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

In Re SRBA

Case No. 39576

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) **REPLY IN SUPPORT OF STATE OF**
) **IDAHO'S AMENDED MOTION FOR**
) **SUMMARY JUDGMENT ON ISSUE OF**
) **RECHARGE SUBORDINATION**
)
)

The State of Idaho hereby submits its reply memorandum in support of the State's Amended Motion for Summary Judgment on Issue of Recharge Subordination (Oct.17, 2008) ("State's Motion"). The State respectfully requests that the Court grant the State's Motion in its entirety for the reasons set forth herein and in the Memorandum in Support of State of Idaho's

Amended Motion For Summary Judgment on Issue of Recharge Subordination (Oct. 17, 2008)
("State's Opening Brief").¹

ARGUMENT

1. **The Parties Agreed In The Swan Falls Agreement To Define The Hydropower Water Rights As Limited To Flows Below Milner And As Carrying No Entitlement To Call For Flows Above Milner, And Idaho Power Conceded To And Agreed Not To Challenge The 1986 Amendment To Idaho Code § 42-203B(2).**

While the State agrees with Idaho Power that the Legislature intended the 1986 amendment to be generally applicable to all water rights in the Snake Basin, *see Idaho Power's Response Brief at 33* ("general applicability"), this point is irrelevant to the first count of the State's Motion. The State's Motion is controlled by the fact that the parties specifically intended the Swan Falls Agreement to limit the hydropower water rights at issue to flows below Milner, and by the fact that in clarifying this intent Idaho Power conceded to and agreed not to challenge the application of the 1986 amendment to the water rights in question.

As the State has previously demonstrated, the plain language of the Agreement strictly limits the legal scope and effect of the hydropower water rights at issue to flows below Milner Dam. *See generally State's Opening Brief at 25-30.*² The parties emphasized this point in

¹ The State herein responds to the arguments in 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 (Nov. 7, 2008) ("Idaho Power's Response Brief"). In the interest of brevity the State has responded to what it understands to be Idaho Power's principal arguments and assertions. In many instances the State has already responded to arguments raised in Idaho Power's Response Brief in the State's Memorandum in Response to Idaho Power Company's Motion for Partial Summary Judgment on Recharge Subordination (Nov. 7, 2008) ("State's Response Brief"). Therefore, the State incorporates by reference the arguments in the State's Response Brief.

² The only exception to this limitation was the Agreement's provision for an amendment to the State Water Plan calling for evaluation of whether "existing storage above Murphy is fully utilized" prior to approving new storage projects. Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment (Jan. 9, 2008) ("First Orr Aff."), Exhibit 30 at 26 (Exhibit 6 to the Swan Falls Agreement). This provision was relaxed in the final amendment to simply call for a determination that new storage was needed "after consideration of then existing public interest criteria." *Id.*, Exhibit 15 at 8 (page 6 of "A Resolution," *In the Matter of Policy 32 of the State Water Plan*) (Idaho Water Resource Board, Mar. 1, 1985) (attachment to minutes of Senate Resources & Environment Committee, Mar. 4, 1985). As Idaho Power points out, this provision also applies above Milner. As such, it is another exception that proves the rule: it implies that the hydropower water rights were otherwise defined to have no effect above Milner.

explaining the settlement in the Idaho Water Resource Board's public information meetings on the Agreement, and in their rejection of the Department's proposal to implement administrative rules that would have defined flows above Milner as subject to the hydropower water rights below Milner. *See id.* at 30-31, 37-44.

The parties negotiated and supported the 1986 amendment to Idaho Code § 42-203B(2) to reject the Department's interpretation and re-affirm the original intent of the Agreement. *See State's Opening Brief at 37-47.* When Senator Mike Crapo and Idaho Power attorney Tom Nelson appeared before the Senate Resources and Environment Committee in support of the 1986 legislation, Mr. Nelson specifically agreed with Senator Crapo's explanation that the amendments were **"intended to merely clarify the agreement. . . . As a result [of the Department's proposed rules], negotiations were entered into by all interested parties and this bill is the result and seems to be acceptable to the concerned parties. He again pointed out, nothing was changed in the agreement, but this is merely clarification. . . ."**³ Idaho Power has also admitted in this proceeding that the 1986 amendment was enacted to clarify section 42-203B(2) as originally enacted in 1985. *Idaho Power's Response Brief at 23* (Feb. 7, 2008). Thus, the 1986 amendment sets forth the original intent of the parties and the Agreement as to the matters addressed in the amendment.

The 1986 amendment expressly limits the water rights held in trust by the State to flows downstream from Milner: "[A]pplication of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not

³ First Orr Aff., *Exhibit 62 at 1* (Minutes of the Senate Resources & Environment Committee) (Feb. 12, 1986) (emphasis added). Senator Crapo also explained to the House Resources and Conservation Committee that the amendments were intended "to clarify language in all Sections regarding minimum stream flows, ground water and tributary waters upstream and downstream from Milner Dam, actions the Director may take to review permits relating to trust waters, etc." First Orr Aff., *Exhibit 63 at 1* (Minutes of the House Resources & Conservation Committee) (Mar. 13, 1986).

place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam.” 1986 Idaho Session Laws 309; *see also* Idaho Code § 42-203B.⁴ The amendment also provides that “no portion” of the water upstream from Milner Dam shall be considered “[f]or the purposes of the **determination** and administration” of water rights diverting from the Snake River below Milner Dam. 1986 Senate Bill 1358; Idaho Code § 42-203B(2) (emphasis added).⁵ The plain terms of the 1986 amendment expressly preclude consideration of flows above Milner as a source of water for the hydropower water rights at issue in this subcase.

It follows that the original intent of the Agreement was also to preclude any consideration of any flows upstream from Milner for purposes of defining the water rights, because the parties specifically negotiated and presented the 1986 amendment as a clarification of the original intent of the Agreement. In other words, regardless of the legal effect of the 1986 amendment in and of itself, its language conclusively removes any doubt as to the original intent of parties to the Agreement with respect to definition of the hydropower water rights at issue. In the 1986 amendment, the parties jointly confirmed that they had always intended the Agreement to define the water rights as strictly limited to flows below Milner, and as carrying no entitlement to call for or rely on flows above Milner. Because the parties specifically addressed and conclusively answered the question of intent on this point, the Court need look no further to determine the intent of the parties and the Agreement with respect to whether flows above Milner are subject to the hydropower water rights at issue in this subcase.⁶

⁴ *See also* First Orr Aff., Exhibit 60 at 2 (1986 Senate Bill 1358).

⁵ “For the purposes of the **determination** and administration of rights to the use of the waters of the Snake river 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.” Id. Idaho Code § 42-203B(2) (emphasis added).

⁶ As the State has previously explained, it has authority to “regulate and limit” hydropower water rights pursuant to Article XV § 3 of the Idaho Constitution and Idaho Code § 42-203B.

Moreover, by specifically negotiating and supporting the 1986 amendment as a clarification of the original Agreement and the 1985 legislation, Idaho Power was “conceding to and agreeing not to challenge the State’s regulatory authority.” Summary Judgment Order at 31; *see also id. at 45* (“Idaho Power previously agreed to the State’s regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings”); *id. at 46* (“as a term of the contract Idaho Power agreed to the State’s regulatory authority”). Thus, in addition to being strictly limited to flows below Milner as matter of contractual definition, the water rights at issue are also defined as such as a matter of law—a law Idaho Power helped draft and to which it voluntarily submitted as a clarification of the settlement. Idaho Power’s argument that the 1986 amendment is simply a statute of “general applicability,” Idaho Power’s Response Brief at 33, is therefore unavailing and insufficient to defeat the first count of the State’s summary judgment motion. *See Summary Judgment Order at 26* (“Accordingly, the Court bases this decision on its interpretation of the Swan Falls Agreement, including the agreement between the parties to enact I. C. § 42-203B, as opposed to deciding the matter based solely on the State’s regulatory authority”).

Idaho Power nonetheless attempts to distance itself from the 1986 amendment by asserting it “was not part of the Agreement,” Idaho Power’s Response Brief at 33, and characterizing the 1986 amendment as a solely Legislative decision. *See generally id. at 33, 34*. These contentions are directly contrary to Idaho Power’s previous support of the 1986 amendment as documented in the undisputed record. If there was any doubt that Idaho Power’s goal in this litigation is to revise the record and “chip away” at the Agreement, that doubt should

be dispelled by the Company's current attempt to disavow the 1986 amendment, which Idaho Power negotiated and supported as a clarification of the original intent of the Agreement.⁷

Idaho Power also contends that the 1986 amendment is purely administrative and not definitional. *See Idaho Power's Response at 23* ("The 1986 legislation deals with administration of water rights above and below Milner generally . . ."); *see also generally id. at 19-25* (characterizing section 42-203B(2) solely as an "administration" statute). This argument ignores the fact that the amendment expressly defines the geographic and hydrologic extent of the water rights held in trust by the State: "[A]pplication of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam." 1986 Idaho Session Laws 309; *see also Idaho Code § 42-203B*.⁸

Idaho Power's contention that the 1986 amendment is purely administrative also ignores the fact that the statute expressly applies in the "**determination**" of water rights diverting below Milner. 1986 Senate Bill 1358; Idaho Code § 42-203B(2) (emphasis added). The Company's argument improperly reads the term "determination" out of the statute, or interprets it as meaning the same thing as "administration." *See Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 900, 188 P.3d 834, 842 (2008) ("In matters of construction, this Court prefers an interpretation that gives meaning to every word, clause, and sentence"); *Ag Services of America, Inc. v. Kechter*, 137 Idaho 62, 67, 44 P.3d 1117, 1122 (2002) ("We will not construe a statute in a way that makes mere surplusage of provisions included therein.")

⁷ *See State's Opening Brief at 44-47*; *see also* First Orr Aff., Exhibit 62 (minutes of Senate Resources and Environment Committee) (Feb. 19, 1986).

⁸ *See also* First Orr Aff., Exhibit 60 at 2 (1986 Senate Bill 1358).

The term “determination” in the context of Idaho water law has a definite meaning and connotes finality. The statute that authorized the SRBA—which itself originated in the implementation of the Swan Falls settlement—provides that effective management in the public interest of the waters of the Snake River basin “requires that a comprehensive **determination** of the nature, extent and priority of the rights of all users of surface and ground water from that system be **determined**.” Idaho Code § 42-1406A(1) (uncodified) (emphasis added); *see also id.* § 42-1406B(1) (Northern Idaho adjudication) (similar). “Adjudication” is defined as an action “for the judicial **determination** of the extent and priority of water rights.” Id. § 42-1401A(5), (8), (10) (emphasis added). In a general adjudication such as the SRBA, the District Court is directed to “enter a partial decree **determining** the nature and extent of the water right . . .” Id. § 42-1412(6) (emphasis added).

Thus, the unmistakable import of the 1986 amendment’s express directive that “no portion” of the flows above Milner “shall be considered” for purposes of “the determination and administration” of water rights diverting downstream from Milner is that the parties and the Legislature intended to strictly limit the source of flows for the hydropower water rights at issue to flows downstream from Milner Dam, and to clarify that the water rights had no entitlement to call for flows above Milner Dam or otherwise seek water rights administration above Milner Dam. The 1986 amendment is not simply an “administration” statute but also controls the final definition of the hydropower water rights at issue.

Idaho Power also makes a spurious argument that defining the water rights as limited to flows below Milner “may tie the hands of the Legislature to modify or amend policy choices regarding management and administration of the river.” Idaho Power’s Response Brief at 38.⁹

⁹ Idaho Power’s new-found concern that the Court not tie the hands of the Legislature is quite ironic given that the Company seeks a ruling on the 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) that would

Decreeing the water rights at issue in this subcase with the Milner source flow limitation to which the parties specifically agreed will not prevent the Legislature from modifying policy for management and administration of the river any more than would any other water right decree entered by this Court. Developing policy and enacting laws without injuring or impairing vested property rights is a routine part of the Legislature's daily business, and decreeing the water rights in this subcase in accordance with the intent of the parties would present no special problems for the Legislature or for future management and development of the Snake River. To the contrary, it would remove a source of controversy and uncertainty, provide the finality necessary for water resource management, planning, and development to move forward, and would enable other interested parties to appropriately order their affairs and property interests.

2. Idaho Power's Argument That The 1985 Legislation Did Not Affirmatively Limit The Water Rights To Flows Below Milner Is The Same Flawed Interpretation Of The Settlement The Department Adopted And The Parties Rejected In 1986.

Idaho Power further argues that the water rights must be decreed with "water beyond the 3900 and 5600 cfs minimum flows, including water passing Milner," as part of the source, Idaho Power's Response Brief at 10, because Idaho Code § 42-203B as originally enacted in 1985 did not limit the water rights to flows below Milner. *See id.* at 24 (arguing that Idaho Code § 42-203B as enacted in 1985 did not contain the "zero flow" or "two rivers" concepts); *see also id.* at 31 (similar). This argument fails because it ignores the 1986 amendment in which, as discussed above, the parties expressly and intentionally clarified that the Agreement defined the water rights as limited to flows below Milner and as carrying no entitlement to call for flows above

tie the Legislature's hands with respect to modifying recharge policy. *See* State's Opening Brief at 49-50; *see also* Fourth Affidavit of Michael C. Orr (Oct. 17, 2008) ("Fourth Orr Aff."), Exhibit 79 at 11-26 (pages 11-26 of minutes of Senate Resources and Environment Committee) (Mar. 27, 2006) (Idaho Power representatives Greg Panter and Jim Tucker speaking in opposition to 2006 House Bill 800).

Milner. It also ignores the fact that Idaho Power conceded to and agreed not to challenge application of the 1986 amendment to the water rights at issue.

Moreover, Idaho Power's reliance on the legislation as originally enacted in 1985 is based on the same reasoning the Department cited for proposing administrative rules that would have defined flows above Milner as subject to the water rights:

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. . . . A simple reading of S 1008 (Section 42-203b(2)) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters. . . . I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters . . . ¹⁰

As previously discussed, both parties, **including Idaho Power**, emphatically rejected this interpretation of the settlement and the legislation, and negotiated and supported the 1986 amendment in order to clarify the settlement and dispose of the Department's interpretation of the original legislation. *See also State's Opening Brief at 30-44.* Thus, Idaho Power's argument is one that the Company itself flatly rejected in 1985-86, and fails for precisely the same reason the Department's original interpretation of Idaho Code § 42-203B is no longer valid: the parties drafted and supported legislation that conclusively disposed of it.

Regardless of what Idaho Power asserts now, the parties made it clear in 1985 and 1986 that the original intent of the Agreement was to define the water rights as strictly limited to flows downstream from Milner. The 1986 amendment is just as much a part of the Agreement as

¹⁰ Fourth Orr Aff., Exhibit 91 at 2 (Memorandum from Norm Young to Ken Dunn, "Legal Issues Associated With Senate Bill 1008") (June 14, 1985). In fairness to the Department, some others also recognized that the absence of an express Milner limitation in Section 42-203B(2) could be construed to mean that flows above Milner were subject to the water rights. *See* Fourth Orr Aff., Exhibit 74 at 1 (acknowledging that section 42-203B(2) as originally enacted "may be interpreted in two ways") (letter from John W. Keyes III, United States Bureau of Reclamation, to A. Kenneth Dunn, Idaho Department of Water Resources) (Jan. 27, 1986); *see also id.*, Exhibit 55 at 4 (attorney for Protective Union discussing "the department's view of the legislation") (page 7 of transcript of public meeting on proposed rules and regulations for water allocation) (Jan. 14, 1986) (Idaho Falls).

Exhibit 7B. Indeed, through the 1986 amendment the parties clarified what they had always intended Exhibit 7B and the 1985 version of Idaho Code § 42-203B to actually mean.¹¹

3. The 1994 Amendments Did Not Repeal The 1986 Amendment Or Re-Define The Water Rights To Include Flows Above Milner Dam.

Idaho Power also argues that regardless of the 1986 amendment, the 1994 amendments to Idaho Code §§ 42-234(2) and 42-4201A(2) make recharge water rights diverting upstream from Milner Dam secondary to the hydropower water rights at issue in this case. Idaho Power's Response Brief at 39. This argument fails because nothing in the 1994 amendments expressly repeals or amends the 1986 amendment to Idaho Code § 42-203B(2). The 1986 amendment unequivocally limits the legal scope and effect of the hydropower water rights at issue strictly to flows downstream from Milner. The 1994 amendments do not purport to repeal or amend the 1986 amendment and may not be presumed to have impliedly done so or to have impliedly re-defined the source of the hydropower water rights so as to extend it to flows above Milner. *See Thomas v. Med. Center Physicians*, 138 Idaho 200, 209, 61 P.3d 557, 566 (2002) ("This Court disfavors statutory amendment by implication absent clear, unequivocal legislative intent").

The principle reason for the 1986 amendment was precisely to prevent an extension or re-definition of the water rights to encompass flows above Milner, which was imminent under a flawed administrative interpretation of the settlement. The 1994 Legislature must be presumed to have been aware of this purpose and that under Idaho law the 1994 amendments would not be interpreted as reversing the 1986 amendment or re-defining and expanding the source of the water rights absent a clear and unequivocal legislative statement of such intent. McCann v. McCann, 138 Idaho 228, 236, 61 P.3d 585, 593 (2002) ("Statutes are construed under the

¹¹ This is also why Idaho Power's objection to the 1986 amendments as being enacted after the Agreement was signed is unavailing. The 1986 amendment merely clarified the original intent of the Agreement and changed nothing in it. The fact that this clarification came after the signing of the Agreement does not negate the validity or significance of the clarification.

assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed”) (internal quotation marks and citation omitted).

