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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' REPLY
TO IDAHO POWER'S RESPONSE BRIEF**

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Fremont-Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, United Canal Company, Aberdeen-Springfield Canal Company, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District, acting for and on behalf of their member water users (collectively the Upper Snake Water Users), by and through counsel, hereby reply to *Idaho Power Company's Response in Opposition to the State of Idaho's and the Upper Snake Water Users' Opening Briefs on Issue of Recharge Subordination* (Idaho Power's Response Brief) pursuant to Rule 56 of the Idaho Rules of Civil Procedure and in accordance with the Court's *Second Amended Scheduling Order Setting Discovery Deadlines on Motion for Summary Judgment on Issue of Recharge Subordination*.

ARGUMENT

The Swan Falls Agreement presented Idaho Power Company with a unique opportunity to negotiate some level of protection for a hydropower right that both Idaho Power and the State of Idaho had always understood to be fully subordinated. The Agreement did not impose limitations on a previously unsubordinated water right; rather, it created discrete entitlements that are not enjoyed by Idaho Power's other hydropower rights. Indeed, prior to the Idaho Supreme Court decision on Swan Falls in 1982, even Idaho Power agreed that its Swan Falls right was fully subordinated.¹ And the right arguably would have remained fully subordinated under principles of estoppel but for the protections created by the Agreement. Accordingly, this Court's interpretation of the Agreement must be viewed in the context of defining new protections for a right that was previously understood to be fully subordinated, not in the context of defining new limitations to a previously unsubordinated right.

¹ See Upper Snake Water Users' Response Brief at 17.

With regard to groundwater recharge, since the subordination provisions that govern Idaho Power's other hydropower rights were specifically decreed to encompass recharge, this Court's interpretation of the Swan Falls Agreement must focus on whether Idaho Power affirmatively negotiated a superior right to recharge under the Agreement. As set forth in prior briefing and herein below, the plain language of the Agreement utterly fails to create any such right. Moreover, Idaho Power's grasping effort to demand positive flows past Milner Dam contradicts the zero flow provision contained in the Agreement and is in direct violation of the Idaho Power's commitment to not take any position inconsistent with the terms of the Agreement. Therefore, the Upper Snake Water Users ask this Court to 1) declare that the Agreement's subordination terms apply as well to groundwater recharge as to all other beneficial water uses, and 2) to order Idaho Power to reimburse the Upper Snake Water Users' for their attorney's fees incurred in defending against Idaho Power's pursuit of a right to demand positive flows past Milner Dam in violation of the Agreement.

I. IDAHO POWER CONTINUES TO DISREGARD ITS COMMITMENT TO NOT TAKE ANY POSITION INCONSISTENT WITH THE TERMS OF THE SWAN FALLS AGREEMENT.

Following the remand of the Idaho Supreme Court decision on Swan Falls, water users in the upper Snake River Basin staunchly objected to any compromise settlement with Idaho Power, believing that the Swan Falls right was fully subordinated under principles of estoppel.² Notwithstanding, Idaho Power and the State eventually secured the upper Snake water users' reluctant support with the promise of a zero flow at Milner Dam that would insulate water use in the upper Snake River Basin from any interference from Idaho Power. Accordingly, the Agreement bestowed upon Idaho Power the benefit of increased minimum Snake River flows as well as the right to use the trust water, but expressly conditioned those benefits upon Idaho

² See Upper Snake Water Users' Opening Brief at 13-14.

Power's agreement that "[t]he minimum daily flow at the Milner gauging station shall remain at zero c.f.s."³ The provision for a zero minimum flow needs no interpretation. It unequivocally assures that all waters tributary to the Snake River above Milner Dam may be diverted above Milner, thereby depleting the entire flow of the Snake River to zero at the Milner Gauge. The term is unambiguous, and both Idaho Power and the State agreed to it, without exception.

