).

The understanding that flows above Milner were not subject to Idaho Power's water rights below Milner was a lynchpin of the Swan Falls Settlement. It was clear to both the State and Idaho Power Company that water users above Milner would never support any settlement, legislation, rules or other reflection of water allocation policy that ran contrary to the accepted policy of insulating the flows above Milner from hydropower water rights below Milner Dam. Those assurances were provided. The upper Snake water users certainly would have never surrendered their right on remand from the 1983 Supreme Court decision to litigate their

equitable defenses to Idaho Power's claim of an unsubordinated water right at Swan Falls absent the assurances by Idaho Power and the State of Idaho that the Settlement allowed the Company no influence over water use above Milner.

Upper Snake water users have invested, farmed and developed the upper Snake River Basin in reliance upon the assurance that Idaho Power held no right to exert control over water use of any kind above Milner. They have engaged in various recharge projects, most notably as a result of the legislative appropriation in 1995 of \$1 million for recharge projects in the upper Snake River Basin.⁵⁴ Had Idaho Power believed it had dominion over recharge in the upper Snake, one would certainly have expected an objection to such a large-scale recharge undertaking. Were Idaho Power to successfully now gain control over recharge above Milner, it would drastically impair current and future water use and development in the upper Snake River basin, including severe disruption of water storage practices. Idaho Power's effort to take control of recharge is especially troubling given the ongoing campaign by some to shut down vast tracts of irrigated farmland upstream from Milner Dam under the surmise that the East Snake Plain Aquifer (ESPA) is over-drafted. Aquifer recharge is beginning to take its place as an essential component of successful management of the ESPA. The ability of upper Snake Water users to continue recharge efforts is vital to their livelihood.

Idaho Power Company has repeatedly represented that the source of its hydropower water rights is limited to waters tributary to the Snake River below Milner Dam. Such representations were made by Idaho Power to facilitate the Swan Falls Settlement, and they reflect a long history of statements by Idaho Power that it has no claim over water use above Milner. The Upper Snake Water Users have relied on these representations for nearly a century, and would not have supported the Swan Falls Settlement or any other agreement, legislation, rule, or policy that ran

⁵⁴ Senate Bill No. 1260, 1995 Sess. Laws, ch. 200, p. 692; Carlson Aff. ¶ 16, at 7-8.

contrary to the representation. Further, Idaho Power expressly agreed to never take any position contrary to the terms of the Settlement: "State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with this Agreement."⁵⁵ Had Idaho Power intended to qualify the effect of the Milner division or carve out exceptions for certain beneficial water users it could and should have done so. It is simply unconscionable for the Company to now, nearly a quarter century later, claim exceptions to the Milner division. It would be unjust and inequitable to permit Idaho Power Company to gain a more favorable settlement than they agreed to on October 25, 1984. The Company should therefore be estopped from arguing that the use of water above Milner for aquifer recharge purposes is subservient to its hydropower water right at Swan Falls.

IV. THE UPPER SNAKE WATER USERS SHOULD BE AWARDED THEIR ATTORNEYS FEES AND COSTS BECAUSE IDAHO POWER'S CLAIM OF DOMINION OVER WATER USE ABOVE MILNER DAM FOR GROUNDWATER RECHARGE IS IN VIOLATION OF THE SWAN FALLS SETTLEMENT AND WITHOUT A REASONABLE BASIS IN LAW OR FACT.

Nowhere in the Swan Falls Settlement and its implementing legislation is Idaho Power granted control over water use of any kind above Milner Dam, let alone specific control over groundwater recharge. The Upper Snake Water Users' have been put to substantial expense to defend their entitlement under the Settlement to freely use water above Milner without interference by Idaho Power's downstream hydropower rights. Idaho Power's contemporary effort to reach above Milner is in breach of the Settlement and without foundation.