This conclusion finds support in the comment Sherl Chapman of the Idaho Water Users Association made to the Senate Resources and Environment Committee in 1994 when it took up the package of recharge legislation of which the amendments were one small part. Mr. Chapman commented that the amendments were intended “to protect and verify” the settlement,¹² and the specifically agreed-upon Milner divide was one of the settlement’s principal elements—important enough to warrant the clarifying 1986 amendment. *See generally State’s Response Brief at 9-17.* Interpreting the 1994 amendments to ignore or reverse the Milner divide would significantly restructure the settlement, not “protect and verify” it—particularly from the standpoint of Mr. Chapman and his organization, which strongly supported the 1986 amendment. *See generally id. at 51-52.*

Idaho Power’s contention that “protect and verify” means that the Agreement was intended to bar recharge subordination is a circular argument. The underlying question posed by the 1994 amendments is whether the Agreement itself precludes subordination to recharge, and by pointing to the 1994 amendments as proof of what the Agreement means Idaho Power is simply trying to bootstrap the 1994 amendments into an agreed-upon term of the settlement itself.

Further, the 1994 amendments can and should be harmonized with the 1986 amendment and with the agreed-upon definition of the water rights as limited to flows below Milner Dam. *See State v. Housel, 140 Idaho 96, 104, 90 P.3d 321, 329 (2004)* (“[i]t is the duty of the courts, in construing statutes, to harmonize and reconcile laws whenever possible and to adopt the

¹² Fourth Orr Aff., Exhibit 78 at 23 (page 1 of minutes of the Senate Resources and Environment Committee) (Mar. 11, 1994).

construction of statutory provisions which harmonize and reconciles them with other statutory provisions) (internal quotation marks and citation omitted). The 1994 amendments can be applied consistently with the 1986 amendment by applying them to recharge and hydropower water rights diverting below Milner but not as to hydropower water rights below Milner and recharge water rights above Milner. This is the most logical interpretation and application of the 1994 amendments in light of the fact that in the 1986 amendment the Legislature effectively severed the Snake River at Milner for purposes of defining and administering the hydropower water rights at issue in this subcase. Moreover, because Idaho Power conceded to and agreed not to challenge this Legislative division of the river into two separate systems for purposes of defining and administering the hydropower water rights at issue in this subcase, the Company may not challenge any limiting effect the 1986 amendment may have on the application of the 1994 amendments to those water rights.

This interpretation is also consistent with the language of the 1994 amendments, which applies to hydropower water rights “that may otherwise be subordinated” under the Swan Falls settlement. The Swan Falls Agreement did not provide for the hydropower water rights to be “subordinated” to any water rights above Milner Dam, because that would have implied a pre-existing entitlement to call for flows from above Milner, which would have been in direct conflict with the parties’ express agreement to strictly limit the legal scope and effect of the water rights to flows below Milner. The concept of “subordination” has no meaning in this context because it assumes that an underlying legal entitlement to call for flows above Milner has been overridden or suspended, when in fact no such entitlement ever existed under the Agreement.¹³ The Legislature’s reference to hydropower rights “that may otherwise be

¹³ This is also the reason Idaho Power is incorrect in characterizing the State’s Motion as seeking a ruling that the hydropower water rights at issue are “subordinate to all future uses above Milner.” Idaho Power’s Response at

subordinated” under the Swan Falls settlement signals its intent to preserve the Milner divide as agreed to by the parties and as codified in the 1986 amendment.

Even if the 1994 amendments could not be interpreted to avoid conflict with the 1986 amendment, Idaho Power’s argument that the 1994 amendments should prevail is legally incorrect. The 1986 amendment was inserted in Idaho Code § 42-203B, the “centerpiece” legislation of the Swan Falls settlement,¹⁴ while the 1994 amendments were a small part of a large package of general aquifer recharge legislation and inserted into statutes that were never part of the settlement. The 1986 amendment was specifically negotiated and supported by the parties one year after the implementing legislation was enacted in order to clarify the parties’ original intent on a pivotal element of the settlement. It was the highly visible culmination of extensive comment and discussion by the parties and the public regarding the nature and scope of the settlement. In contrast, the 1994 amendments, whose precise origin is at best murky and uncertain, *see State’s Response Brief at 54-58*, appeared ten years later and without joint negotiation or review by the parties. The 1994 amendments flew largely under the radar, and their relationship to the settlement received minimal consideration or review by the Legislature and the public. Clearly, the 1986 amendment is more specific with respect to the Swan Falls settlement and should control over the 1994 amendments if the amendments are deemed to be in conflict. Estate of Collins v. Geist, 143 Idaho 821, 827, 153 P.3d 1167, 1173 (2007) (“It is well

31. The State’s Motion seeks, rather, a threshold determination that flows above Milner are not part of the source of the hydropower water rights at issue here, and that those water rights do not include any legal right or entitlement to call for flows upstream from Milner.

¹⁴ See First Orr Aff., Exhibit 28 at 4 (page 59 of JOURNAL OF THE STATE SENATE—ORGANIZATIONAL SESSION AND FIRST REGULAR SESSION OF THE FORTY-EIGHTH LEGISLATURE OF THE STATE OF IDAHO—1985 (“Statement of Legislative Intent—S 1008”)) (“This bill, Senate Bill 1008, is the centerpiece of the legislation which is contemplated by the agreement”). Idaho Power’s contention that the Milner divide was not important to the settlement because it was not discussed in the “Statement of Legislative Intent” is unavailing. Immediately after the Senate Resources and Environment Committee approved the “Statement of Legislative Intent,” committee member Senator Ringert stated that the approval “should not be regarded as addressing anything except what is specifically set out in this statement of intent. There could very well be other matters within the bill that are not absolutely crystal clear.” Chairman Noh agreed: “That should be well understood.” First Orr Aff., Exhibit 40 at 6 (page 13 of transcript of meeting of Senate Resources and Environment Committee) (Feb. 1, 1985).

established that [a] specific statute . . . controls over a more general statute when there is any conflict between the two”) (internal quotation marks and citation omitted).

4. The Swan Falls Agreement Does Not Bar The State From Amending Or Repealing The 1994 Amendments.

While the 1994 amendments do not make recharge water rights diverting above Milner secondary to the hydropower water rights at issue, the State agrees that the 1994 amendments do make recharge water rights diverting below Milner and above Murphy secondary to the hydropower water rights, except for recharge water right 37-7842, because Idaho Power subordinated to it as a term of the Swan Falls Agreement and reaffirmed that subordination, notwithstanding the effect of sections 42-234(2) 42-4201 and 42-4201A, in the “Stipulation” of April 11, 2006.¹⁵ The State’s second count for summary judgment, however, seeks a ruling recognizing that the State retains the authority to amend or repeal the 1994 amendments and thereby authorize subordination to recharge of the water rights held in trust by the State. *See* State’s Motion at 2 (seeking a ruling that the State “has the right to subordinate, to the extent authorized by state law,” the water rights held in trust by the State to any water right diverting between Milner and Murphy, including recharge water rights).

Idaho Power argues that the second count of the State’s Motion would give the State a “blank check to amend the law and thus revise the Swan Falls Agreement,” Idaho Power’s Response at 41-42, and would change “the contractual recognition of the company’s water rights at the Murphy gauge.” *See id.* at 41-42 & n.61 (discussing Tom Nelson’s explanation of Paragraph 17 to the House Resources and Environment Committee).¹⁶ Idaho Power also argues that the contractual provisions of the Swan Falls Agreement control subordination of the water

¹⁵ *See* State’s Opening Brief at 54-56; State’s Response Brief at 17-19.

¹⁶ *See also* First Orr Aff., Exhibit 20 at 1 (minutes of the House Resources and Environment Committee) (Feb. 11, 1985) (statements of Tom Nelson).

rights held in trust by the State. See id. at 41 (“the Agreement alone establishes the circumstances under which Idaho Power’s water rights may be subordinated”). These arguments ignore this Court’s Summary Judgment Order.

This Court held in its Summary Judgment Order that the contractual provisions of the Swan Falls Agreement simply define the water rights as a single cumulative entitlement to flows as measured at the Murphy gauging station, and divide that cumulative right into “unsubordinated” and “subordinatable” portions. See Summary Judgment Order at 28 (“Paragraph 7 then defines Idaho Power’s various hydropower water rights as a single cumulative right and then apportions the right between the unsubordinated and subordinated portions”). The trust, on the other hand, was **not** created by the contractual provisions of the Agreement. See id. at 29 (“Paragraphs 7A through E do not refer to a trust or division of ownership of the subordinated portions of Idaho Power’s rights into legal and equitable title”). “Rather, the rights are held in trust *by operation of law.*” Id. at 38 (*italics in original*).

Idaho Power attorney Tom Nelson drew the same distinctions between the contractual provisions of the Agreement and the trust legislation in the Company’s written comments on the administrative rules the Department proposed to implement the “public interest criteria”:

Rule 1,5,1. states that the October, 1984 agreement places certain water in trust. This is not correct. The agreement did not place any waters in trust. The trust was created by an act of the Legislature. This is more than a technical distinction, since **the agreement itself defines the extent of the Company’s water rights above the Murphy Gage and below Milner Dam, as unsubordinated, subject to subordination. The legislation has the effect of placing these “subordinatable” water rights in trust pending their actual subordination to other uses. However, only the statute has that effect, not the agreement.**¹⁷

¹⁷ Fourth Orr Aff., Exhibit 71 at 2 (page 1 of “Idaho Power’s Comments on Proposed Water Allocation Rules”) (enclosed with letter from Thomas G. Nelson to A. Kenneth Dunn, Idaho Department of Water Resources) (Jan. 27, 1985) (*emphasis added*).

Further, this Court held in its Summary Judgment Order that with respect to the water rights held in trust by the State that Idaho Power “was simply conceding to and agreeing not to challenge the State’s regulatory authority.” Summary Judgment Order at 31; *see also id. at 45* (“Idaho Power previously agreed to the State’s regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings”); *id. at 46* (“as a term of the contract Idaho Power agreed to the State’s regulatory authority”).

These holdings and Idaho Power’s record statements foreclose its current arguments that the contractual provisions of the Agreement control subordination of the water rights held in trust by the State and that the parties contractually barred subordination to recharge. The Court has determined that it is the State’s regulatory authority, rather than the contractual provisions of the Agreement, that governs subordination of the water rights held in trust by the State and that Idaho Power conceded to and agreed not to challenge this authority. Further, under settled law the State could not contract away or delegate its regulatory authority via the Swan Falls Agreement. *See State’s Response Brief at 43-45*. The Legislature therefore remains free to change State law governing subordination and administration of the water rights held in trust by the State, including but not limited to providing for subordination of the water rights held in trust by the State to recharge. *See generally id. at 45-46*.

The Agreement was never intended to prevent the Legislature from amending State law governing subordination of the water rights held in trust by the State. This is evident from Paragraph 17 of the Agreement, the parties’ explanations of the settlement to the public and the Senate and House committees, and the Statement of Legislative Intent for Idaho Code §§ 42-203B and 42-203C. *See State’s Response Brief at 46-48*.

Idaho Power nonetheless argues that Tom Nelson's explanation of Paragraph 17 to the House Resources and Conservation Committee demonstrates that the Legislature is contractually barred from changing State law governing subordination. Idaho Power bases this contention on the fact that while Mr. Nelson explained that the Legislature retained the authority to "undo this whole thing next year," he also said that it did not have the power to change "the contractual recognition of the Company's water right."¹⁸ This is another circular argument that assumes the conclusion it seeks to prove: Idaho Power assumes that "the contractual recognition of the Company's water right" includes a right to prevent the Legislature from changing the law. Not only is this argument logically flawed, it is also contrary to Idaho law and this Court's holding that Idaho Power simply conceded to and agreed not to challenge the State's regulatory authority with respect to the water rights held in trust by the State. As this Court held with respect to Paragraph 17: "As such, if the status of the State's regulatory authority changed in the future, it would not at affect the status of Idaho Power's rights as originally agreed." Summary Judgment Order at 32.

Moreover, Mr. Nelson's other statements in the Swan Falls record demonstrate that he understood "the contractual recognition of the Company's water right" to simply consist of an unsubordinated right¹⁹ to the seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. at Murphy.²⁰ In contrast, when speaking of subordination of the water rights held in trust by the State, Mr. Nelson typically referred to standards set by the "legislation" or the "statute," not by the

¹⁸ First Orr Aff., Exhibit 20 at 1 (page 1 of minutes of House Resources and Conservation Committee) (Feb. 11, 1984); *see also* Summary Judgment Order at 36-37.

¹⁹ "Unsubordinated" except for the specific exceptions in Paragraphs 7(C) and 7(D) of the Swan Falls Agreement. *See* First Orr Aff., Exhibit 30 at 4 (page 4 of the Swan Falls Agreement).

²⁰ *See, e.g.,* First Orr Aff., Exhibit 40 at 7 (pages 18-19 of transcript of Senate Resources and Environment Committee meeting) (Feb. 1, 1985) (discussing "contractual recognition of the company's water rights"); *id.* at 29 ("the contractual right").

“contract.”²¹ Mr. Nelson also emphasized to the Senate Resources and Environment Committee that the contract did not prohibit any particular kind of development, and that adverse impacts on hydropower would be accounted for by the “public interest criteria” analysis rather than contractual prohibitions on future development:

The statute and the contract don’t prohibit development. They’re not intended to and they don’t. They simply say, look, you may have an adverse impact on hydropower generation. That element of the public interest has to be addressed before you have further development. And if it’s addressed and it’s found to be in the public interest that you have that impact on hydropower, that it’s in your state’s overall best interest to proceed with development, you proceed with development. But that is a very important element of this plan, not just the river flows but also the public interest.²²

This Court’s Summary Judgment Order, the express terms of the Agreement, and the settlement implementation record all compel the conclusion that the Legislature retained authority to change the subordination criteria in State law. Idaho Power’s contention that this would amount to giving the State a “blank check to amend the law and thus revise the Swan Falls Agreement” is nonsense. Idaho Power’s Response at 41-42. The State’s authority to amend State law arises from the constitution, not from the Agreement, and the State did not in the Agreement contractually limit the State’s constitutional authority to amend State law regarding subordination of the “subordinatable” water rights held in trust by the State—nor could it have lawfully done so.²³ Idaho Power’s arguments in opposition to the State’s second count for summary judgment must be rejected.

5. Idaho Power’s Argument That The Agreement Incorporated The 1984 Version Of Idaho Code § 42-4201A(2) Is Contrary To The Agreement, The Intent Of The Parties, The Company’s Subsequent Actions, Its Current Arguments Regarding

²¹ See First Orr Aff., Exhibit 40 at 9 (page 25 of transcript of Senate Resources and Environment Committee meeting) (Feb. 1, 1985) (“the standard set by the legislation”); *id.*, Exhibit 37 at 10 (page 21-22 of transcript of Senate Resources and Environment Committee) (Jan. 18, 1985) (“it’s reallocated pursuant to the statute”).

²² First Orr Aff., Exhibit 37 at 8 (page 15 of transcript of Senate Resources and Environment Committee) (Jan. 18, 1985).

²³ See generally State’s Response Brief at 43-44.

The 1994 Amendments, And In Any Event Does Not Bar Subordination To Recharge Of The Water Rights Held In Trust By The State.

Idaho Power also opposes the State's Motion on the ground that the law existing when a contract is executed must be read into the agreement. Idaho Power further argues that the 1984 version of Idaho Code § 42-42-4201A(2) categorically provided that "recharge water rights are secondary to hydropower water rights." Idaho Power's Response Brief at 19; see also *id.* at 40, 42 (similar). It should be noted at the outset that even assuming, *arguendo*, that the relevant provisions of sections 42-4201(2) and 42-4201A(2) as they existed in 1984 had been incorporated in the Agreement—which they were not for reasons discussed below—the Agreement would not have prohibited subordination of the water rights held in trust by the State to recharge.

The reason for this is that the plain terms of the 1984 statutes applied only to hydropower water rights "held by any privately owned electrical generating company," 1978 Idaho Sess. Laws 726 (Idaho Code § 42-4201(2)); 1982 Idaho Sess. Laws 539 (Idaho Code § 42-4201A(2)), not those held by the State or a governmental entity. One of the central elements of the Swan Falls settlement was that it specifically provided for the "subordinatable" water rights for flows exceeding the seasonal minimum flows of 3,900 c.f.s. and 5,600 c.f.s. as measured at Murphy to be "held in trust by the state of Idaho." Idaho Code § 42-203B(2); see also Summary Judgment Order at 31 ("This Court holds that Exhibit 7B clearly and unambiguously provides that any portion of Idaho Power's water rights in excess of the minimum flows are held in trust by the State, by and through the Governor, for the use and benefit of Idaho Power for power purposes and of the people of the State of Idaho").²⁴

²⁴ See also First Orr Aff., Exhibit 30 at 29 (Exhibit 7B to the Swan Falls Agreement).