Not only that, but the State and Idaho Power further agreed that they would "not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement."⁴ The experience of the negotiating parties obviously led them to foresee the possibility that, after the ink had dried, either party may be tempted to take a position that is incompatible with the Agreement in an effort to get ahead, potentially undermining the Agreement or leading to litigation of the very controversy that the parties had labored so heavily to settle. The deal was therefore made that neither Idaho Power nor the State would take any position even *inconsistent with* the terms of the Agreement. Now nearly a quarter century removed from the Agreement, Idaho Power is consciously taking a position inconsistent with the Agreement by demanding positive flows past Milner Dam. Idaho Power argues that the zero flow provision is ambiguous, and that both parties to the Agreement understood that Idaho Power was granted a right to demand that water that would otherwise be diverted for recharge above Milner Dam be sent downriver and spilled past Milner for the benefit of hydropower generation at Swan Falls. In other words, Idaho Power is arguing that zero didn't really mean zero, that there were strings attached that allow Idaho Power to demand positive flows past Milner. In so doing, Idaho Power has intentionally taken a position that is not just inconsistent with, but is in direct opposition to, the zero flow at Milner.

³ Agreement ¶¶ 7(A), 13(A)(ii), Ex. 6 (Orr Aff., Ex. 30).

⁴ Agreement ¶ 4 (Orr Aff., Ex. 30 at 1) (emphasis added).

Idaho Power and the State held themselves to a high standard in committing to never take a position inconsistent with the Agreement. The parties further protected against collateral attacks on the Agreement by including a merger clause, assuring that its terms would not subsequently be contradicted or supplemented through parol evidence.⁵ When serious concerns were expressed that once the Agreement was signed, Idaho Power would be over at the legislature chipping away at it, Idaho Power pointed to its obligation to act in good faith and not take any position inconsistent with the Agreement.⁶ Accordingly, for either Idaho Power or the State to take a position inconsistent with the plain language of the Agreement, as Idaho Power has done here, the party must be held to prove by substantial and competent evidence that its inconsistent position is justified. A failure to soundly support an inconsistent position must be deemed to have been pursued unreasonably and without foundation, thereby warranting an award of attorney's fees to the parties forced to defend against the inconsistent position. There must be consequences to deter both the State and Idaho Power from mounting unjustified assaults against the Agreement in wishful efforts to gain ground.

Idaho Power has asked this Court to pencil in an exception to the zero flow provision that would allow Idaho Power to demand that water in the upper Snake River Basin be delivered past Milner Dam rather than diverted for recharge purposes above Milner. Significantly, it is Idaho Power's position that is inconsistent with the plain language of the Agreement. Nowhere in the Agreement is recharge excluded from the subordination of Idaho Power's hydropower right at Swan Falls; rather, the Agreement's subordination provisions facially apply to all beneficial upstream water uses approved under State law. Moreover, in all of the thousands of pages of

⁵ "This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth." (Agreement ¶ 19 (Orr Aff., Ex. 30 at 9)).

⁶ See State's Opening Brief at 34-35, n. 140.

hearing transcripts, correspondence, court pleadings and other documents leading up to the Agreement, Idaho Power has failed to cite a single statement expressing its contemporary contention that the parties understood and agreed that recharge was excluded from the subordination of the Swan Falls hydropower right under the Agreement. Instead, Idaho Power relies on tenuous inferences and assumptions that have little or no support in the historical record. The utter dearth of evidence supporting Idaho Power's contention that it was granted a superior claim to recharge under the Agreement speaks volumes.

It is against the backdrop of Idaho Power's commitment to not take any position inconsistent with the terms of the Swan Falls Agreement, together with the meager and strained "proof" that Idaho Power has offered in support of its inconsistent position, that the Upper Snake Water Users request reimbursement of their attorney's fees. It is not enough for Idaho Power to establish some distant argument upon which to hang its claimed right to demand positive flows past Milner. Idaho Power has failed to soundly substantiate its taking of a position in direct opposition to the plain language of the Agreement. Accordingly, an award of attorney's fees incurred to defend against Idaho Power's inconsistent position is justified.

II. BOTH THE PLAIN LANGUAGE OF THE AGREEMENT AND CIRCUMSTANTIAL EVIDENCE DEMONSTRATE THAT IDAHO POWER HAS NO RIGHT TO DEMAND THAT FLOWS IN THE UPPER SNAKE RIVER BASIN BE DELIVERED PAST MILNER DAM.