Idaho Code § 12-120(3) discourages unmeritorious litigation by creating a statutory right in the prevailing party in a dispute over "any commercial transaction" to recover reasonable attorneys fees and costs. The definition of "commercial transaction" is exceptionally broad,

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

defined as “all transactions except transactions for personal or household purposes.”⁵⁶ The definition of “transaction” is similarly inclusive; it includes: “1. The act or an instance of conducting business or other dealings. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons.”⁵⁷ A negotiated contract defining party obligations, as is the Swan Falls Settlement, fits squarely within the definition. Specifically at issue is Idaho Power’s contractual commitment to “not take any position before the legislature or any court, board or agency which is inconsistent with this Agreement.”⁵⁸ By asserting dominion over water use above Milner Dam the Company has taken a position in direct opposition to the zero flow provision of the Agreement. The Company’s about-face is further compromised by its numerous representation to water users above Milner Dam that the Settlement would have no affect on water use in the upper Snake River Basin which remains free from interference by the Company’s hydropower rights below Milner. Accordingly, an award of attorneys fees and costs is warranted to the Upper Snake Water Users per Idaho Code § 12-120(3).

An award of reasonable attorneys fees and costs is also justified under Idaho Code § 12-120, which mandates an award of fees and costs to any prevailing party required to defend against a claim pursued frivolously, unreasonably, or without foundation.⁵⁹ There is simply no foundation within the four corners of the Swan Falls Settlement to reasonably support Idaho Power’s claim over water use for groundwater recharge above Milner. Further, Idaho Power makes its claim in direct contravention of the promises made to upper Snake Water Users during negotiation of the Settlement. The fact that Idaho Power is now for the first time asserting

⁵⁶ Idaho Code § 12-120(3).

⁵⁷ *Black’s Law Dictionary*, 716 (2nd Pocket Edition, 2001.)

⁵⁸ Agreement ¶4. (Orr Aff., Exhibit 30 at 2.)

⁵⁹ Idaho R. Civ. P. 54(e)(1).

control over ground water recharge above Milner Dam, nearly a quarter century after the Settlement was finalized, and more than ten years since the legislature appropriated \$1 million for recharge projects in the upper Snake River Basin, highlights the unreasonableness of the Company's claim. That Idaho power would reverse its position in the face of its contractual commitment to "not take any position before the legislature or any court, board or agency which is inconsistent with [the Settlement]" is further justification for and award of fees and costs.⁶⁰ Therefore, the Upper Snake Water Users respectfully request that they be reimbursed for the significant expense of defending against Idaho Power's unnecessary and unwarranted claim.

CONCLUSION

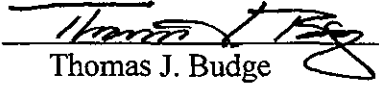
The parties to the Swan Falls Settlement intended to safeguard the historic principle that hydropower rights below Milner Dam could not seek water from above Milner. Idaho Power Company cannot be permitted to unilaterally alter its obligations under Swan Falls Settlement. To now allow the Company to reach above Milner on the basis of its hydropower water rights runs directly counter to the negotiated terms of the Settlement. The Upper Snake Water Users respectfully request an order that the Swan Falls Settlement unambiguously protects water users upstream from Milner Dam from any interference by Idaho Power's hydropower water right at Swan Falls, and that the protection applies as well to water use for groundwater recharge as to every other beneficial use of water above Milner. Further, the Upper Valley Water Users relied on Idaho Power's assurances that the Settlement would not affect water rights above Milner, and therefore request an order adjudging that Idaho Power Company is estopped from claiming any control over waters above Milner Dam to supply its hydropower rights below Milner. Finally, the Upper Snake Water Users request an award of their reasonable attorneys fees and costs

⁶⁰ Agreement ¶4. (Orr Aff., Exhibit 30 at 2.)

incurred in defending against Idaho Power's improper pursuit of water above Milner which is without reasonable foundation under the Swan Falls Settlement.

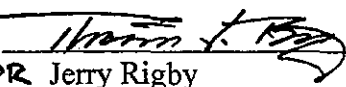
DATED this 16th day of October, 2008.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By 
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Irrigation District, New Sweden Irrigation
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2008, the above and foregoing document was served in the following manner:

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Twin Falls, Idaho 83303

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