The Agreement did not call for an amendment to section 42-4201A so that it would also apply to hydropower water rights “held in trust by the State of Idaho” even though, as Idaho Power admits, the parties must be assumed to have been aware in 1984 that the statute only applied to hydropower water rights “held by any privately owned electrical generating company.” 1978 Idaho Sess. Laws 726 (Idaho Code § 42-4201(2)); 1982 Idaho Sess. Laws 539 (Idaho Code § 42-4201A(2)). Thus, it must also be assumed that the parties did not intend the relevant provisions sections of 42-4201(2) and 42-4201A(2) as they existed in 1984 to apply to the water rights held in trust by the State, even if those provisions were incorporated into the Agreement as a fixed term of the settlement. *See generally* State’s Response Brief at 46-49.

Beyond this, however, it is clear the Agreement did not incorporate the recharge-hydropower administration provisions of Idaho Code §§ 42-4201(2) and 42-4201A(2) as they existed in 1984 because a contract does not incorporate existing law if “a contrary intent is disclosed.” Primary Health Network, Inc. v. State, 137 Idaho 663, 667, 52 P.3d 307, 310 (2002). Such a contrary intent is part and parcel of the Agreement because Idaho Power was simply conceding to and agreeing not to challenge the State’s regulatory authority to subordinate the water rights held in trust by the State. Summary Judgment Order at 31; see also id. at 45, 46 (similar). It was settled law at the time of the Agreement that the State’s regulatory authority could not be contractually limited or delegated. State’s Response at 43-49. Thus, with respect to the “subordinatable” water rights held in trust by the State, the settlement was specifically designed to allow the State to alter the standards for subordination by changing State law.

It would have been entirely contrary to this structure for the Agreement to have incorporated as a fixed and immutable term an existing statutory provision making recharge water rights secondary to hydropower water rights. Thus, “contrary intent” is inherent in the

very structure and purpose of the settlement, and the recharge-hydropower administration provisions of Idaho Code §§ 42-4201(2) and 42-4201A(2) as they existed in 1984 may not be read into the settlement. *Primary Health Network, Inc.*, 137 Idaho at 667, 52 P.3d at 310.

Further, Paragraph 17 of the Agreement expressly provides that the Agreement remains valid even if State law changes.²⁵ This means, as Idaho Power attorney Tom Nelson explained to the House Resources and Conservation Committee, the Legislature retains its prerogative “to undo this whole thing,” and the only thing it cannot change “is the contractual recognition of the company’s water rights at the Murphy gauge.”²⁶ Given that the Agreement specifically allowed for changes in the very legislation the parties proposed to implement the settlement, it cannot even be viewed as incorporating the implementing legislation. It follows that the Agreement could not have been intended to incorporate other statutory provisions that the parties did not even identify or propose to amend for purposes of implementing the settlement—such as the recharge-hydropower administration provisions of Idaho Code §§ 42-4201(2) and 42-4201A(2).

Idaho Power’s argument that the relevant provisions of Idaho Code §§ 42-4201(2) and 42-4201A(2) as they existed in 1984 became part of the Agreement is also inconsistent with the Company’s reliance on the 1994 amendment to section 42-4201A(2). The 1994 amendment substantially altered the language of the recharge-hydropower administration provision of Idaho Code § 42-4201A(2) as it existed in 1984. Had that provision been incorporated into the Agreement as a fixed term of the settlement, it would have violated the settlement to alter the language of section 42-4201A(2). The fact that the State and Idaho Power did not protest the 1994 amendment on this ground demonstrates that neither party viewed the recharge-

²⁵ First Orr Aff., Exhibit 30 at 8 (paragraph 17 of the Swan Falls Agreement).

²⁶ *Id.*, Exhibit 20 at 1 (page 1 of minutes of House Resources and Conservation Committee) (Feb. 11, 1985) (statements of Tom Nelson).

hydropower administration provisions of Idaho Code §§ 42-4201(2) and 42-4201A(2) as they existed in 1984 to have been incorporated into the Agreement as fixed terms of the settlement.

Finally, Idaho Power's subsequent failure to protest recharge diversions as violations of the Swan Falls Agreement demonstrates that the Company's recharge argument is a recent construct. For instance, Idaho Power recently produced documents to the State demonstrating that in 1995 the Company was carefully tracking recharge diversions above Swan Falls,²⁷ and calculating the quantity of recharge diversions that had taken place after flows at Murphy had fallen below 8,400 c.f.s.²⁸ Yet, the Company never protested or objected to any of these diversions as violations of the Swan Falls Agreement.

6. Idaho Power's "Management Tool" Argument Does Not Preclude Subordination To Recharge.

Idaho Power further contends that the parties did not contemplate subordination of the hydropower water rights to recharge because "at the time of the Agreement . . . [recharge] was viewed as a water management tool under the State's Water Plan—not as a use to which the Company's rights could be subordinated . . ." Idaho Power's Response Brief at 4; see also id. at 12, 15 (characterizing recharge as a "management tool"). The fallacy in this contention is evident in the fact that Idaho Power expressly subordinated the hydropower water rights at issue to three recharge water rights as a term of the Agreement. See State's Opening Brief at 54-56. Had the parties viewed recharge as a "management tool" rather than a "beneficial use" to which the water rights could be subordinated, the Agreement would have included a "management

²⁷ See Sixth Affidavit of Michael C. Orr (Nov. 21, 2008) ("Sixth Orr Aff."), Exhibit 2 (aquifer recharge reports for 1995). The two exhibits to the Sixth Orr Affidavit are copies of documents that Idaho Power did not produce to the State until November 10, 2008, which was after the last day for filing the State's Opening Brief on the State's Motion and the State's Response Brief.

²⁸ See id. at 1 (Table Entitled "Total Water Diverted For Recharge," with hand calculations in margin).

tool” exception and Idaho Power would never have agreed to subordinate to these three recharge water rights.

Idaho Power’s “management tool” argument is nothing more than a concept the Company has manufactured for this litigation, a newly-minted subordination limitation that finds no support in the settlement record. Idaho Power has simply appropriated the term “management tool,” which appears nowhere in the Agreement, presents it as a term of art, and argues that it should be read into the settlement as an affirmative limitation on the State’s authority to subordinate the water rights held in trust, regardless of the public interest.

Further, there is no logic in Idaho Power’s contention that the settlement did not allow for subordination to a “management tool.” There is nothing mutually exclusive about the terms “management tool” and “beneficial use,” and nothing in the settlement or Idaho law precludes establishing a water right for a “management tool” so long as the application for a water right otherwise satisfies State law. This is evidenced by the three recharge water rights to which Idaho Power voluntarily subordinated. *See State’s Opening Brief at 54-56.*

Idaho Power’s “management tool” argument is also contrary to the settlement’s goal of providing the State with the legal authority and technical tools to effectively manage the river-aquifer system, which was an important objective of the settlement.²⁹ Idaho Power’s “management tool” argument runs entirely counter to this purpose and presumes that the State—whose concern had been ensuring that management decisions and “watermaster” authority would

²⁹ See First Orr Aff., Exhibit 15 at 4 (page 2 of “A Resolution,” *In the Matter of Policy 32 of the State Water Plan*) (Idaho Water Resource Board, Mar. 1, 1985) (attachment to minutes of Senate Resources & Environment Committee, Mar. 4, 1985) (“The Snake River Plain aquifer which provides this [ground-water discharge] must therefore be managed as an integral part of the river system”); *see also* Third Affidavit of Michael C. Orr (Jul. 18, 2008) (“Third Orr Aff.”), Exhibit 25 at 12 (page 42 of transcript of Idaho Water Resource Board meeting on proposed State Water plan amendments) (2:00 p.m., Jan. 30, 1985) (Burley) (“That’s why I asked the question about the hydrologic studies and economic studies funding that, to me, are the backbone of providing the ability for the department to make evaluations of how beneficial this new storage, how can you better manage the aquifer river system and not [go below] 3900.”) (Dr. Charles Brockway).

reside with the State rather than the Company—simply agreed to hand Idaho Power veto authority over an important tool for coordinated river-aquifer management. This contention is implausible and contrary to the trust compromise, under which the State agreed to Idaho Power's demand for "subordinatable" water rights only if the State was firmly in control of subordination criteria and decisions. *See generally* State's Response Brief at 24-27.

Idaho Power's reliance on the fact that recharge subordination is prohibited because the parties agreed in the Framework to study recharge also fails because it is an implausible interpretation of the language and structure of the Framework, as the State has pointed out. *See State's Response Brief at 36-38*. Moreover, as the parties' explanations of the settlement demonstrate, the agreement to study recharge (and to undertake other hydrologic and economic studies) was simply intended to ensure that the State, as manager of the river-aquifer system and legal owner of the water rights held in trust, had the information necessary to make informed management and subordination decisions.³⁰ Idaho Power's argument that the agreement to "study" recharge was meant to bar subordination is contrary to the Framework, the Agreement and the settlement record.

In a related argument, Idaho Power asserts that "[r]echarge is, and always has been, subordinate to hydropower water rights on the Snake River" under Idaho law. Idaho Power's Response Brief at 40; *see also id. at 19, 34, 38, 42* (similar). This argument relies on a mischaracterization of past and present versions of Idaho Code §§ 42-234, 42-4201 and 42-

³⁰ As Pat Kole explained in the IWRB public information meeting in Lewiston on November 1, 1984:

Finally, we wanted to make sure that the state would be in a position to take responsible management action in the future. And so what we have set forth here is a basis upon which further studies, both of economic and of hydrologic factors, can take place so that we will be able to wisely manage the water resource that we have been blessed with.

First Orr Aff., Exhibit 46 at 4-5 (pages 8-9 of transcript of Idaho Water Resource Board public information meeting) (Nov. 1, 1984) (Lewiston)

4201A, which never categorically subordinated all recharge uses to all hydropower uses. Rather, these statutes were selective and only provided for recharge to be secondary to either hydropower water rights “held by any privately owned electrical generating company,” 1978 Idaho Sess. Laws 726 (Idaho Code § 42-4201(2)); 1982 Idaho Sess. Laws 539 (Idaho Code § 42-4201A(2)), or to hydropower water rights “that may otherwise be subordinated” under the Swan Falls settlement. Idaho Code §§ 42-234(2), 42-4201A(2).

Idaho Power’s argument also ignores the history of recharge and years of legislative efforts to promote it.³¹ As demonstrated by many of the documents the State cited and quoted in the historic background discussion of the State’s Opening Brief, recharge was the subject of considerable interest and discussion for a number of years prior to the Swan Falls settlement.³² It has long been recognized as a promising means of capturing surplus or excess runoff, flood waters and non-irrigation season flows, and as generally enabling optimum development of the State’s water resources.³³ As a practical matter, however, recharge always faced considerable legal, technical and financial obstacles that impeded realization of its potential benefits.³⁴ The

³¹ See, e.g., Fourth Orr Aff., Exhibit 79 at 51 (page 51 of transcript of meeting of the Senate Resources and Environment Committee) (Mar. 27, 2006) (“I guess the trouble I have with this [is that] I sat through those [1993 Recharge] committee hearings. We wanted recharge. The whole motive behind that piece of legislation . . . was recharge.”) (Senator Cameron) (first brackets and ellipsis in original, second brackets added); see also Fifth Affidavit of Michael C. Orr (Nov. 7, 2008) (“Fifth Orr Aff.”), Exhibit 7 at 3 (1993 House Concurrent Resolution No. 26) (authorizing appointment of a committee “to undertake and complete a study regarding recharge of Idaho’s aquifers and [to] make recommendations for implementation of a recharge policy”).

³² See, e.g., Fourth Orr Aff., Exhibit 7 at 7 (page 6 of “Future Upstream Depletion Above Hells Canyon,” by Lynn Crandall) (Apr. 6, 1953) (discussing recharge); *id.*, Exhibit 8 at 32-38 (Crandall Examination at 10316-10322) (discussing recharge); *id.*, Exhibit 13 at 10 (page 9 of “Information Bulletin on a Study of Water Resource Development Possibilities – Upper Snake River Basin”) (U.S. Bureau of Reclamation & U.S. Army Corps of Engineers) (Sept. 29, 1960) (discussing recharge); *id.*, Exhibit 16 at 1 (Letter from Robert E. Smylie, Governor of Idaho, to the Honorable Stewart L. Udall, Secretary of the Interior) (Dec. 7, 1966) (discussing future irrigation development above Milner, including “ground water recharge”).

³³ See *supra* note 63; see also Fifth Orr Aff., Exhibit 7 at 10 (page 4 of minutes of 1993 Recharge Committee for May 27, 1993) (“Cochairman Barraclough . . . strongly feels that such [recharge] efforts are the single most prudent action to take to utilize waste flood waters . . .”).

³⁴ See, e.g., Fourth Orr Aff., Exhibit 8 at 34 (Crandall Examination at 10318) (“Any of these projects would be quite costly”); Fifth Orr Aff., Exhibit 7 at 11-13 (pages 5-7 of minutes of 1993 Recharge Committee for May 27, 1993) (discussion of issues and potential problems) (Dr. Charles Brockway); *id.* at 14 (page 8 of minutes of 1993 Recharge Committee for May 27, 1993) (“Right now, statute provisions that provide for recharge projects are not

statutes on which Idaho Power relies were enacted not to relegate recharge to a permanently inferior status but rather to help it overcome those obstacles and judiciously promote the development of recharge projects. Idaho Power's characterization of recharge as an inherently disfavored use is contrary to the long-established recognition of its benefits and the Legislature's attempts to support and promote recharge development.

7. The State's Motion Asserts That The Water Rights Should Be Defined As Limited To Flows Below Milner, Not That The State Water Plan's Milner "Zero Flow" Policy Should Be An Element Of The Water Rights.

Rather than responding to the first count of the State's Motion, Idaho Power attempts to defeat it by re-characterizing the relief sought by the State. Idaho Power asserts that the State seeks to "includ[e] the State's 'zero flow at Milner policy' as an 'element'" of the water rights in question, Idaho Power's Response Brief at 3, and "to elevate its 'zero flow' or 'two rivers' policy of general applicability to an element of the Company's Swan Falls rights." Id. at 4; *see also id.* at 3, 17, 18, 23, 24, 25, 26, 27, 29, 31, 32, 33, 40 (characterizing the State's Motion as seeking a ruling that the zero flow "policy" is an element of the water rights and/or arguing against such a position). Yet, Idaho Power fails to quote any portion of the State's Motion or briefing making such an assertion, nor could it, because the State has never taken such a position.

The State's Motion seeks a ruling "[t]hat Idaho Power Company agreed and/or conceded that the water rights at issue in this consolidated subcase are defined to exclude the flows of the Snake River or surface water or ground water tributary to the Snake River upstream from Milner Dam, and carry no right or entitlement to seek curtailment or administration of rights to the use of the waters of the Snake River or surface water or ground water tributary to the Snake River

adequate to really address the whole big picture") (Dr. Charles Brockway); *see also generally* Exhibit B to Affidavit of Michael A. Gheleta in Support of Idaho Power Company's Opening Brief in Support of Motion for Partial Summary Judgment on Recharge Subordination (Oct. 17, 2008) ("Feasibility of Large Scale Managed Recharge of the Eastern Snake Plain Aquifer System") (IDWR, Dec. 1999);

upstream from Milner Dam, including ground water recharge water rights.” State’s Motion at 1-

2. Nothing in the State’s Motion or its briefing asks the Court to incorporate any policy from the State Water Plan into the Court’s determination of the hydropower water rights at issue, or to make any such policy an “element” of the water rights.

Idaho Power’s strawman argument that the State seeks to make the State Water Plan’s Milner “zero flow” policy itself an element of the water rights apparently rests on the State’s assertion that “[t]he parties intended the ‘zero flow’ provision of the Agreement to have a specific contractual meaning with respect to the definition of the water rights. The ‘zero flow’ provision of the Agreement was a term of the parties’ bargained-for exchange and an element of the definition of the hydropower water rights that were at the center of the controversy.” State’s Opening Brief at 25-26; see also Idaho Power Response Brief at 5 (citing page 26 of the State’s Opening Brief). Contrary to Idaho Power’s contention, this argument does not call for making any policy of the State Water Plan an element of the water rights. Rather, the State’s argument simply points out that the parties understood and intended their agreement to support retention of the minimum flow of zero at Milner in the State Water Plan to demonstrate that they intended to preclude consideration of flows upstream from Milner for purposes of the determination and administration of the hydropower water rights at issue.

This understanding is well-documented in the undisputed record. As Idaho Power attorney Tom Nelson stated in a public information meeting concerning the administrative rules to implement the “public interest criteria”: “I don’t think that the surface water diversions for recharge above Milner are part of the trust waters . . . [trust] water has to be made available by reason of a subordination condition, and **there’s no water right at Milner. That’s a zero flow**

under the state water plan.”³⁵ In Idaho Power’s written comments on the rules, Mr. Nelson further stated: “[I]f the intent of the rules is to implement the Swan Fall Agreement, then the surface water flows above Milner should be considered not to be trust waters. **The agreement is clear in its limitations on its impact above Milner.**”³⁶

Mr. Nelson’s partner, John Rosholt, who had also represented Idaho Power in the Swan Falls litigation,³⁷ stated in his written comments on the rules: “[I]t’s been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam. . . . **for the reason that the minimum stream flow at Milner is zero.**”³⁸ Attorney General Jim Jones also stated in a press release and his written comments on the rules that the zero flow provision of the Agreement was intended to mean the water rights would be limited to flows below Milner: “[T]he parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows . . . **The reason for this conclusion is that the parties retained the minimum streamflow at Milner at zero.**”³⁹ Moreover, as the State has pointed out in its previous briefing on the State’s Motion and in response to Idaho Power’s Partial Motion for Summary Judgment on Recharge Subordination,

³⁵ Fourth Orr Aff., Exhibit 48 at 7 (transcript of public information meeting) (May 23, 1985) (Twin Falls) (emphasis added); *see also id.*, Exhibit 49 (statement of “Nelson”) (similar).