This case should be decided by the plain language of the Agreement, which sets clear parameters on Idaho Power's hydropower right at Swan Falls. Under the Agreement, Idaho Power is granted a right to demand the delivery of two sources of water. First, it has a right under paragraph 7(A) to demand that the minimum flows be delivered. That claim exists only until the minimums are satisfied. Above and beyond the minimum flows, Idaho Power has a right under paragraph 7(B) to demand the delivery of the "trust water" tributary to the Snake

below Milner Dam. The Agreement grants nothing more. Thus, under the plain language of the Agreement, Idaho Power has no further claim to water once the minimum flows are satisfied and the trust water is delivered.

Notwithstanding, Idaho Power argues that its right is not limited to the minimum flows and the trust water, but that it is additionally entitled under the Agreement to demand the delivery of water that would otherwise be diverted for recharge purposes above Milner Dam. Thus, Idaho Power is now claiming a right to three sources of water: (1) the minimum flows, (2) the trust waters, and (3) waters in the upper Snake River Basin that would otherwise be diverted for recharge. The plain language of the Agreement clearly does not go so far; it unambiguously provides a right to minimum flows and to trust water, but nothing more. If Idaho Power believed that its right extended beyond the minimum flows and trust water, it was Idaho Power's obligation to incorporate that entitlement into the Agreement. The absence of any language in the Agreement affirmatively providing a right to demand the delivery of water past Milner that would otherwise be diverted for recharge is sufficient to decide the issue.

However, the Court is not constrained to make its decision solely on the lack of an affirmative right within the Agreement. Not only does the Agreement fail to provide such a right, it explicitly precludes any such claim via incorporation of the zero flow at Milner. The zero flow provision is not ambiguous. It assures the ability to divert all waters tributary to the Snake River above Milner Dam, without exception. Clearly the Agreement does not grant to Idaho Power the right to supervise and decide which types of water development will or will not be permitted above Milner. The lack of any affirmative right in the Agreement to look beyond the minimum flows and trust water, together with the zero flow at Milner, plainly answers the question of whether Idaho Power can demand that water in the upper Snake River Basin be

delivered past Milner. The plain language of the Agreement speaks for itself, and this Court need not look beyond the language of the Agreement to affirm that Idaho Power has no claim over water use above Milner, whether for recharge or otherwise.

Not surprisingly, Idaho Power spends little time discussing the plain language of the Agreement, as it offers nothing in support of Idaho Power's position. Instead, Idaho Power dubiously claims an implied entitlement to water for which there is no reference in the Agreement. That argument is seriously compromised by the Agreement's merger clause, confirming that the language in the Agreement "sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties."⁷ It is unreasonable to think that both Idaho Power and the State understood and agreed that Idaho Power received dominion over recharge (in contrast with Idaho Power's other hydropower subordination provisions) yet deliberately omitted any mention of a recharge exception to the zero flow provision. This is especially true given the importance of the zero flow to the thousands of upstream water users on whose behalf the State negotiated the Agreement.

It is not disputed that the State and Idaho Power used the promise of a zero flow at Milner to secure the necessary political support for the Agreement, assuring that water use in the upper Snake River Basin would continue free from any interference by Idaho Power. The promise of Idaho Power's chief negotiator, Tom Nelson, is worth repeating: "you have to keep the split personality of the river involved, and the numbers were based on zero flow at Milner. ...what goes on above Milner is not affected by this Settlement."⁸ In fact, Mr. Nelson specifically addressed diversions for recharge above Milner at a hearing held in Twin Falls to lobby support for the Agreement, stating:

⁷ Agreement ¶ 19 (Orr Aff., Ex. 30 at 9).

⁸ Tr. of Public Mtg., Twin Falls, Idaho, Oct. 25, 1984 (Orr Aff., Ex. 44 at 27).

I don't think that the surface water diversions for recharge above Milner are part of the trust waters. To be part of the trust waters, the water has to be made available by reason of the subordination provision, and there's no water right at Milner. That's a zero flow under the state water plan. So the surface water diversion above Milner would not be subject to those criteria.⁹

Rather than accept and sustain the representations of its own chief negotiator, however, Idaho Power discounts them as "not dispositive of whether the Swan Falls Agreement subordinated Idaho Power's water rights to recharge."¹⁰ Statements by Tom Nelson absolutely bear on the intent of the parties to the Agreement.

One cannot look beyond the language of the Agreement without giving thorough consideration to public statements of Idaho Power's chief negotiator that directly contradict Idaho Power's current position. It is absurd to believe, as suggested by Idaho Power, that the negotiating parties were so designing as to unconditionally promise a zero flow at Milner while keeping secret a vitally important exception to the rule. Given the public assurances by Idaho Power and the State, and the critical import of the zero flow at Milner to the thousands of water users on whose behalf the State negotiated the Agreement, it cannot be assumed that the negotiating parties recognized an affirmative right in Idaho Power to demand the delivery of water past Milner without making any reference to such a right in the Agreement.

A. Idaho Power's ownership of storage water in the upper Snake River Basin does not create a right to demand that natural flows be spilled past Milner.

Idaho Power curiously cites to its storage rights in the upper Snake River Basin in support of its claim that recharge was excluded from the subordination of its Swan Falls right under the Agreement.¹¹ Of course, the Upper Snake Water Users do not contest that Idaho Power owns storage in the upper Snake River Basin, or that Idaho Power is entitled to release

⁹ Tr. of Public Mtg., Twin Falls, Idaho, May 23, 1985 (Fourth Orr Aff., Ex. 48 at 6) (emphasis added).

¹⁰ Idaho Power's Response Brief at 35.

¹¹ *Id.* at 6-8.

that storage and deliver it past Milner. But that has no bearing on the meaning or effect of the zero flow at Milner. Ownership of storage water in no way entitles Idaho Power to additionally demand the delivery of unappropriated flows past Milner that could otherwise be diverted for recharge purposes above Milner. The zero flow assures that all *unappropriated* water supplies above Milner may be developed without obstruction by hydropower rights below Milner; it says nothing of existing storage rights.

Similarly, the fact that a subordinated right enjoys surplus water from time to time does not create a right to call for such water. Idaho Power goes so far as to claim that it's right under the Agreement extends to flows "beyond the 3900 and 5600 cfs minimum flows, including whatever water passes Milner."¹² In other words, Idaho Power is asking this Court to decree a new water right for surplus waters that occasionally spill past Milner. This argument is a sure way to end all water development upstream from Milner, and Idaho Power attempts to support it by pointing out that some water has historically spilled past Milner during various parts of the year.¹³ That argument is entirely without merit. There is no basis in the Agreement to grant Idaho Power, in addition to the minimum flows and the trust water, a right to demand "whatever water passes Milner." Further, to judicially grant such a right would obviate and circumvent the legal procedures employed by the Idaho Department of Water Resources to appropriate new water rights. That Idaho Power may occasionally benefit from surplus flows past Milner does not create a right to demand that upper Snake River Basin flows be spilled past Milner.

¹² Idaho Power's Response Brief at 10 (emphasis added).

¹³ *Id.* at 12.

B. Whether characterized as an “element” or a “condition” of Idaho Power’s Swan Falls right, the effect of the zero flow at Milner is the same.

Idaho Power’s argument that the zero flow provision is not an “element” of its Swan Falls water right is a red herring.¹⁴ It matters not the manner in which the zero flow provision is incorporated into the definition of the right, only that it is incorporated. The provision could easily be incorporated into the source element, limiting the source of Idaho Power’s right to the Snake River flows below Milner. The provision could just as easily be designated a condition that bars Idaho Power from in any way opposing the diversion of water above Milner Dam or otherwise demanding that water in the upper Snake River Basin be delivered past Milner.

Idaho Power carries this misplaced argument further in claiming 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.”¹⁵ Again, it is pointless to debate the difference between elements and administrative conditions that define a water right. The Snake River Basin Adjudication not only defines all of the standard elements of a water right, but also “such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right or for administration of the right by the director.” I.C. 42-1409(1)(k). Call it an element or call it a condition, either way the zero flow at Milner limits Idaho Power’s right to waters tributary to the Snake River below Milner.

Inferred in Idaho Power’s Response Brief is the idea that the zero flow provision has no bearing on the definition of its water right, and that it was included in the Agreement merely as a recitation of State water policy that could just as easily have been left out. Idaho Power’s suggestion does not square with its own claim that the Agreement was negotiated and crafted with great care. There is a reason that the zero flow at Milner was made an express term of the

¹⁴ Cf. Idaho Power’s Response Brief at 23-26.