³⁶ *Id.*, Exhibit 71 at 2 (page 1 of “Idaho Power’s Comments on Proposed Water Allocation Rules”) (enclosed with letter from Thomas G. Nelson to A. Kenneth Dunn, Idaho Department of Water Resources) (Jan. 27, 1986) (emphasis added).

³⁷ *See, e.g., id.*, Exhibit 24 at 5 (page 5 of Plaintiff’s Memorandum In Support Of Motion To Re-Consider And Amend Summary Judgment, *Idaho Power v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Feb. 19, 1980) (signed by John A. Rosholt).

³⁸ *Id.*, Exhibit 69 at 1 (page 1 of letter from John A. Rosholt to Mr. Kenneth Dunn) (Oct. 30, 1985) (emphasis added). Mr. Rosholt also stated that “certainly it was the perception of those who participated in the Swan Falls Settlement Agreement and the resulting legislation that trust water does not exist above Milner.” *Id.*, Exhibit 70 at 2 (page 2 of letter from John A. Rosholt to A. Kenneth Dunn, Director, Idaho Department of Water Resources) (Jan. 15, 1986).

³⁹ Third Orr Aff., Exhibit 41 at 2 (“News Release,” Idaho Office of the Attorney General) (Jan. 29, 1986) (emphasis added); *see also* Fourth Orr Aff., Exhibit 72 at 4 (page 3 of “Comments of the Attorney General on the Proposed Water Allocation Rules of the Idaho Department of Water Resources”) (enclosed with letter from Attorney General Jim Jones to Mr. A. Kenneth Dunn, Director, Idaho Department of Water Resources) (Jan. 27, 1986) (similar).

the parties' agreement to retain the "zero flow" at Milner was widely understood by members of the Legislature, the Idaho Water Resource Board, the water user community and the general public to mean that the source flows for the hydropower water rights would be limited to waters downstream from Milner Dam.⁴⁰

Rather than making the State Water Plan's provision for a minimum flow of zero c.f.s. at Milner an "element" of the water rights, the parties intended to define the water rights consistently with that minimum flow, and with the other development policies of the State Water Plan as amended to implement the settlement. *See State's Opening Brief at 28-29.* In order to be consistent with the State Water Plan, the water rights had to be defined as limited to flows below Milner and as carrying no right to call for flows above Milner. As Idaho Power attorney Tom Nelson explained, the State Water Plan's provision for a "zero flow" at Milner "was not a goal or a target, but a planning tool to indicate that development upstream of that site would not be hampered by a minimum flow there."⁴¹ It would have hampered development above Milner and been directly contrary to the minimum flow of zero at Milner, as well as historic practice and

⁴⁰ *See generally State's Opening Brief at 30-34; State's Response Brief at 7-13* (Nov. 7, 2008); *State of Idaho's Response to Idaho Power Company's Motion to Consolidate at 23-26* (Aug. 25, 2008). While the State and Idaho Power were the formal signatories to the Swan Falls Agreement, the settlement was obviously subject to public review and comment given the extensive legislative and administrative actions necessary to implement the Agreement.

⁴¹ Third Orr Aff., *Exhibit 1 at 4* (page 14 of THE ADVOCATE, Vol. 32, No.9) (Idaho State Bar, Sept. 1989) ("Between Rock Creek And A Hard Place: Who Will Control Idaho's Water?" by Thomas G. Nelson). Mr. Nelson's explanation of the Milner "zero flow" provision in the State Water Plan also demonstrates the error in Idaho Power's contention that the State Water Plan was intended to "maintain" a "zero flow" or dry riverbed at Milner. *Idaho Power's Response Brief at 23.* As Mr. Nelson explained, the zero minimum flow provision is a planning tool, "not a goal or target." *See also* Fourth Orr Aff., *Exhibit 90 at 4* ("The water plan policy provides that [Milner] flow is not required to be maintained but does not require it to be zero.") (Memorandum from Norman C. Young to R. Keith Higginson) (Nov. 2, 1988) ("Comments Received on Swan Falls Area Policy and Implementation Plan"). In addition, and directly contrary to Idaho Power's contentions, the State's Motion does not seek a ruling that the Swan Falls Agreement, much less the State Water Plan, requires the "maintenance" of a "zero flow" level at Milner Dam, nor has the State asserted that the Snake River has been managed to achieve or maintain a "zero flow" level at Milner. Idaho Power's contentions on this point are simply another mischaracterization of the State's Motion and arguments, apparently intended to improperly inject into this subcase questions that are appropriately addressed in subcases 02-0200 (the Idaho Water Resource Board's claim for an average daily flow of 0 c.f.s. at Milner) and 00-92002GP (Basin 02 General Provision No. 4).

settled property rights expectations on the Snake River, to extend the hydropower water rights to encompass flows upstream from Milner Dam.

In short, the parties (and the public) understood the agreement to be consistent with the State Water Plan's minimum flow of zero at Milner,⁴² and to also mean that the hydropower water rights would be limited to flows downstream from Milner and have no entitlement to call for flows above Milner. This does not mean that the parties intended to make Policy 32 of the State Water Plan itself an "element" of the water rights, and the State has never so asserted. Idaho Power's repeated contentions to the contrary simply erect and dispose of a strawman argument that presents different questions than the first count of the State's Motion.

8. Management And Development On The Snake River Prior To The Swan Falls Controversy Was Historically Based On The Principle That Water Rights Below Milner Had No Entitlement To Call For Flows Above Milner, Not On "Maintaining" A Flow Of Zero C.F.S. At Milner.

Idaho Power's critique of the State's brief discussion of the history of the Milner divide focuses on the State Water Plan's Milner minimum flow provision rather than the first count of the State's Motion, which Idaho Power repeatedly mischaracterizes as an attempt by the State to portray the Snake River "as having always been managed for zero flow." Idaho Power's Response Brief at 8; *see also id.* at 5 (arguing that "it was not the intent of the concerned interests to completely deplete the flow of the river above Milner"); *id.* at 12 (stating that a 1967 letter to the Director of the Idaho Water Resource Board "makes no reference to a 'zero flow' policy"); *id.* at 17 ("the State's Statement of Facts does not establish a consistent history regarding the maintenance of a zero flow at Milner"). Once again, Idaho Power neither cites nor quotes any such assertions in the State's Motion or briefing in support of these characterizations, because there aren't any. The State has never asserted or implied that the Snake River has

⁴² See First Orr Aff., Exhibit 30 at 26 (Exhibit 6 to the Swan Falls Agreement); *id.* at 7 ¶ 13 (requiring amendment of State Water Plan to implement the provision of Exhibit 6).

always been managed to completely deplete the flow at Milner, and seeks no such ruling in this case.

Rather, the State's discussion of the historic background for the Swan Falls Agreement in general, and the 1986 amendment to Idaho Code § 42-203B(2) in particular, points out that the pre-Swan Falls planning and development of irrigation and hydropower on the Snake River was largely dictated by, and intentionally conformed to, the physical and hydrologic divide created by the river's descent into a deep canyon at Milner and by the springs below Milner that "regenerate" the river.⁴³ See, e.g., State's Opening Brief at 16 ("The *de facto* division of the river at Milner and the shared State and Federal goal of maximizing the use of the water resources of the Snake River for agricultural development were foundational principles that guided the management of the river in the years preceding the Swan Falls controversy"). As pointed out in a law review article Idaho Power cited in prior briefing in this subcase:⁴⁴

Any attempt to describe the historical underpinnings of the Swan Falls controversy must include at least a brief discussion of how, over the decades, the Upper Snake Basin effectively came to be treated as separate from the portion located downstream from Milner Dam for purposes of water delivery and administration of rights. Idaho Power's rights at Swan Falls and other power plants are senior to many above-Milner natural flow rights and most of the storage rights, but the Company never took any action to curtail above-Milner rights to serve these priorities. . . . [B]y the time of the Swan Falls controversy the Company would have found it difficult to compel continuation of these past-Milner flows, partly because of the Company's own actions.

⁴³ Idaho Power used the same concepts and similar terminology in responding to FERC inquires regarding the Company's petition for an order approving the Swan Falls Agreement: "Irrigation development proceeded essentially downstream . . . to the current site of Milner Dam . . . At that point the river descends several hundred feet into a basalt canyon . . . The Snake River regenerates itself below Milner Dam . . . from springs representing the outlet of the Snake Plain Aquifer." Fifth Orr Aff., Exhibit 8 at 4 (page 2 of Idaho Power Company Response to Questions 5 and 6 Completing Response to Request for Information Dated January 30, 1987 (FERC Docket no. EL85-38-000) (May 19, 1987).

⁴⁴ See Idaho Power Company's Response To State Of Idaho's Motion for Partial Summary Judgment at 3 n.4, 7 n.16 (citing 28 Idaho L. Rev. 573) (Feb. 7, 2008).

Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls In 3D: A New Look At The Historic, Legal And Practical Dimensions Of Idaho's Biggest Water Right Controversy*, 28 Idaho L. Rev. 573, 589 (1992).⁴⁵

Idaho Power does not dispute these points or the fact that because of the Milner divide irrigation became the predominant use above Milner while hydropower came to be concentrated below Milner. See Idaho Power's Response Brief at 5 ("It is true that considerable irrigation occurs above Milner and that most of Idaho Power's hydropower generation facilities on the mainstem Snake River are located below Milner"). Rather, Idaho Power argues that the State has failed to show "a consistent history regarding the maintenance of a zero flow at Milner," Idaho Power's Response Brief at 17, something the State never set out to prove and that it need not establish to demonstrate the parties' intent to strictly limit the hydropower water rights entitlement to flows below Milner. Idaho Power also digresses by asserting the State has "coined" the term "Milner divide" for purposes of this litigation, an unsupportable contention in light of the fact that the basin was widely viewed as being "divided" at Milner long before the Swan Falls controversy.⁴⁶

⁴⁵ The State's discussion also demonstrated that the concept of recharge was established long before the Swan Falls Agreement, as was the recognition that recharge diversions make use of winter and non-irrigation season flows above Milner. Idaho Power does not dispute these points. See State's Opening Brief at 10-11, 13-15; see also, e.g., Fourth Orr Aff., Exhibit 8 at 32-38 (pages 10316-10322 of transcript of examination of Lynn Crandall in Federal Power Commission proceedings on Idaho Power Company's proposed Hells Canyon project) (Jan. 12-13, 14-15, 1954) ("Crandall Examination") (discussing recharge).

⁴⁶ See, e.g., Fourth Orr Aff., Exhibit 13 at 6 ("From a land and water resource development standpoint, the Basin is divided at Milner Dam") (page 5 of "Information Bulletin on a Study of Water Resource Development Possibilities - Upper Snake River Basin") (U.S. Bureau of Reclamation & U.S. Army Corps of Engineers) (Sept. 29, 1960) (emphasis added); *id.*, Exhibit 11 at 1-2 ("The Snake River divides itself into units in our area . . .") (page 1 of "Statement of Mr. Edward Ermine, Irrigation and Reclamation Subcommittee, House Interior and Insular Affairs Committee, March 4, 1957"); Third Orr Aff., Exhibit 3 at 1 ("from a power standpoint, the Snake River is divided into two sections, that above and that below Milner dam" ("Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, for Preliminary Permit Covering Twin Falls site, on Snake River") (emphasis added). Although the foregoing report was undated, it was quite likely prepared prior to February 1, 1922, because the report analyzed Idaho Power's application for a "Preliminary Permit" at Twin Falls, *id.*, and on February 1, 1922 the Company filed its "Application for License" for the same facility. See *id.*, Exhibit 4 at 6 (signature page of "Application for License—Twin Falls Project—Snake River, Idaho—Idaho Power Company").

Idaho Power also argues that if the Milner divide was central to the Agreement, the State would have discussed it in its briefing on the State's first summary judgment motion. See Idaho Power's Response Brief at 4-5. This assertion ignores the fact that the State only moved for **partial** summary judgment⁴⁷ and was under no obligation to seek summary judgment on the Milner question. Given the potential complexity of the trust and ownership issues raised in the State's first motion, and the lengthy factual discussion the State deemed necessary to properly present those questions,⁴⁸ the State determined that raising the Milner question simultaneously with the trust and ownership questions could result in unnecessarily confusing and unwieldy briefing.⁴⁹ The State's decision to bifurcate these issues was permissible under the Idaho Rules of Civil Procedure and did not mislead the Court or prejudice Idaho Power, nor does this sequencing diminish the importance of the Milner divide in the final settlement.

Moreover, Idaho Power raised and relied on the 1986 Milner amendment to Idaho Code § 42-203B(2) in its response to the State's first motion, and both parties acknowledged that the amendment was intended to clarify the settlement. See Idaho Power Company's Response To State Of Idaho's Motion For Partial Summary Judgment at 11, 23-25 (Feb. 7, 2008); Reply In Support Of State Of Idaho's Motion For Partial Summary Judgment at 10-14 (Feb. 15, 2008). Thus, the language of the Swan Falls Agreement and the settlement implementation record shows that the Milner question was central to the resolution of the Swan Falls controversy. *See*

⁴⁷ See State of Idaho's Motion for Partial Summary Judgment (Dec. 14, 2007).

⁴⁸ See generally Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment at 4-25 ("Statement of Undisputed Facts") (Jan. 11, 2008).

⁴⁹ This determination has been borne out by the scope of the issues and the extent of the briefing on the parties' instant cross-motions for summary judgment on recharge subordination, as well as the briefing required to dispose of Idaho Power's motions of this past summer to strike the first Milner issue from the State's Motion, *see* Idaho Power Company's Motion To Strike, Or Alternatively Motion In Limine Re: Scope Of State Motion For Summary Judgment (Jun. 30, 2008), or to consolidate it with other subcases. See Idaho Power Company's Motion to Consolidate (Aug. 8, 2008).

generally State's Opening Brief at 16-47. Idaho Power's suggestion that the Milner issue is something new or beyond the scope of this subcase is meritless.

9. The 1923 American Falls Contract And The 1934 Federal Power Commission License For The Twin Falls Facility Confirm That Prior To The Swan Falls Litigation Idaho Power Never Asserted An Entitlement To The Natural Flows Above Milner For Power Production Below Milner.

Idaho Power asserts that its claimed hydropower water rights below Milner historically included an entitlement to call for flows above Milner by virtue of storage rights in American Falls reservoir the Company claims pursuant to a 1923 contract with the Bureau of Reclamation and a Federal Power Commission license for the Company's Twin Falls facility. *See Idaho Power's Response Brief at 7* (asserting the American Falls contract demonstrates Idaho Power "had rights which entitled it to flows for hydropower generation below Milner, and which continue to the present day"). The nature and scope of Idaho Power's storage rights under the 1923 American Falls contract, and of subsequent contracts and legislation, is the subject of other SRBA proceedings and of a United States Court of Federal Claims action⁵⁰ and therefore not properly before the Court in this subcase. The 1923 American Falls contract, however, provides important historic context for purposes of this litigation, and evidences a disclaimer by Idaho Power of the right to call for natural flows above Milner for purposes of hydropower use below Milner.

While Idaho Power is entitled to some storage space in American Falls reservoir pursuant to federal contracts,⁵¹ these storage space contracts and the Twin Falls license demonstrate that

⁵⁰ See SRBA Subcase Nos. 01-02064, 01-10485, 01-10486, and 1-10487, and United States Court of Federal Claims Case No. 07-00730. The precise scope and nature of Idaho Power's claimed storage rights at the American Falls reservoir remain in dispute, and the State of Idaho expressly reserves its rights to contest all aspects of these claims.

⁵¹ District Engineer Crandall noted during his examination in the Federal Power Commission proceedings on Idaho Power's application for a federal license for the Hells Canyon complex that the storage water Idaho Power is authorized to send past Milner "doesn't amount to much." Fourth Orr Aff., Exhibit 8 at 26 (page 10203 of transcript of examination of Lynn Crandall in Federal Power Commission proceedings on Idaho Power Company's proposed

even prior to the Swan Falls Agreement, Idaho Power retained only the right to generate power below Milner with stored water and inflow below Milner. Article 21 of the 1923 American Falls contract provides: "The company's right to demand the turning out of water from the [American Falls] reservoir for release by and use below Milner Dam shall be limited to [its contractual storage rights]."⁵²

As development at American Falls and Twin Falls continued, the United States remained adamant that Idaho Power should not be allowed to establish rights to demand natural flow above Milner, as demonstrated by a 1931 Idaho Power memorandum: "It was very clear to me that it is not [Mr. Stoutemyer's] nor the Reclamation Department's intention that we shall gain, without his or their serious protest, any further prior rights to water of Snake River which may be used for irrigation purposes at or above Milner Dam."⁵³ Indeed, the United States insisted that the 1934 Twin Falls Federal Power Commission license reconfirm this limitation. The license provided that all water rights for Twin Falls the site would be "subject, inferior and subordinate" as against present and future upstream irrigation uses, except (a) certain American Falls storage releases; and (b) such seepage, percolation, drainage, spring or springs, waste and/or other influent waters **"which do not flow or spill over Milner Dam but which enter in, arise in, and flow in and along the channel of the Snake River between the down-stream toe of Milner**

Hells Canyon project) (Jan. 12-13, 14-15, 1954) ("Crandall Examination"). It is not inconsistent with the Swan Falls Agreement for Idaho Power to send past Milner storage water it controls under the 1923 contract, because the Agreement expressly does not limit "the Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey to and past its power plants below Milner Dam." First Orr Aff., Exhibit 30 at 4 (page 4 ¶ 7(E) of the Swan Falls Agreement). This provision is another exception that proves the rule: there would be no need for such a reservation if the Agreement did not otherwise strictly limit the hydropower water rights in question to flows below Milner. It is also not inconsistent with the Milner "zero flow" provision of the State Water Plan to spill such storage water past Milner because, as previously discussed, the State Water Plan's provision for a minimum flow of zero at Milner is not a goal or target, but a planning tool to indicate that development above Milner would not be hampered by a minimum flow at Milner.