¹⁵ Idaho Power’s Response Brief at 26.

Agreement while numerous other State water polices were left out. Indeed, the fact that the parties explicitly incorporated the zero flow into the Agreement when it was already embodied in the existing State Water Plan persuasively highlights the important role that the zero flow at Milner played in settling the Swan Falls controversy.

C. The 1986 amendment of Idaho Code § 42-203B is the best evidence of the intent of the parties to the Agreement.

Idaho Power makes much ado of legislation that was passed in 1994, claiming it is the best evidence of the intent of the negotiating parties to the Agreement entered into ten years earlier. However, unlike the 1986 amendment of Idaho Code § 42-203B, the 1994 legislation amended statutes that were neither part nor parcel of the Swan Falls Agreement. Nor was the 1994 legislation intended to clarify the Agreement, as the 1986 legislation was designed to do. If the Court is to look beyond the four corners of the Agreement to divine party intent, the 1986 amendment to Idaho Code § 42-203B provides far better evidence than the 1994 legislation.

The most outlandish argument made by Idaho Power is that within a year of the Agreement Idaho Power's own representatives actively advocated for legislation (amendment of Idaho Code § 42-203B) that Idaho Power now claims contradicted its intent in entering the Agreement. The amendment of Idaho Code § 42-203B, which was expressly supported by Idaho Power, was enacted to "clarify" the Agreement by providing that,

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.¹⁶

Idaho Power's representatives publicly stated that the Agreement was intended to limit the Idaho Power's trust water supply to waters downstream from Milner.¹⁷ Idaho Power has since changed

¹⁶ 1986 Idaho Sess. Laws, Ch. 117, pp. 308-09.

¹⁷ See State's Opening Brief at 37-40.

its tune, and in order to justify its contradictory position, now claims that “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.”¹⁸ Idaho Power asks this Court to ignore the statements made by its own representatives shortly after the Agreement was entered and to instead construe the Agreement based on legislation made ten years later that was neither written nor even publicly supported by the parties to the Agreement.

If the Court is going to look beyond the four corners of the Agreement for guidance, statements made by Idaho Power immediately after the Agreement provide compelling insight. Further, the only legislation that confirmed the intent of the Agreement occurred in 1986, not 1994, and it makes certain that the Agreement granted Idaho Power no claim over waters tributary to the Snake River above Milner, for recharge or otherwise.

D. Idaho Power’s claimed right to demand positive flows past Milner Dam directly contradicts its prior representations.

Idaho Power disputes the Upper Snake Water Users’ estoppel arguments on the basis that “there has been no false representation.”¹⁹ Yet Idaho Power’s current position is in direct opposition to the many assurances that it made to facilitate legislative approval of the Agreement. Idaho Power repeatedly promised upper Snake River Basin water users that their concerns over the Agreement were unwarranted because the Agreement had no effect on water use above Milner Dam. Not once did Idaho Power state that its Swan Falls right, unlike the rest of its hydropower rights, had a right to demand that upper Snake River Basin flows be spilled past Milner Dam rather than diverted for recharge purposes above Milner. Idaho Power’s current position inherently turns its promises made at the time of the Agreement into half-truths.

¹⁸ Idaho Power’s Response Brief at 30.

¹⁹ *Id.* at 50.

There can be no doubt that water users in the upper Snake River Basin relied upon the assurances of both Idaho Power and the State that they were free to fully develop water supplies above Milner, including for recharge purposes, without obstruction from Idaho Power. Why would water users and the State have invested millions of dollars over more than twenty years to research and develop recharge programs and facilities if they had believed Idaho Power had the right to shut it down at will? Further, if the State believed Idaho Power held a superior right to recharge above Milner, then why has the State issued recharge permits in the upper Snake without conditioning them upon the ability of Idaho Power to call them out for hydropower generation below Milner? Were that believed to be a legitimate risk, recharge would have never gotten off the ground.

In no way would water users in the upper Snake River Basin have supported the Swan Falls Agreement had they believed it placed Idaho Power in control of diversions for recharge above Milner. Recharge is vital to the health and viability of irrigated agriculture and to the economy of southern Idaho as a whole. This is particularly apparent in light of recent record drought that has resulted in intense battles between surface and groundwater users along the eastern Snake River Plain. In fact, the State is currently engaged in an extensive effort to create a comprehensive aquifer management plan (the so-called CAMP plan) designed to buoy the East Snake Plain Aquifer and augment the supply of water available for both surface and groundwater users. Groundwater recharge is taking its place as a central component of that plan. Recharge provides the ultimate win-win water management tool, as it does not require the competitive apportionment of water but instead increases the supply of both surface and groundwater for the benefit of all users. Were Idaho Power to successfully take control over recharge, the economic fallout would be severe as it would drastically impair current and future use and development of

water throughout the upper Snake River Basin and frustrate the effort to develop long-term solutions through the CAMP plan.

III. IDAHO POWER'S SWAN FALLS RIGHT IS ALSO SUBORDINATE TO RECHARGE WITHIN THE TRUST WATER AREA BELOW MILNER UNDER THE TERMS OF THE AGREEMENT.

As with flows above Milner, the plain language of the Agreement grants Idaho Power no special claim over recharge diversions below Milner, leaving its Swan Falls hydropower right subordinate to recharge just as Idaho Power's Hells Canyon hydropower rights are subordinate to recharge.²⁰ The trust water provision of the Agreement states that the Swan Falls right "shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A)."²¹ The Agreement clearly gives the State, not Idaho Power, the discretion to control how the trust water will be developed. Under the plain language of the Agreement, it is up to the State to manage the development of trust water. And there is no exception in the Agreement for recharge. Therefore, for the purpose of defining the parameters of the Swan Falls right to the use of trust waters under the Agreement, the right must be decreed to be subordinate to all beneficial uses approved in accordance with State law, recharge included.

The District Court decision in Ada County Case No. 62237 forcefully confirms the understanding at the time of the Agreement that the subordination of Idaho Power's hydropower rights to upstream irrigation development inherently includes recharge.²² Idaho Power counters this devastating yet unavoidable fact by asserting that the very litigation that precipitated the Agreement "is not relevant to the issues presently before this Court."²³ Certainly, however, if the Court is going to look beyond the four corners of the Agreement for guidance, the facts and

²⁰ See Upper Snake Water Users' Response Brief at 6-7.

²¹ Agreement ¶ 7(B) (Orr Aff., Ex. 30 at 4) (emphasis added).

²² See Upper Snake Water Users' Opening Brief at 6-7.

²³ Idaho Power's Response Brief at 13.

posture of the case being settled is instructive. For example, the fact that the 7500 case was Idaho Power's first-ever attempt to curtail water use above Milner explains why a zero flow at Milner was incorporated into the Agreement even though the zero flow policy was already embodied in the State Water Plan. Similarly, the decision concerning recharge is especially important in light of Idaho Power's dubious assertion that "there was no reason for Idaho Power to challenge the use of water for recharge," as if the Idaho Power's claimed superiority to recharge was a foregone conclusion.²⁴ Of course, that decision stands for the proposition that recharge is intrinsically *included* in, not *excluded* from, the subordination of hydropower rights.

Idaho Power further attempts to minimize the key recharge decision by claiming that "the court ruled on the limited record before it...."²⁵ Yet if Idaho Power believed the decision to be ill-informed and in error, that is all the more reason to address it in the Agreement. Given the district court ruling, together with subordination language that facially encompasses all beneficial uses, it was imperative that Idaho Power express in the Agreement a superior right to recharge had Idaho Power believed it to exist at Swan Falls even though it does not exist at Hells Canyon. The language of the Agreement is dispositive on this issue.

Idaho Power's misleading characterization of recharge as nothing more than a flow augmentation tool for the benefit of hydropower contradicts both common sense and the plain language of the Agreement. Idaho Power relentlessly argues that recharge provides one benefit only—flow augmentation—and that it does not "'store' water for irrigation in the sense that storage reservoirs do."²⁶ On this claim Idaho Power contradicts itself, pointing out that in 1975 recharge was contemplated as a means to "store excess surface flows...."²⁷ Indeed, at the time of

²⁴ *Id.* at 14.

²⁵ *Id.* at 15.

²⁶ Idaho Power's Response Brief at 16.