⁵² Third Orr Aff., Exhibit 6 at 3 (page 21 of Contract Between the United States and Idaho Power Company, Relative to Power Rights at American Falls, Idaho) (Jun. 15, 1923).

⁵³ Sixth Orr Aff., Exhibit 1 at 1 (page 1 of memorandum from James L. Boone to Mr. Hibbard) (May 29, 1931).

Dam . . . and the site of the project covered by this license.”⁵⁴ In a 1962 letter to the Chairman of the Federal Power Commission in connection with Idaho Power’s application for a federal license for the Company’s hydropower facilities at American Falls, Shoshone Falls and Upper Salmon Falls, the Assistant Secretary of the Interior reaffirmed that the federal reservoir system above Milner “is operated with the objective of conserving the water to minimize spills past Milner Dam. This matter was the subject of extensive negotiations with the Idaho Power Company in connection with the issuance of license under Project No. 18 at the Twin Falls site.”⁵⁵

Thus, contrary to Idaho Power’s contentions, the 1923 American Falls contract and the 1934 Twin Falls license demonstrate clear intent to limit Idaho Power’s water rights below Milner Dam to spring waters and other inflows below Milner, and upstream storage releases. These provisions are consistent with the historic principles as enunciated in the 1920 Board of Engineers Report: “The principle involved therefore is to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam.”⁵⁶

10. The Crandall Report And Testimony In The Hells Canyon Proceedings Show That Idaho Power Had No Entitlement To Call For Natural Flows Above Milner.

Idaho Power also attempts to prove its claimed hydropower water rights below Milner historically included an entitlement to call for flows above Milner and to preclude recharge by

⁵⁴ Third Orr Aff., Exhibit 9 at 12 (page 11, Article 14 of License on Government Lands – Project No. 18, Idaho – Idaho Power Company) (Federal Power Commission, Jun. 11, 1934) (emphasis added).

⁵⁵ Fourth Orr Aff., Exhibit 15 at 4 (page 4 of Letter from Assistant Secretary of the Interior Kenneth Holum to the Honorable Joseph C. Swidler, Chairman, Federal Power Commission) (Aug. 30, 1962).

⁵⁶ Third Orr Aff., Exhibit 2 at 14 (page 5 of Board of Engineers Report). The report also added: “To a moderate extent these interests conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored at Upper Salmon Falls and the injury to that resource which would be susceptible of future development is relatively not very great.” *Id.* at 14-15. See also *id.*, Exhibit 3 at 1 (“from a power standpoint, the Snake River is divided into two sections, that above and that below Milner dam”) (“Report on Application Before Federal Power Commission by Idaho Power Company, Serial No. 18, for Preliminary Permit Covering Twin Falls site, on Snake River”).

mischaracterizing and taking out of context a statement by District Engineer Crandall during his examination in the Hells Canyon Federal Power Commission proceedings. Idaho Power argues that because Mr. Crandall testified recharge diversions would occur "at times when all prior water rights on the river were being filled," he must have meant that Idaho Power's hydropower water rights below Milner would be filled before recharge diversions could take place above Milner. Idaho Power's Response Brief at 9.⁵⁷

This argument ignores the fact that Mr. Crandall explained the "prior rights" to which he referred were only those diverting above Milner: "[S]o this [diversion for ground water recharge] would be the diversion of waters that would otherwise spill down the river past Milner into the Columbia."⁵⁸ This statement demonstrates, particularly when taken with Mr. Crandall's earlier testimony that flood waters spilling past Milner were considered "waste . . . which goes down to the Pacific Ocean. . . . it is being wasted,"⁵⁹ that he did not consider Idaho Power's hydropower water rights below Milner to be "prior rights" for purposes of the flow allocations above Milner, and that he did not view recharge diversions at or above Milner as subject to hydropower water rights below Milner.

Mr. Crandall's earlier testimony also supports this conclusion because he characterized water spilled past Milner for power purposes not as flows to which Idaho Power was entitled, but

⁵⁷ See also Fourth Orr Aff., Exhibit 8 at 34 (page 10318 of Crandall Examination).

⁵⁸ Id. (emphasis added). The full text of Mr. Crandall's "prior rights" statement is as follows:

Q First, as to the physical aspects, under what conditions could this type of diversion for ground water recharging occur?

A It would occur at times when all prior water rights on the river were being filled, the canals were drawing what they wanted, and the reservoirs were either filled or assured of filling; so that this would be the diversion of waters that would otherwise spill down the river past Milner into the Columbia.

⁵⁹ Id. at 23 (Crandall Examination at 10200) ("In the early part of the season when the flood waters are on there is plenty of water for everybody, and we are usually spilling water to waste past Milner which goes down to the Pacific Ocean.").

rather as only those which “could be spared for power production” after all potential needs above Milner were satisfied.⁶⁰ Mr. Crandall’s testimony was also consistent with his 1937 letter to District Counsel B.E. Stoutemyer regarding the subordination stipulation in Article 14 of the 1934 Twin Falls license, in which he expressed his view that the stipulation meant “the date of priority [of Idaho Power’s Twin Falls water right] applies only to rights below Milner and is not adverse to subsequent developments above Milner.”⁶¹ Plainly, Mr. Crandall viewed Idaho Power’s hydropower water rights below Milner as having no legal entitlement to flows above Milner.

Idaho Power attempts to diminish the significance of Mr. Crandall’s testimony, and his report entitled “Future Upstream Depletion Above Hells Canyon,”⁶² by asserting that “it is not even clear whether Idaho Power introduced the report into evidence.” Idaho Power’s Response Brief at 8. This statement is flatly incorrect, as demonstrated by the hearing officer’s identification of the report: “This report, which is [Mr. Crandall’s] direct testimony, was offered by the applicant.”⁶³ Idaho Power was **offering and relying** on Mr. Crandall’s report and testimony for purposes of obtaining a Federal Power Commission license for the Hells Canyon complex.⁶⁴ Thus, contrary to Idaho Power’s current representation to this Court, Idaho Power affirmatively relied on Mr. Crandall’s depletion analysis and testimony in seeking the Hells Canyon license, including Mr. Crandall’s views that the Company’s water rights had no call on

⁶⁰ Id. at 24 (page 10201 of Crandall Examination).

⁶¹ Third Orr Aff., Exhibit 12 (letter from Lynn Crandall to B.E. Stoutemyer, June 18, 1937).

⁶² See generally Fourth Orr Aff., Exhibit 7 (“Future Upstream Depletion Above Hells Canyon,” by Lynn Crandall) (Apr. 6, 1953).

⁶³ Fourth Orr Aff., Exhibit 8 at 16 (page 10146 of Crandall Examination).

⁶⁴ Thus, it is not surprising that Mr. Parry did not “grill” Mr. Crandall, as Idaho Power puts it. Idaho Power’s Response Brief at 9. The State simply pointed out that Mr. Parry did not attempt to clarify or limit his own witness’s characterization of Idaho Power’s hydropower water rights below Milner as something less than “prior rights” for purposes of flow allocations above Milner—expressly including recharge diversions.

flows above Milner, and that future diversions, including diversions of surplus flows and waters for ground water recharge purposes, would further deplete the flows spilling past Milner.

11. This Subcase And The State's Motion Raise Issues Of The Intent Of The Parties And The Definition Of The Water Rights Subject To The Swan Falls Agreement, Which Should Not Be Combined With Questions Regarding The Scope And Validity Of State Policies And Statutes That Are Generally Applicable To Other Water Rights Not At Issue In This Subcase.

Idaho Power's focus on Policy 32 of the State Water Plan and the "two rivers" doctrine is an improper attempt to combine this consolidated subcase, which deals with the intent of the Swan Falls Agreement for purposes of defining the hydropower water rights at issue, with the overall scope and effect of the State Water Plan and the 1986 amendment to Idaho Code § 42-203B(2). For instance, Idaho Power argues that "it would not be appropriate for the State Water Plan's zero flow policy to be included as a general provision associated with Idaho Power's water rights in the SRBA Decree," Idaho Power's Response Brief at 27, that "the SRBA Decree should not lock in a zero flow policy, in Idaho Power's rights or elsewhere," *id.* at 29, and that "the 'two rivers' language in § 42-203B(2) was not part of the Agreement [and] is a legislative provision of general applicability." *Id.* at 33.

These contentions recycle the same arguments Idaho Power made in its motions to strike and consolidate earlier this year, which the Court denied.⁶⁵ Questions regarding the scope and validity of State policies and statutes of general applicability are properly addressed in subcases 02-0200 and 00-92002GP.⁶⁶ This Court has observed that "deciding the issues entirely based on the State's exercise of its regulatory authority over hydropower rights independent from the underlying Agreement raises a number of significant constitutional issues." Summary Judgment

⁶⁵ See Order Denying Idaho Power's Motion to Strike/In Limine And Granting State of Idaho's Motion to Compel (Aug. 6, 2008); Order Denying Idaho Power Co.'s Motion to Consolidate (Sept. 8, 2008).

⁶⁶ Subcase 02-0200 pertains to the Idaho Water Resource Board's claim for a daily average flow of 0 c.f.s. at Milner. See Appendix A (Director's Report for 02-0200). Subcase 00-92002GP pertains to General Provision No. 4 for Basin 02. See Appendix B (Director's Report for Basin 02 General Provisions).

Order at 24. This Court also held that such questions can be avoided when Idaho Power has consented to the State's regulatory authority: "Therefore, the Court need not decide the issue based on a determination of the scope of the State's regulatory power over Idaho Power's vested hydropower rights. A contractual agreement between the parties to settle a water rights dispute does not raise the same constitutional issues." Summary Judgment Order at 25.

This Court has reasoned that even if Idaho Power had not "directly agreed" to limitations on the hydropower water rights at issue, "it could still concede to the State's authority or agree not to challenge the State's authority to 'regulate' its rights in a manner that would achieve the same result. However, Idaho Power's consent to the State's authority would not necessarily be binding on unrelated hydropower claims." Summary Judgment Order at 26. This Court therefore based its decision on the parties' first cross-motions for summary judgment "on its interpretation of the Swan Falls Agreement, including the agreement between the parties to enact I.C. § 42-203B, as opposed to deciding the matter based solely on the State's regulatory authority." Summary Judgment Order at 26.

The same reasoning and holdings apply to the State's second motion for summary judgment, because it is expressly based on the intent of the parties and does not depend on the general applicability of the State Water Plan or the 1986 amendment to Idaho Code § 42-203B(2) to other water rights. Rather, the State's Motion argues that the parties agreed to limit the hydropower water rights to flows below Milner, and Idaho Power conceded to and agreed not to challenge application of the 1986 amendment to Idaho Code § 42-203B(2) to the water rights at issue in this subcase.

12. Idaho Power's Arguments Are At Best An Attempt To Modify The Plain Terms Of The Settlement To Reflect A Subjective Intent Idaho Power Never Disclosed To The State.

Idaho Power's recharge subordination arguments hinge on reading into the settlement new terms and subordination limitations that do not appear in the Agreement or its implementing legislation. Idaho Power insists that the settlement authorized subordination of the water rights held in trust by the State only to "consumptive" uses "existing at the time" of the settlement, and barred subordination to any use of water that may constitute a "management tool," or which the State and the Company agreed to "study." None of these qualifications or limitations appears anywhere in the Agreement or its implementing legislation. They are simply attempts to "chip away" at the plain language of the settlement.

Even viewing Idaho Power's arguments in the most charitable light, they are at best assertions of a subjective intent that is reflected nowhere in the Agreement, the implementing legislation, the implementing State Water Plan amendments, the administrative rules, or the implementation and ratification record. Such omissions are significant in contract interpretation, as Judge Edward Lodge observed in his 2006 decision in Public Service Co. of Colorado v. Kempthorne, Case No. CV 91-0350S-EJL (United States District Court for the District of Idaho, May 5, 2006):⁶⁷ "As with everything in the law, but even more so in contract law, words are our tools." *Id.* at 4.

Simply put, if one party has an intent in mind, but such intent is never articulated to the other party during negotiations and the language of the contract is not changed during negotiations to reflect the subjective intent, the final language of the contract should not be interpreted according to the party's undisclosed subjective intent. When lawyers, after weeks [of] negotiation, settle on words with a common and accepted meaning . . . they should be held responsible for what they agreed to. Parties are held accountable not only for what they say but for what they do not say if there was a duty to speak. It seems only reasonable that if the Federal government intended the agreement to be restricted to the transuranic waste above ground it would have said so.

⁶⁷ A copy of this decision is appended hereto as Appendix C.

Id. at 24. By similar reasoning, if Idaho Power had subjectively intended the Swan Falls Agreement to bar subordination to recharge, it is only reasonable that it should have clearly said so at the time. There is no indication anywhere in the extensive record, however, that Idaho Power ever articulated such an intent or understanding at the time of the Agreement.

Idaho Power's protestations that it never had any reason to do so are implausible and cannot be credited. The Company itself has asserted that prior to the Swan Falls controversy, it was always careful to insist that its subordination provisions be expressly limited to "consumptive" uses or "irrigation" in order to prevent subordination to recharge. Idaho Power Company's Opening Brief in Support of Motion for Partial Summary Judgment at 19-25 (Oct. 17, 2008). Yet, neither Paragraph 7 of the Swan Falls Agreement nor the implementing subordination legislation is limited to such uses. Rather, Paragraph 7(B) contemplates subordination to "subsequent beneficial upstream uses" upon approval of such uses by the State in accordance with State law,⁶⁸ and Idaho Code § 42-203B(2) provides for subordination to "future beneficial upstream users" whose rights are acquired pursuant to state law, including compliance with Idaho Code § 42-203C. Idaho Code § 42-203B(2).⁶⁹

Even if the Company **had** insisted on expressly limiting subordination to "consumptive" uses or "irrigation," this would not have been sufficient to bar subordination to recharge. The Fourth Judicial District Court's decision on the Idaho Power's Motion to Re-Consider and Amend Summary Judgment in the original Swan Falls litigation removed any basis the parties may have had for assuming that recharge was not a "consumptive" use for purposes of subordination, by ruling that recharge fell within the scope of a subordination provision that

⁶⁸ First Orr Aff., Exhibit 30 at 4 (page 4 of the Swan Falls Agreement).

⁶⁹ The contractual subordination language in Paragraph 7(B) is not substantially or materially different than that in Idaho Code § 42-203B(2). See Summary Judgment Motion at 32 ("this Court finds it inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State pass legislation entirely inconsistent with the body of the contract or the intent of the parties").

applied only to "consumptive" uses. *See State's Response Brief at 33-36.*⁷⁰ Moreover, Idaho Power's Attorney Tom Nelson specifically explained in an Idaho Water Resource Board public information meeting on the settlement that subordination to "non-consumptive uses" was not only possible, but would actually be favored under the "public interest criteria." State's Response Brief at 32.⁷¹

Under these circumstances, Idaho Power not only had good reason to expressly and specifically articulate its subjective intent that it would not agree to subordination to "recharge," but it was under an affirmative duty to do so. The fact that Idaho Power voluntarily subordinated the hydropower water rights to three existing recharge water rights as a term of the settlement underscores this conclusion. In the absence of any express qualification or reservation, the State quite naturally viewed the Company's agreement to subordinate the hydropower water rights to three recharge water rights as implying that the Company also had no objection to subordinating the water rights held in trust by the State to future recharge uses. If Idaho Power's actual subjective intent was otherwise, it was under an affirmative obligation to specifically inform the State. The "Good Faith" provision of the Agreement required nothing less.⁷²

Further, the same Senate and House committees with primary responsibility for the Swan Falls legislation also considered recharge legislation on several occasions during the 1985 session, at least once with Tom Nelson in attendance. *State's Response Brief at 48-49.*

⁷⁰ See also Fourth Orr Aff., *Exhibit 24* (Plaintiff's Memorandum in Support of Motion to Re-Consider and Amend Summary Judgment," *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County) (Feb. 19, 1980); *id.*, *Exhibit 25*, (Memorandum Decision, *Idaho Power Co. v. State*, Case No. 62237) (Fourth Jud. Dist., Ada County) (May 16, 1980); Fifth Orr Aff., *Exhibit 4* ("Memorandum Decision and Order," *Idaho Power Co. v. State*, Case No. 62237 (Fourth Jud. Dist., Ada County) (Dec. 10, 1979).

⁷¹ See also First Orr Aff., *Exhibit 46 at 13* (pages 42-43 of transcript of Idaho Water Resource Board public information meeting on Swan Falls settlement) (Nov. 1, 1984) (Boise) (Tom Nelson explanation regarding "consumptive" and "non-consumptive" uses).