²⁷ *Id.* at 13 (emphasis added).

the Agreement, groundwater recharge was principally viewed as a storage mechanism to augment water supplies for irrigation and other consumptive uses.²⁸

Idaho Power further mistakenly aims to gain control over recharge by asserting that recharge is “not a use to which the Company’s rights could be subordinated under the public interest criteria.”²⁹ There is simply no support for that argument. Indeed, the Agreement specifically promotes the public interest by supporting “multiple use development of the water resources of the State of Idaho.”³⁰ Recharge fits squarely within that class. In fact, Idaho Power quotes a 1995 resolution of the Idaho Water Resource Board citing multiple recharge benefits:

The 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 the effects of junior water diversions upon the availability of water for diversion under more senior rights.³¹

Idaho Power was well aware at the time of the Agreement that recharge presented far greater opportunities than merely as a stream flow augmentation tool. The right to conduct managed recharge serves multiple uses and is central to the viability of irrigation and to the economic vitality of the entire Eastern Snake River Plain. The Agreement provides for the development of trust water in the public interest, and that certainly includes recharge.

IV. THE LEGISLATURE DOES NOT HAVE A RIGHT TO RETROACTIVELY DE-SUBORDINATE IDAHO POWER’S WATER RIGHTS TO RECHARGE IRRESPECTIVE OF THE TERMS OF THE SWAN FALLS AGREEMENT.

Idaho Power excessively turns the Court’s attention to the 1994 amendments of Idaho Code §§ 42-234 and 42-4201A, as if they were addendums negotiated by the parties to the

²⁸ See Upper Snake Water Users’ Response Brief at 7-8.

²⁹ Idaho Power’s Response Brief at 4.

³⁰ Agreement Ex. 1 at 4 (Orr Aff., Ex. 30).

³¹ Idaho Power’s Response Brief at 16 n. 31 (citing Second Gheleta Aff. Ex. D at 2).

Agreement.³² For the purpose of defining Idaho Power's hydropower right under the Agreement, however, the 1994 legislation is irrelevant. The Agreement itself provides that "any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement."³³ Accordingly, "to the extent there is alleged discrepancy or ambiguity between the agreement and the legislation, the starting point is the agreement, not the legislation."³⁴

The only real relation of the 1994 legislation to the Swan Falls Agreement is that it reflects Idaho Power's contemporary efforts to get ahead by undermining the bargain that was reached in 1985. The 1994 legislation does not reflect the terms of the Agreement between the State and Idaho Power; rather, it reflects Idaho Power's work to legislatively create a claim over recharge which had not been granted under the Agreement. Idaho Power's effort to amend the Agreement through legislation is simply wrong; the Agreement specifically provides that "[n]o ... amendment of this Agreement or of any covenants, conditions, or limitations herein shall be valid unless in writing duly executed by the parties...."³⁵ Of course, Idaho Power knew that the State, with its institutional knowledge of the Agreement, would never agree to creating in Idaho Power an additional claim to water that was not contemplated under the Agreement. Therefore, Idaho Power leveraged its considerable political weight to persuade a misinformed legislature to enact legislation aimed to undermine the Agreement.

Working behind the scenes to gain control of the Snake River is nothing new for Idaho Power. A review of the legislative record indicates that the language added to Idaho Code §§ 42-234 and 42-1401A in 1994 aiming to de-subordinate Idaho Power's Swan Falls right with respect

³² See 1994 Idaho Sess. Laws, ch. 433, § 1, p. 1397 and ch. 274, § 1, p. 851.

³³ Agreement ¶ 17 (Orr Aff., Ex. 30 at 8).

³⁴ Mem. Decision and Order on Cross-Motions for Summ. J. at 23 (April 18, 2008).

³⁵ Agreement ¶ 15 (Orr Aff., Ex. 30 at 9).

to recharge below Milner was suspiciously inserted at the eleventh hour, after the bill had left committee. Senator Dean Cameron recalled the surreptitious event in a public hearing before the Senate Resources and Environment Committee concerning recharge:

As a committee member that was here in 1994 and served on the Interim Committee, I can tell you that Idaho Power did not testify at any point, either during the Interim Committee or in front of the committee. And, Mr. Tucker, I will also affirm for you that I along with Representative Bell made the motion from the Interim Committee to amend the law, amend Section 42-4201A and did not include the asserted language that is now being used to un subordinate the water right.

...

I'm just stating for the record, for your information, because I don't believe we understood that that language was put there to somehow un subordinate our rights, our trust rights. It's my understanding that the language was inserted at the request of Idaho Power with the water users, unbeknownst really to the legislators, and in between when the Interim Committee met and when Representative Bell and I made the motion. I seconded her motion to amend 42-4201 and subsequent when the language came before the committee. There was no testimony. I reviewed my minutes, reviewed our motions, and seen nothing that reflects that any testimony was given to the facts as you stated – that we knew what we were doing, that we purposefully chose to un subordinate our rights.³⁶

It seems that the paranoia expressed at the time of the Agreement (that not long after its execution Idaho Power would be chipping away at it through the legislature) was prophetic indeed.

The Upper Snake Water Users seriously disagree with the legislative attempt in 1994 to grant Idaho Power with new rights that were not negotiated under the Agreement. The language of the Agreement clearly fails to grant Idaho Power the right to demand the delivery of water that would otherwise be diverted for recharge below Milner. And to the extent the 1994 amendments “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.”³⁷ The fact that the State

³⁶ Testimony of Senator Dean Cameron before Senate Resources and Environment Committee, March 27, 2006 (Fourth Orr Aff., Ex. 79 at 23).

³⁷ Mem. Decision and Order on Cross-Motions for Summ. J. at 23 (April 18, 2008).

has continued to pursue groundwater recharge since the 1994 legislation evidences truth that the Idaho Power is constrained by the Agreement notwithstanding the subsequent legislation.

The definition of Idaho Power's hydropower right in this proceeding must turn on the language of the Agreement and not on legislative amendments enacted a decade later. The 1994 legislation has no bearing.

CONCLUSION

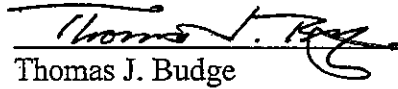
There is no language in the Swan Falls Agreement that creates in Idaho Power a right to demand the delivery of water past Milner Dam that would otherwise be diverted for recharge purposes above Milner. Nor does the Agreement grant Idaho Power a superior right over recharge within the trust water area. The Agreement creates an entitlement to two sources of water—the minimum flows and the trust water—and nothing further. The terms of the Agreement are not ambiguous, and this Court need not look outside the four corners of the Agreement to confirm that recharge is encompassed within the subordination of Idaho Power's Swan Falls hydropower right under the Agreement.

Extrinsic evidence only further confirms that the parties to the Agreement did not recognize or agree that Idaho Power held control over recharge. The Ada County district court decision makes this clear, as well as multiple representations by Idaho Power that the Agreement had no effect on water use above Milner. It is absurd to think that Idaho Power and the State understood and agreed that recharge was excluded from the subordination provisions of the Agreement, yet deliberately secured the support of upper Snake River Basin water users by assuring a zero flow without exception. This Court need not pencil into the Agreement a term that the parties surely would have included themselves had they agreed to it.

In addition, Idaho Power's claimed right to demand positive flows past Milner Dam is in direct opposition to the zero flow provision of the Agreement. Given the utter lack of language within the Agreement to support Idaho Power's inconsistent position, and Idaho Power's failure to substantially support its inconsistent position with extrinsic evidence, the Upper Snake Water Users respectfully request that Idaho Power's be ordered to reimburse the reasonable attorney's fees incurred in having to defend against Idaho Power's inconsistent position which was pursued in direct violation of the terms of the Agreement.

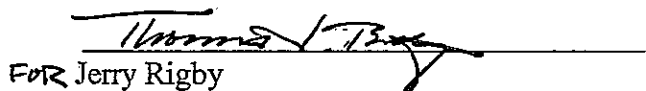
DATED this 20th day of November, 2008.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED


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Irrigation District, New Sweden Irrigation
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of November, 2008, the above and foregoing document was served in the following manner:

Deputy Clerk	☒ U.S. Mail/Postage Prepaid
Snake River Basin Adjudication	☐ Facsimile
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Twin Falls, Idaho 83303	☐ Hand Delivery
Idaho Power Company	☐ U.S. Mail/Postage Prepaid
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