⁷² First Orr Aff., *Exhibit 30 at 1* (page 1 ¶ 4 of the Swan Falls Agreement) ("Good Faith").

Recharge was discussed several times in the Idaho Water Resource Board's public hearings on the State Water Plan amendments proposed to implement the Swan Falls settlement, with an Idaho Power representative in attendance. State's Opening Brief at 51-52.⁷³ During the Department's May 23, 1985 public information meeting on the administrative rules that would implement the "public interest criteria"—the purpose of which is to determine whether a proposed use will be allowed to subordinate the water rights held in trust—recharge was discussed at several points, with Tom Nelson in attendance. State's Opening Brief at 37-38, 52-53.

Under such circumstances and with so many opportunities, "it is only reasonable" to expect Idaho Power to have mentioned, at least once, that it intended the Agreement to bar subordination to recharge, but it never did. See Public Service Co. of Colorado, Case No. CV 91-0350S-EJL at 24 ("It seems only reasonable that if the Federal government intended the agreement to be restricted to the transuranic waste above ground it would have said so.").

Idaho Power must be held responsible for the terms to which it actually agreed regardless of any undisclosed subjective intent it held with respect to recharge subordination. See id. ("When lawyers, after weeks [of] negotiation, settle on words with a common and accepted meaning . . . they should be held responsible for what they agreed to. Parties are held accountable not only for what they say but for what they do not say if there was a duty to speak").

13. The Third Count of the State's Motion Presents A Justiciable Controversy.

⁷³ There was considerable discussion of recharge at the two Burley meetings on the State Water Plan amendments proposed to implement the Swan Falls settlement. Third Orr Aff., Exhibit 25 at 18 (pages 65-68 of transcript of Idaho Water Resources Board public hearing on proposed amendments to Policy 32 of the State Water Plan) (Jan. 30, 1985, 2:00 p.m.) (Burley); id. at 43-45 (pages 53-61 of transcript of Idaho Water Resources Board public hearing on proposed amendments to Policy 32 of the State Water Plan) (Jan. 30, 1985, 7:00 p.m.) (Burley). The attendance sheets for these meetings indicate that Idaho Power representatives attended both meetings. See Fourth Orr Aff., Exhibit 65 at 1 (attendance sheet for 2:00 p.m. meeting in Burley); id. at 2 (attendance sheet for 7:00 p.m. meeting in Burley).

Idaho Power opposes the third count of the State's Motion on grounds that the State's request for rulings that the hydropower water rights at issue in this subcase are subordinate to recharge water rights nos. 01-7054 and 37-7842, State's Motion at 2, "do not present a justiciable case or controversy and are not ripe for judicial determination." Idaho Power's Response Brief at 45. The fallacy of this contention is demonstrated by Idaho Power's Motion for Partial Summary Judgment on Recharge Subordination. Idaho Power put subordination of the hydropower water rights in question to recharge directly at issue by seeking a ruling that pursuant to the Swan Falls Agreement, "Idaho Power Company **did not subordinate** its hydropower water rights to the diversion or management of water for aquifer recharge." Idaho Power's Motion at 2 (emphasis added).

Idaho Power's broad request for an unqualified ruling that the Company "did not subordinate" to recharge does not differentiate between the two quite different types of subordination involved in the Swan Falls settlement: immediate subordination to existing uses under Paragraphs 7(C) and 7(D), and prospective subordination of the "subordinatable" water rights held in trust by the State to future uses approved under State law. Indeed, this analytical imprecision pervades Idaho Power's briefing on the parties' instant cross-motions for summary judgment, and unnecessarily muddles the otherwise straightforward subordination analysis that obtains under the Court's holdings and guidance in the Summary Judgment Order regarding Paragraph 7 of the Agreement, Exhibit 7B and Idaho Code § 42-203B. *See* Summary Judgment Order at 28-32, 41-46; see also State's Response Brief at 19-25.

Idaho Power's first count for summary judgment is broad enough to encompass the two recharge water rights held by the Idaho Water Resource Board that are the subject of the third

count of the State's Motion.⁷⁴ If the Court were to grant the first count of Idaho Power's Motion as presented, Idaho Power would be able to escape the subordination to which it expressly agreed under Paragraph 7(C) of the Swan Falls Agreement and re-affirmed in the "Stipulation" of April 11, 2006. Idaho Power's assertion that the Complaint did not challenge subordination to existing uses is unavailing because regardless of what the Complaint alleges, the plain terms of Idaho Power's Motion request an unqualified ruling that would prevent the State from enforcing the terms of the Agreement or the Stipulation on this point.

Moreover, Idaho Power has carefully avoided directly admitting that it subordinated to existing recharge uses under the **Swan Falls Agreement**, admitting only that it stipulated to such subordination "pursuant to the terms of the 2006 Stipulation." Idaho Power's Response at 47. Idaho Power also asserts that subordination is "governed by the 2006 Stipulation," raising the question of whether the Company views the Stipulation as limiting the otherwise unqualified subordination to which Idaho Power agreed under Paragraph 7(C) of the Agreement, rather than simply re-affirming that subordination. This is not a phantom concern, as the State and Idaho Power have sharply disagreed over the meaning and effect of the Stipulation in this very litigation.⁷⁵ Indeed, much of the litigation in this subcase has centered on statutory or contractual language that one or the other party insisted was plain and unambiguous and allowed for only one interpretation. Idaho Power's argument that the Agreement and the Stipulation are so clear with respect to subordination to the two recharge water rights that there can be no real dispute over its meaning and effect is naive at best and misleading at worst.

⁷⁴ Idaho Power's broad summary judgment request also sweeps in the third recharge water right that Idaho Power dismissed from the 7500 Case: 21-7166. See State's Response Brief at 17-19.

⁷⁵ Compare Idaho Power Company's Motion to Strike, Or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment at 16-17 with State of Idaho's Response to Idaho Power Company's Motion to Strike, Or Alternatively, Motion in Limine Re: Scope of State Motion for Summary Judgment at 51-52.

While Idaho Power also argues as if there is no real question over whether Idaho Power has in fact subordinated to the two recharge water rights under the Swan Falls Agreement and the Stipulation, its discovery responses to the State's requests for admission demonstrate otherwise. In its first set of discovery requests, the State posed two straightforward requests for admission: "Admit that Idaho Power subordinated its water rights to Water Right No. [01-7054 or 37-7842] pursuant to the terms of the 'Swan Falls' Agreement."⁷⁶ Not only did Idaho Power refuse to make any such admission, but it responded to each request for admission with more than a full page of explanations detailing why it would not do so. If Idaho Power truly "does not understand why the State insists on proceeding to litigate what the parties previously negotiated," Idaho Power's Response at 49, it need look no further than its own discovery responses.

Idaho Power also argues that the State's third count for summary judgment is premature because "it is impossible to predict what the final license terms might say." Idaho Power's Response at 47. This argument is meaningless because the State does not seek to determine the terms of the licenses. Rather, the State simply seeks a ruling from this Court—the only Court that has jurisdiction over the question—that the hydropower water rights in question are subordinate to the two recharge permits pursuant to the Swan Falls Agreement, and recognizes that licensing has not yet taken place. A water user is required to put water to beneficial use in order to obtain a license, and the Idaho Water Resource Board's ability to divert and use water for recharge for purposes of licensing is dependent, in part, on resolution of the subordination issue presented by the State's third claim for summary judgment.

In addition, the mere fact that licensing will take place in the future does not render the question of subordination under the terms of the Swan Falls Agreement hypothetical or uncertain. To the contrary, this Court's resolution of the question will afford the parties "relief

⁷⁶ See Appendix D.

from uncertainty and controversy in the future.” Schneider v. Howe, 142 Idaho 767, 773, 133 P.3d 1232, 1238 (2006). Thus, the issue is ripe for adjudication even though licensing has yet to occur. See generally id. (determining that a claim for declaration that an easement existed was justiciable even though the claimant had not filed the re-zoning application necessary to construct the subdivision for which the easement was sought); see also In re Pintlar Corp., 180 B.R. 594, 597 (Bkrcty.D.Idaho 1995) (rejecting the contention that a claim to adjudicate insurance liability was hypothetical and not ripe); see also Idaho Code § 42-1421(3) (authorizing the District Court to enter a partial decree before licensing is complete).

Idaho Power’s argument also ignores the fact that under the Swan Falls Agreement the hydropower water rights are subordinated to the two recharge water rights **regardless** of the final terms of the licenses. As Idaho Power attorney Tom Nelson assured the members of the Senate Resources and Environment Committee, the 1180 Contract dismissals meant that “the power company is barred from challenging their water right.”⁷⁷ The third count of the State’s Motion presents a live controversy that this Court should decide in order to avoid uncertainty and further litigation.

CONCLUSION

For the reasons set forth herein and in the State’s Opening Brief, the State respectfully requests that the Court grant the State’s Motion.

DATED this 21st day of November 2008.

LAWRENCE G. WASDEN
Attorney General

⁷⁷ First Orr Aff., Exhibit 40 at 12 (page 39 of transcript of Senate Resources and Environment Committee meeting) (Feb. 1, 1985).

STEVEN L. OLSEN
Deputy Attorney General
Chief, Civil Litigation Division

KARL T. KLEIN
MICHAEL C. ORR
SHASTA KILMINSTER-HADLEY
Deputy Attorneys General



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November 2008, I caused a true and correct copy of the REPLY IN SUPPORT OF STATE OF IDAHO'S AMENDED MOTION FOR SUMMARY JUDGMENT ON ISSUE OF RECHARGE SUBORDINATION to be served on the following parties by the indicated methods:

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IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail
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- ☐ Facsimile: _____
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Chief, Natural Resources Division
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State of Idaho
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- ☒ Not Applicable

United States Department of Justice
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Division
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Reply in Support of State of Idaho's
Amended Motion for Summary Judgment
on Issue of Recharge Subordination

Appendix A:

Director's Report – Subcase 02-0200

SRBA

DIRECTORS REPORT 02-00200

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IWT072

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Right Number: 02-00200

Name and Address: STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098

Source: SNAKE RIVER Tributary: COLUMBIA RIVER

The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner Dam gaging station at river mile 638.7 downstream.

Priority Date: 12-29-1976

Diversion Point: T10S R21E S28 LOT 5 (SWSWNW) Within Jerome County

There are no diversions associated with this minimum stream flow water right at Milner Dam. The point of diversion is the Public Land Survey description at the north abutment of Milner Dam.

Purpose and			
Period of Use:	Purpose of Use	Period of Use	Quantity
	Minimum Stream Flow	01-01 TO 12-31	

Use of water under this right shall be non-consumptive.

Place of Use: See remarks

Place of Use: Minimum Stream Flow
Same as Other Use

Place of use is within the reach above and below benefiting from the minimum stream flow at the point of measurement for this right.

Other Provisions Necessary for Definition / Administration of this Water Right:

Explanatory Material: Basis of Claim - Statute

Codified by §42-1736B, Idaho Code, Policy 32.

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Reply in Support of State of Idaho's
Amended Motion for Summary Judgment
on Issue of Recharge Subordination

Appendix B:

Director's Report – Subcase 00-92002GP
(Basin 02 General Provisions)

BASIN 02 GENERAL PROVISIONS

The Director of the Idaho Department of Water Resources recommends to the Snake River Basin Adjudication District Court that the following general provisions be included in the decree determining rights to water from Basin 02.

1. The following water rights from the following sources of water in Basin 02 shall be administered separately from all other water rights in Basin 02 in accordance with the prior appropriation doctrine as established by Idaho law:

WATER RIGHT NO.

None

SOURCE

None

2. The following water rights from the following sources of water in Basin 02 shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriate doctrine as established by Idaho law:

WATER RIGHT NO.

None

SOURCE

None

3. Except as otherwise specified above, all other water rights within Basin 02 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.
4. The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second. The Milner gauging station is located at Latitude 42° 31'41", Longitude 114° 01'06"(revised), (NAD83), in the SW1/4 NE1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.

Reply in Support of State of Idaho's
Amended Motion for Summary Judgment
on Issue of Recharge Subordination

Appendix C:

“Memorandum Order”,
Public Service Co. of Colorado

v.

Kempthorne,

Case No. CV 91-0350S-EJL

(United States District Court for the District
of Idaho, May 5, 2006)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO**

**PUBLIC SERVICE COMPANY OF
COLORADO,**

Plaintiff,

vs.

**DIRK KEMPTHORNE, in his official
capacity as Governor of the State of Idaho,**

Defendant.

Case No. CV 91-035-S-EJL
(Lead Case)

MEMORANDUM ORDER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

**DIRK KEMPTHORNE, in his official
capacity as Governor of the State of Idaho;
STATE OF IDAHO,**

Defendants.

Case No. CV 91-054-S-EJL

On March 31, 2003 this Court entered an order denying Plaintiff's motion to dismiss/motion for summary judgment and granting Defendants' motion for summary judgment and declaratory ruling. (Dkt. No. 266). The Ninth Circuit reversed and remanded the matter. (Dkt. Nos. 276, 278). A status conference was held whereupon both parties withdrew their motions and stipulated to a period of discovery. (Dkt. Nos. 287, 288, 289, 290). The parties also agreed that the matter would be decided by way of a court trial which was held on February 6, 2006. (Dkt. No. 336). At the conclusion of the trial, the Court directed the parties to submit briefing which the parties have now done and the matter is ripe for the Court's consideration. (Dkt. Nos. 345, 346, 347). Accordingly, the Court enters the following order.

MEMORANDUM ORDER
06ORDERS\INEEL_TRIAL

Factual and Procedural Background

This case has a lengthy factual and procedural history which centers around the transportation, receipt, storage, management, and removal of hazardous wastes at the Idaho National Engineering Laboratory ("INEL").¹ The INEL was established in 1949 to research various types of nuclear reactors. The INEL has since broadened its research to include other engineering facilities and research, including the Radioactive Waste Management Complex ("RWMC") where the Department of Energy ("DOE") manages waste generated by national defense sources and research programs.

The original complaint in this matter was filed on February 7, 1991. The parties in the action at that time were Plaintiff Public Service Company of Colorado, Defendant then Governor of the State of Idaho, Cecil D. Andrus, and Counter Defendant the DOE. (Dkt. No. 1, Case No. CV91-35-S-EJL).² A similar action was also filed by the United States of America against Governor Andrus and the State of Idaho (hereafter the "State" or "Idaho"). (Dkt. No. 1, Case No. CV91-54-S-EJL). In that action (Case No. CV91-54-S-EJL), the State of Idaho filed counterclaims against the United States of America. The cases were consolidated with Case No. CV91-35-S-EJL being made the lead case. The issues presented involved the review of the DOE's decision to store spent nuclear fuel at the INEL.

On May 7, 1991, the Honorable Harold L. Ryan granted the United States' motion for summary judgment and Public Service Company of Colorado's motion for preliminary injunction

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The name of the facility has been changed several times since it was opened. When it opened in 1949 it was called the National Reactor Testing Station ("NTRS"). It then became the Idaho National Engineering Laboratory (INEL) and in 1997 was changed to the Idaho National Engineering and Environmental Laboratory (INEEL). Today, the facility is called the Idaho National Laboratory ("INL"). This order shall hereafter refer to the facility as INEL.

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Cecil D. Andrus was the Governor of the State of Idaho in the initial action filed in 1991. Governor Philip Batt was substituted when the matter was re-opened in 1995. At present, Dirk Kempthorne is serving as Governor of the State of Idaho and has been substituted as the named Defendant accordingly. (Dkt. No. 224).

MEMORANDUM ORDER
06ORDERS\INEEL_TRIAL

which enjoined Governor Andrus and the State of Idaho from interfering with the transportation of spent nuclear fuel across the highways of Idaho for storage at INEL. The parties filed cross motions for summary judgment. On June 28, 1993, Judge Ryan entered an order granting the State of Idaho's motion for summary judgment and denied the United States' motion for summary judgment. (Dkt. No. 118). The Court also enjoined the DOE from any further transportation, receipt, processing, and storage of spent nuclear fuel at INEL until a comprehensive Environmental Impact Statement ("EIS") was completed as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* The EIS was to examine alternatives concerning transportation, receipt, storage and management of spent nuclear fuel at the INEL. (Dkt. No. 118). The Court retained jurisdiction over the case to resolve any disputes between the parties regarding the final EIS.

Following the issuance of the EIS, this matter was re-opened on May 19, 1995 to address the State's concerns regarding the United States' compliance with the final EIS. (Dkt. No. 149). The parties again filed countering motions for summary judgment. On October 17, 1995, during then Governor Philip Batt's administration, the parties resolved the matter by entering into a settlement agreement ("1995 Agreement"). (Dkt. No. 219). The Court entered an order adopting the 1995 Agreement and again retained jurisdiction over the case. (Dkt. No. 220).

The matter is again before the Court on the State's motion to re-open the case pursuant to the Court's retained jurisdiction seeking to contest the United States' compliance with the 1995 Agreement. (Dkt. No. 223). Specifically, the State seeks a determination that the DOE is obligated, pursuant to the express terms and conditions of the 1995 Agreement, to remove all transuranic waste located at the INEL no later than 2018, including, but not limited to transuranic waste which was indiscriminately buried in the subsurface disposal area. (Dkt. No. 223).³ The Court granted

³ Certain waste was deposited at both the Subsurface Disposal Area ("SDA"), as buried waste, and at the Transuranic Storage Area ("TSA"), in an above ground storage area.

the motion and ordered that the case be reopened. (Dkt. No. 231).⁴ The parties then filed their cross motions.⁵ The Court found in favor of the State and the decision was appealed. (Dkt. No. 266). The Ninth Circuit reversed and remanded the decision with the following direction:

We remand the case for the district court to consider the parties' extrinsic evidence, including the source of the 65,000 cubic meter estimate, in interpreting the contract so as to give effect to the second clause as well as the first. See Gumpert v. AT&T Techs., Inc., (In re Transcon Lines), 89 F.3d 559, 568 (9th Cir. 1996) (stating that the parol evidence rule "does not prohibit the use of evidence to clarify or to explain ambiguous terms" of a contract).

(Dkt. No. 276, p. 3). Accordingly, the Court held a four and a half day bench trial where both parties presented evidence regarding the interpretation of the 1995 Agreement and, in particular, the 65,000 cubic meters estimate. Having presided over this matter for several years, and having heard the evidence, reviewed the record, and considered the parties' oral and written arguments, the Court finds as follows.

Analysis

This is a contract case. As with everything in the law, but even more so in contract law, words are our tools.⁶ The words expressed in a contract become legally binding and enforceable commitments upon the parties once the contract is finalized. Where the words are clear there is little dispute over the commitments upon each party. Where, however, words are unclear the

⁴ Plaintiff, Public Service Company of Colorado, has been dismissed with prejudice pursuant to the parties stipulation. (Dkt. Nos. 261 and 263).

⁵ The Plaintiff in the current action is the United States of America ("United States"); in particular the DOE and Navy. The Defendants are the Honorable Dirk Kempthorne, in his official capacity as Governor of the State of Idaho, and the State of Idaho.

⁶

"The law is a literary profession: words are our tools. Hence, writing is of paramount significance. We lawyers are different from medical doctors, accountants, and most professionals. A surgeon may, in silence, perform a laminectomy or indeed a hemilaminectomy. The surgeon and accountant need to know how to do their work. We, too, need to know how to do our work but we need to communicate effectively using written words. There is a Latin maxim that he who knows but cannot express what he knows might as well be ignorant (*Qui novit neque id quod sentit exprimit perinde est ac si nesciret*). This applies more to lawyers than to others." Law Society Gazette, January/February 1998, p. 8.

contract must be interpreted to give meaning to the parties' intent. The meaning of a contract term can only be ascertained when viewed in the context in which the parties drafted the terms. "Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, [and where applicable] usages of trade, and the course of dealing between the parties." See Restatement (Second) of Contracts § 202, 219-23 (1981). After the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention. See Restatement (Second) of Contracts § 202 (1981).

1) Posture of the Parties:

The Court's inquiry begins by viewing the context of the contract negotiation and the posture of the parties when the negotiations of the 1995 Agreement began. On May 17, 1995 the State moved to reopen the case. (Dkt. No. 148). The Court reopened the case and reimposed the June 28, 1993 injunction which stopped any further shipments of spent nuclear fuel into Idaho. (Dkt. No. 149). Former Governors Andrus and Batt both testified that at the time they felt the United States was not keeping its commitments to Idaho and both were concerned that Idaho would become a *de facto* dumping ground, or permanent repository, unless an agreement was reached

assuring that the waste stored at INEL would be removed from Idaho.⁷ (Batt, pp. 82-84, 87).⁸ The State also feared for the safety of the Snake River aquifer located directly below the waste buried at the subsurface disposal area ("SDA"); this fear stemmed from the recent leak of radioactive material at the Hanford facility that was threatening the Columbia River coupled with the knowledge that the wastes buried prior to the 1970's were stored in containers with a life-expectancy of twenty or twenty-five years which, in 1995, were nearing expiration. In some cases, the waste was contained only in cardboard boxes. (Andrus, pp. 19, 21, 23-24; Batt, pp. 72, 74-75; Lance, pp. 152-55). This fear was bolstered by Idaho's own experience with carbon tetrachloride from the National Reactor Testing Station ("NTRS")⁹ which had migrated 600 vertical feet toward the Snake River aquifer. (Andrus, pp. 20, 30).

The State expressed its concerns and fears regarding the buried waste at INEL in a telegram to Dixie Lee Ray at the Atomic Energy Commission ("AEC").¹⁰ (Andrus, pp. 20-21). The telegram was an effort by the State to obtain assurances from AEC that the waste at INEL, in particular the buried waste, would be removed from INEL. Thus, from the State's perspective the removal of waste centered around the buried waste at the INEL. The safety and security of the underground

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Governor Batt had enumerated three goals or principles regarding waste at INEL stating that: 1) Idaho will oppose the shipment of nuclear waste material to our state until we receive an absolute assurance that the material will ultimately be moved outside of our state; 2) Idaho will insist on a proper cleanup of existing storage problems, including the cleanup of material that was indiscriminately buried years ago, and 3) Idaho will seek attractive projects that will create new employment opportunities at the INEL. These three goals became the basis of the State's position throughout the 1995 negotiations. (Grumbly, pp. 37-40). The goals were reported in an opinion piece carried in the local paper, a letter, and other sources. (Defendant's Exs. 516, 518).

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Because neither party has ordered a final corrected copy of the transcript, the citations to the transcript in this decision are made to the rough copy of the transcript from the February, 2006 court trial. The transcript citations herein provide the name of the testifying witness and the corresponding page number, however, the page numbers may differ from those in a final corrected copy of the transcript ordered at a later time.

⁹ As footnoted previously, NTRS was the original name for INEL.

¹⁰ The AEC was the previous title for the agency which later became the DOE.

aquifer was a "lightning rod" issue in this case and was of primary importance to Idaho. (Guida, p. 101). Any leak of the wastes into the Snake River aquifer would not only have tremendous political ramifications, but also an economic impact of gigantic proportions throughout the State since the Snake River traverses nearly the entire length and width of the State of Idaho. (Lance, pp. 152-55).

The United States brought to the table the pressing need to remove and store spent nuclear fuel rods from Navy ships, which had been halted when Idaho secured the injunction upon reopening the case. (Guida, p. 93; Frei, pp. 167-169; Grumbly, pp. 6, 8-11, 18-22). The delay in shipments of spent fuel rods to Idaho was creating a national security issue in that at least some nuclear powered ships could not operate until this settlement was resolved. (Batt, pp. 76-77; Grumbly, pp. 6, 8-11, 18-22; Frei, p. 168). Additionally, the DOE had its own spent fuel objective to bring foreign based spent fuel to the United States for storage because the fuel was coming out of reactors in unstable countries around the world and could potentially be made directly into nuclear weapons.¹¹ (Grumbly, p. 22). Politically in 1995, the DOE was under budget constraints from Congress relief from which the DOE was seeking the support of Idaho's congressional delegation. (Grumbly, p. 18-19). Finally, witnesses for the United States testified that DOE desired to reverse the perception that it had not lived up to its past obligations. (Grumbly, p. 9). According to Mr. Grumbly, the federal government wanted to improve its credibility by fulfilling its obligations and commitments which had not occurred in the past. (Grumbly, p. 9). For all of these reasons the Navy and DOE wanted very much to settle the dispute with Idaho.¹²

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The DOE was trying to implement a policy of bringing back research reactor fuel stored in other countries to protect the world from proliferation of plutonium and weapons grade material; the policy began under President Eisenhower entitled The Atoms For Peace Program. (Mr. Frei, p. 168; Trever, p. 31).

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Mr. Frei also testified that while the DOE wanted to settle this matter with the State quickly and in a timely fashion, he stated "I would not say we were under a tremendous amount of pressure. I would not paint a picture of people running

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With that background, the bargaining positions of the parties becomes clear. Idaho held an important bargaining chip having obtained an injunction precluding the shipment of the Navy's spent nuclear waste which was causing a national security problem thereby enabling the State to proclaim the August 31, 1995 proposal as its final offer. The United States' own objectives meant that it too was eager to reach a settlement in this matter.

2) Interpretation of the 1995 Agreement:

The express language of the 1995 Agreement requires DOE to remove all transuranic waste, as defined in the Agreement, out of Idaho regardless of where it is located at the INEL. Paragraph B.1 states:

B. TRANSURANIC WASTE SHIPMENTS LEAVING IDAHO

1. DOE shall ship all transuranic waste now located at INEL, currently estimated at 65,000 cubic meters in volume, to the Waste Isolation Pilot Plant (WIPP) or other such facility designated by DOE, by a target date of December 31, 2015, and in no event later than December 31, 2018.

Transuranic waste is expressly defined in the contract at Paragraph A.4 of the 1995 Agreement and states that "'Transuranic waste' shall be defined as set forth in the EIS, Volume 2, Appendix E," which states:

transuranic waste Waste containing more than 100 nanocuries of alpha-emitting transuranic isotopes with half-lives greater than 20 years per gram of waste, except for (a) high-level radioactive waste; (b) waste that the U.S. Department of Energy has determined, with the concurrence of the Administrator of the U.S. Environmental Protection Agency, does not need the degree of isolation required by 40 CFR 191; or (c) waste that the U.S. Nuclear Regulatory Commission has approved for disposal on a case-by-case basis in accordance with 10 CFR 61.

around the building screaming what do we do, what do we do. No, we were looking at this document, looking at the time frame in which we had to respond and deciding which issues we were going to bring back to the table hopefully to resolve with the state." (Frei, p. 169). Although this testimony provides a context for the DOE's posture at the time of the negotiations, having viewed all of the testimony in the case the Court concludes that the United States was under pressure and motivated to settle the case, as was the State of Idaho.

The words of the contract could not be clearer. The waste meeting this definition and located at INEL must be removed from Idaho as stated in Paragraph B.1. It is the definition, not the 65,000 cubic meter estimate, that controls the obligation to remove waste under the 1995 Agreement. For better or worse, both parties are bound by the definition both as to what it includes and what it does not.

a) Drafting History - Alpha Low-Level Waste and Transuranic Waste Definition:

This definition was a contested point in the negotiations. In arriving at the definition of transuranic waste, the State sought repeatedly to include alpha low-level waste in the definition. (Trever, pp. 22, 53-82). Idaho was particularly concerned about alpha low-level waste being removed because of future projects proposed by DOE at INEL which had the potential for alpha low-level waste to be stored at INEL permanently. (Trever, pp. 22, 55-82, 166-68). This is consistent with Idaho's efforts throughout these negotiations to expand the waste subject to removal from INEL. (Frei, p. 155; Urie, pp. 182-83; Trever, pp. 9-12, 53-82). On the other hand, the United States was insistent that transuranic waste be defined as in the EIS which excluded alpha low-level waste. Late in the negotiations, the State ceded the point and alpha low-level waste was taken out of the final definition thereby removing any obligation upon the United States to remove alpha low-level waste from INEL.¹³ (Grumbly, pp. 47-49; Trever, pp. 81).

¹³ Idaho's intent to remove all waste was consistent even though it ultimately agreed to remove alpha low-level waste from the agreement because the State believed alpha low-level waste could be addressed through the Resource Conservation and Recovery Act which is subject to the State's authority. (Trever, p. 81).

United States' witnesses testified that alpha low-level waste was removed from the definition so that the definition was consistent with other applicable Federal documents and regulations and because WIPP would not accept alpha low-level waste. (Frei, p. 155-57; Guida, pp. 68-69, 76-78). The Federal Government acknowledges that although not included in the definition of transuranic waste, the intent was to remove the alpha low-level waste by mixing it with transuranic waste stored at the Transuranic Storage Area ("TSA") to meet the requirements for shipment to WIPP. The United States maintains this intent is evidence by the DOE documents used by Ms. Trever and the parties' negotiations for the Site Treatment Plan. These intentions, however, were not conveyed to Idaho's negotiators. (Batt, pp. 100, 103; Trever, pp. 166-67).

The United States points out that the EIS, used to define transuranic waste, estimates the amount of waste stored at TSA was 65,000 cubic meters. The United States concludes that because Idaho knew the intent was for alpha low-level waste and transuranic waste at TSA to be treated together for removal to WIPP, Ms. Trever's conclusions regarding the 65,000 cubic meter estimate are unreasonable. Because the two waste streams were to be managed together, the United States contends, the quantity of material for removal referenced by the 65,000 cubic meters could only be that waste stored at the TSA. In response, Ms. Trever noted that figure used a definition which included both transuranic and alpha low-level waste. (Trever, 120-122, 143). During cross-examination of Ms. Trever, counsel noted portions of the ROD (Ex. 69) which stated that transuranic and alpha low-level wastes were generally expected to be managed together and that the site treatment facility was for treatment of alpha low-level waste such that it meets the acceptance criteria for disposal at WIPP. (Trever, pp. 128-29). In response, Ms. Trever acknowledged the ROD did speak to those things but that the statements were "at odds" with other portions of the ROD. Id. On redirect, Ms. Trever clarified that the ROD's application of the management of alpha low-level and transuranic wastes together seemed to only apply to storing and

characterizing the waste not treatment and disposal because the ROD discussion regarding treatment did not coincide with the later plan proposals which included disposal of alpha low-level waste at the INEL. (Trever, pp. 166-68). In short, the State viewed the ROD's inclusions of potential program options where alpha low-level waste remained at the INEL as DOE's attempt to keep these options on the table thereby causing concern to the State about the potential of such wastes being permanently stored at the INEL; directly contrary to the State's goals of removal.

The United States also points to the negotiations between the State and DOE regarding the site treatment plan at the INEL required by the Federal Facilities Agreement and Consent Order ("FFA/CO"). (Trever, pp. 129-133). These negotiations were ongoing at the time of the drafting of the 1995 Agreement. Drafts of the site treatment plan called for the construction of a facility called the advanced mixed waste treatment plant which would manage transuranic waste and mixed alpha low-level waste together as they traditionally had been and that most mixed transuranic waste would be shipped to WIPP. (Trever, p. 132). During testimony, Ms. Trever challenged the terms "most" mixed waste would be shipped to WIPP and that the waste was "managed" together. (Trever, p. 132). Mr. Rasch, who was in charge of the site treatment plan (Ex. 128), testified that the State was aware of the plan to treat the waste and ship it to WIPP. (Rasch, p. 45, 50, 52-53). Mr. Rasch, however, was not part of the negotiations of the 1995 Agreement. The final site treatment plan was executed two weeks after the 1995 Agreement on November 1, 1995. (Ex. 128). Thus, while drafts of the site treatment plan may have discussed the possibility that alpha low-level waste and transuranic waste would be managed together and possibly shipped to WIPP, these draft proposals did not address the State's concerns to achieve definite deadlines for removal of alpha low-level waste. Just the opposite, the drafts likely caused greater concern to the State as they evidenced the possibility that alpha low-level waste might remain at the INEL.

In sum, the United States' efforts to show that Idaho was aware of the United States' intention behind removing alpha low-level waste from the definition was to make the definition consistent with its other documents and that the parties still intended for alpha low-level waste to be treated with transuranic waste for shipment to WIPP is to no avail. Their own witness, Mr. Frei was unable to point to any provision in the language of the 1995 Agreement reflecting the intention or understanding that the 1995 Agreement was intended to require removal of both transuranic waste and alpha low-level waste exclusively from TSA. (Frei, pp. 158-59). Quite simply, the words expressed in the contracts do not convey this intent. Had the parties discussed and/or arrived at an understanding regarding the treatment of alpha low-level waste during their negotiations, such an understanding is not included in the 1995 Agreement and the language contained in the final contract controls the obligations which are binding upon the parties. The United States must now live with the definition for transuranic waste which they feverishly negotiated for and agreed to in the contract. In short, transuranic waste as defined in the 1995 Agreement must be removed from INEL regardless of where it is located at the INEL. Just as the United States is bound by the language of the contract, so too is the State of Idaho who must accept the fact that regardless of any understanding spoken of between the parties, the 1995 Agreement does not require the United States to remove alpha low-level waste.

b) Significance of the 65,000 cubic meters estimate in Paragraph B.1:

DOE further asserts the 65,000 cubic meter estimate itself evidences that the parties intended for waste to be removed only from the Transuranic Storage Area ("TSA") not the Subsurface Disposal Area ("SDA"). On appeal, the Ninth Circuit determined that there was an ambiguity in the agreement concerning what the 65,000 cubic meter estimate referred to in Paragraph B.1 and provided that this Court could use extrinsic evidence to resolve the same. (Dkt. No. 276). The Ninth Circuit's only disagreement with this Court's prior ruling was its

determination that this Court had not considered the second sentence of Paragraph B.1 relating to the 65,000 cubic meters estimate; stating that if the estimate was not reasonable then the Court had to resolve that ambiguity. Nothing else was suggested or ruled on as error, so arguably the State is correct in suggesting that is the only issue before this Court. Having now viewed the record, testimony, and evidence presented the Court finds that the evidence clearly shows that the 65,000 cubic meters of waste was a reasonable estimate of the amount of transuranic waste located at the INEL as it is defined in the 1995 Agreement. The evidence also establishes that the 65,000 cubic meter figure was a reasonable estimate initially of the transuranic and alpha low-level waste stored above ground and, more importantly, was confirmed by the State to be a reasonable estimate of all the transuranic waste located above and below ground when alpha low-level waste was removed by the United States from the definition for transuranic waste. Because it was never thought to be an exact figure, the 65,000 cubic meter estimate was not an issue of contention at the time of the negotiations. (Trever, p. 142).

When Idaho conceded to the removal of alpha low-level waste from the contract definition of transuranic waste, Ms. Trever undertook an investigation to determine whether any other language modifications were necessary after the definition change and to assure that the 1995 Agreement satisfied the stated purpose from Idaho's perspective: to remove the waste from endangering the Snake River aquifer. (Trever, pp. 81-83). In doing so, Ms. Trever realized the 65,000 cubic meter estimate had remained the same throughout the draft changes and that she needed to verify the number.¹⁴ (Trever, pp. 82-83). Ms. Trever's investigation caused her to look

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The 65,000 cubic meter number appeared first in the State's draft of July 26, 1995. (Ex. 586). This draft provided that "the total volume of transuranic waste shipped out of Idaho shall be no less than 65,000 cubic meters." (Ex. 586, 3.A(3)). The definition of transuranic waste in this draft included alpha low-level waste. (Ex. 586, 2.D). Subsequent to this draft proposal, the parties met in Chicago and Minneapolis and exchanged numerous drafts and phone calls. Ultimately, the State sent its August 31, 1995 final offer which included the commitment to ship all transuranic waste out of Idaho by a specified date with a definition of transuranic waste that included alpha low-level waste. Ms. Trever testified

to the DOE Programmatic Spent Nuclear Fuel Management and Idaho National Engineering Laboratory Environmental Restoration and Waste Management Programs Final EIS, April 1995 (Ex. 588) ("1995 EIS"), the May 30, 1995 ROD for the 1995 EIS (Ex. 69), the Engineering Design File for INEL 1995 EIS (Ex. 554), and the August 1995 Draft Waste Management Programmatic EIS (Ex. No. 585) ("Waste Management EIS"), as well as other documents. Ultimately, Ms. Trever concluded that the 65,000 cubic meters estimate was a reasonable estimate for transuranic waste at the INEL in the TSA, the SDA, and other areas as it was defined in the 1995 Agreement to exclude alpha low-level waste. (Trever, p. 86, 90, 114). Generally, Ms. Trever determined that based on the different figures provided in the DOE documents the estimated range for all transuranic waste at the INEL was between 60,000 and 70,000 cubic meters. (Trever, p. 87). Given that it was the United States' definition of transuranic waste being used and such definition was consistent with their documents, Ms. Trever did not discuss her conclusion regarding the estimate with the United States. (Trever, pp. 87, 143) (stating "because they had been using the right number in conjunction with the definition of transuranic waste that they were using.").

It was entirely reasonable for Ms. Trever to have undertaken the investigation in the manner she did in light of the fact that during the negotiations when the State inquired as to the definition the United States' response was to refer the State to the EIS without further explanation. (Guida, p. 105). Given this direction, Ms. Trever did exactly what the United States told her to do; she looked to DOE documents, including the two EISs, to ascertain the meaning of 65,000 cubic meters estimate contained in Paragraph B.1. At this point in the negotiations had the United States wanted to clarify its intent that removal was limited to that waste stored at the TSA it could easily have

that "[o]nly later did I realize that the volume used in [Paragraph B.1] was not consistent with our definition of transuranic and alpha low-level waste, but that ended up being resolved later." (TR, pp. 36, 38). The volume number was included as "a reasonable estimate of all of the transuranic waste and alpha low-level waste as we defined it." (Trever, p. 38). The United States submitted a draft in response (Ex. 526) which removed alpha low-level waste from the definition of transuranic waste but left the volume estimate the same.

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done so by stating as much when asked about the definition by the State. Instead, United States simply referred State officials to other documents. Ms. Trever's reasoning from these other materials is sound. By utilizing DOE's other documents the State seemingly had met the United States' stated purpose behind the change in the definition of transuranic waste: make the definitions and the contract consistent with its other Federal documents. Having heard the testimony at trial, the Court finds Ms. Trever's investigation to have been appropriate and reasonable; arriving at a sound understanding of the 65,000 cubic meters estimate of transuranic waste as defined by DOE in the 1995 Agreement.

The United States' argument here is that both parties intended the agreement to mean something other than what it says; that the 65,000 cubic meter figure defines the volume and location of the waste subject to removal. This subjective intent of the meaning of 65,000 cubic meters estimate on the part of the United States, however, was not communicated to Idaho officials. (Batt, pp. 102-03; Lance, p. 158; Frei, p. 127; Grumbly, pp. 50-51; Sullivan, pp. 196-201; Nordhaus, pp. 34-40).¹⁵ It is clear from the evidence that among themselves, United States' officials commonly understood the "65,000 cubic meters" to refer to only the waste stored at the TSA. (Guida, pp. 105-07, 116-18, Frei, pp. 130-31; Urie, pp. 178-80; Grumbly, pp. 32-33; Nordhaus, pp. 37-38). It is equally clear that this was not the understanding of the State of Idaho who had consistently maintained that all waste at the INEL, and in particular the buried waste, must be removed. (Batt, pp. 102-03; Lance, p. 158).

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Mr. Urie, however, testified that "at some point or points during the negotiations and specifically during a conference call or calls, that representatives from the Department of Energy and representatives from the State of Idaho discussed the fact that 65,000 cubic meters of transuranic waste is meant 65,000 cubic meters of waste located in the retrievable stored area." (Urie, p. 185). Though he remembers this occurring, Mr. Urie had no specific recollection of when or with whom such a conversation took place. Mr. Urie was a staff attorney in the general counsel's office under Mr. Nordhaus and provided legal advice and support to those who were preparing the EIS and stated he was involved in the negotiations of the 1995 Agreement as a participant in the telephone conference calls between the parties.

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The 65,000 cubic meters estimate in Paragraph B.1 is neither a floor nor a ceiling but an estimate. (Trever, p. 38). The language in the contract is that the 65,000 cubic meters was a "reasonable estimate" which corroborates the State's argument that the language of the estimate was never intended to be a quota or limit on the waste to be removed. Nor has the United States provided evidence that the parties' intent was that DOE would only remove 65,000 cubic meters of waste. The estimate does not limit or define the waste subject to removal as the United States argues. Instead, the definition of transuranic waste contained in Paragraph A.4 controls the meaning "transuranic waste" in Paragraph B.1 that must be removed.

The federal government argues that Ms. Trever's status in these negotiations was minimal and that the Court should not put great weight in her testimony. The evidence shows, however, that the State of Idaho relied heavily on her input in these complex negotiations. Both Governor Batt and then Attorney General Lance testified that they were direction and policy makers in these negotiations and that the contract details were left up to the staff, in particular Ms. Trever. (Batt, pp. 106, 109, 111-12, 146- 47; Lance, pp. 157-60, 164). It is only reasonable then to find that an attorney with a matter of this importance would make a careful review of the wording and detail involved in the contract. Ms. Trever's investigation into the 65,000 cubic meter estimate was a necessary result of the fact that she was relied upon to confirm the details of the contract and the State's overarching concern regarding the buried waste over the aquifer.

The language of the contract itself yields credibility to Ms. Trever's testimony and conclusion because it uses the word "all" in terms of removal of transuranic waste located at INEL. Idaho did not believe the 65,000 cubic meters was a quota or fixed amount but, instead, just what the words say it is, a "reasonable estimate." The United States argues that the terms "all" transuranic waste and "now located at INEL" create only a technical ambiguity, when in fact these terms go to the very heart of the negotiations given the posture of the parties at the time of the

negotiations. Ms. Trever's investigation into the 65,000 cubic meters estimate was undertaken to assure that Idaho's concerns regarding the removal of waste would be satisfied; i.e. that "all" meant "all." (Trever, p.38, 82-87). It was in Idaho's own interests to assure that the 65,000 cubic meters figure was a reasonable estimate. Since Idaho wanted "all" transuranic waste removed it only stands to reason that Idaho would want to know that the number was a "reasonable estimate" of the volume of transuranic waste located at INEL. Having viewed Ms. Trever's testimony first-hand, the Court finds her to be a knowledgeable and credible witness concerning the negotiations of the 1995 Agreement.

c) Consistency Between the Contracts and Within the 1995 Agreement:

The United States next argues that to require removal of buried waste would result in an inconsistency between Paragraph G.1, Paragraph E, and the Federal Facilities Agreement and Consent Order ("FFA/CO"). (Green, p. 24). Such an inconsistency, the United States asserts, supports its position that the parties intended for buried waste to be considered separate from the 1995 Agreement. In particular, the United States argues that Paragraph G.1 expressly leaves the buried waste to be addressed by the terms of the FFA/CO and Paragraphs E.1 and E.2 spell out that the treatment facility built at the INEL was to mix the transuranic waste with the alpha low-level waste for shipment to WIPP; this, the United States asserts, is what the parties intended under the 1995 Agreement. Idaho, on the other hand, points out that neither Paragraph G.1 or E nor the FFA/CO address removal of waste but, instead, involve the treatment and remediation of waste. Therefore, the State maintains there is no inconsistency between the contracts nor within the 1995 Agreement's own terms. Removal, the State argues, is covered by the 1995 Agreement and remediation is covered by the FFA/CO.

A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together. Restatement (Second) of Contracts § 202(2) (1981). To the extent possible

all provisions in a contract are to be construed together in an effort to give legal effect to all of its provisions if at all possible. See Klamath Water Users, 204 F.3d 1206, 1210 (9th Cir. 1999) (citing Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) ("A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations."); see also Central Arizona Water Conservation Dist. v. United States, 32 F.Supp.2d 1117, 1127 (D. Ariz. 1998) ("A contract must be construed in its entirety, rather than from reading one provision in isolation from the rest of the contract."). The same is true when the parties enter into two or more contracts concerning the same subject matter.

"The normal rule of construction, of course, is that courts must interpret contracts, if possible, so as to avoid internal conflict." Westlands Water Dist., 134 F.Supp.2d at 1135; see also Central Arizona Water Conservation Dist. v. United States, 32 F.Supp.2d at 1128 ("A court should construe a contract in a manner that gives full meaning and effect to all its provisions and avoid an interpretation which leaves part of the contract meaningless or unreasonable") (citing Kennewick). "Preference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory." Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989) (citation omitted). As such, the Court's interpretation here arrives at a resolution avoiding any internal conflict and providing a reasonable interpretation of the contracts giving both sides the benefits of the bargain for which they argued and satisfying the goals of both parties as conveyed at the time of the negotiations.

The FFA/CO is a process for investigating and deciding how to remediate the various waste at INEL and includes enforceable deadlines upon which the parties must proceed. (Green, p. 11). Paragraph G.1 of the 1995 Agreement states:

G. INEL ENVIRONMENTAL RESTORATION PROGRAM

1. INEL Environmental Restoration Program to Continue.

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DOE shall continue to implement the INEL environmental restoration program in coordination with Idaho and EPA. Such implementation shall be consistent with the schedules contained in the Federal Facilities Agreement and Consent Order (FFA/CO) entered into with the State of Idaho, EPA and DOE, and it shall include schedule requirements developed pursuant to the completed and future Records of Decision under the FFA/CO. The sole remedies for failure to implement the environmental restoration activities specified in the FFA/CO shall be those specified in the FFA/CO.

As to their obligations on the parties, the FFA/CO and the 1995 Agreement do not conflict. Instead they address two different matters in terms of the waste at INEL. The FFA/CO concerns the process for determining how to remediate the buried waste at INEL, thereby incorporating CERCLA law. The 1995 Agreement relates to the obligation to remove waste from INEL. This distinction was recognized by many of the United States' own witnesses. Mr. Frei stated that the 1995 Agreement "is not about how we are going to do things, it is a commitment of what we are going to do in terms of dealing with the waste on site." (Frei, p. 157). Mr. Frei acknowledged that neither Paragraphs G.1 or E requires disposal or removal of waste but only discuss treatment or the building of a treatment facility. (Frei, pp. 158-59). Mr. Rasch also conceded that the site treatment plan, as required by the FFA/CO, did not require shipment anywhere outside of Idaho but only treatment of waste. (Rasch, pp. 52-53, 63-65). Ms. Trever testified that in her discussion with Ms. Sullivan regarding the enforcement provisions of the contracts that she pointed out the distinction between the FFA/CO's environmental restoration activities and the 1995 Agreement's obligation to remove waste. (Trever, pp. 46-49).¹⁶ As a result of their discussion, the words "as modified" were deleted from Paragraph G.1 so as to recognize that the two agreements addressed different obligations. The obligation to remove transuranic waste being distinct and separate from the

¹⁶ Governor Batt also testified that no one from the United States ever conveyed that the FFA/CO was to exclusively cover the buried waste at INEL. (Batt, p. 103)

environmental restoration activities specified in the FFA/CO. (Trever, p. 52). Thus, the United States is required to remove that waste specified in the 1995 Agreement. The United States is also required to continue the remediation process outlined in the FFA/CO. Paragraph G.1 assures that the two agreements, the FFA/CO and the 1995 Agreement, remain consistent by requiring that the parties continue to implement the INEL's environmental restoration program with the EPA upon the schedules contained in the FFA/CO.

Considering the parties' positions at the time of the negotiations, it is clear that all of the parties intended for the FFA/CO restoration programs to continue and that Paragraph G.1 of the 1995 Agreement would incorporate the provisions of the FFA/CO.¹⁷ Two things are important about Paragraph G. First, it specifically addresses the scheduling of when and how things are to be done consistent with CERCLA law. Ms. Green testified that if the 1995 Agreement required removal of transuranic waste from the SDA it would conflict with the requirements of the FFA/CO and CERCLA because removal of waste would need to occur before a remedy had been decided under CERCLA. (Green, p. 25). Recognizing this potential scheduling conflict, the Court has read these provisions to arrive at a consistent interpretation. In fact, the Court finds it is not difficult at all to reconcile Paragraph G.1 with Paragraph B.1. The FFA/CO controls the implementation of the environmental restoration program. Removal of buried transuranic waste, as required by the 1995 Agreement, must be done in compliance with the environmental restoration time line set forth in the FFA/CO. Stated another way, to the extent that the 1995 Agreement puts a different schedule

¹⁷ It is also clear that the DOE did not want to expand the remedies provided for by the FFA/CO. In fact, the United States was "adamant" about not expanding the enforcement provisions that had already been provided for under the FFA/CO. (Trever, pp. 44, 46). Ms. Sullivan testified that "anything covered by another cleanup agreement would not be covered by this agreement" and "that we were not giving the State of Idaho in this agreement additional remedies with respect to waste streams that were already covered by another agreement." (Sullivan, p. 197-200). This is consistent with the interpretation stated here. The FFA/CO and 1995 Agreement operate in cooperation with one another but cover distinct obligations. The FFA/CO applies to the remediation process that is to be employed. The 1995 Agreement applies to the obligation to remove certain waste from INEL.

on when buried transuranic waste is to be removed and it cannot be reconciled with the earlier agreement, the FFA/CO, prevails as to the time frame applicable for conducting the remediation process for the buried waste - the obligation to remove, however, remains. As the United States has argued, CERCLA law governs remediation and cleanup of hazardous waste and the CERCLA process will necessarily drive the time-line upon which remediation here can proceed. This only makes sense given that neither party would have agreed to subject people to an unwarranted risk by requiring removal without employing the CERCLA process to determine whether removal is safe. The removal of transuranic waste located at the TSA must continue upon the time frame contained in the 1995 Agreement as it does not present the same need for CERCLA compliance as the buried waste. Second, the EPA was not a party to the 1995 agreement and any conflicts over which it had jurisdiction are not before the Court at this time.

This interpretation of the distinct obligations of the FFA/CO and 1995 Agreement is realized when reading the documents in their entirety. Paragraph G.1 of the contract assures that the FFA/CO's environmental restoration activities for the treatment of buried waste remain and become part and parcel of the 1995 Agreement. However, it is clear that the FFA/CO does not address when or how transuranic waste is to be located or stored once it is treated. The parties to the 1995 Agreement clearly had authority to resolve that open question. While parties cannot contract to do something that is contrary to the law or to refrain from doing something the law requires, parties are free to negotiate and obligate themselves to do something over and above what the law or some prior agreement obligated or required them to do. The FFA/CO does not address what should happen to the buried transuranic waste once it is remediated and treated pursuant to CERCLA's rules and regulations. Unless something is encountered that would prohibit its removal, the 1995 Agreement obligates the United States to remove all transuranic wastes, with the buried transuranic waste being on a time schedule dictated by CERCLA and the FFA/CO. The fact that it may be

cheaper or that under CERCLA it is determined that the waste could be stored safely in Idaho does not negate the United State's obligation to remove the waste from Idaho under the 1995 Agreement. Accordingly, the Court will retain jurisdiction over this matter to monitor this obligation but the State must understand its agreement to allow CERCLA law to function as set forth in Paragraph G.1 of the 1995 Agreement. Should the EPA ultimately conclude that removal of certain waste is too dangerous and the State disagrees, the Court would necessarily have to resolve that dispute and the Court retains jurisdiction to do so.

The United States also argues that to require removal of buried transuranic waste under the 1995 Agreement would cause conflict with Paragraph E. Paragraphs E.1 and E.2 relate to the building of a treatment facility at INEL and state:

E. TREATMENT & TRANSFER OF EXISTING WASTES AT INEL

1. Treatment Commitment. DOE agrees to treat spent fuel, high-level waste, and transuranic wastes in Idaho requiring treatment so as to permit ultimate disposal outside the State of Idaho.

2. Mixed Waste Treatment Facility. DOE shall, as soon as practicable, commence the procurement of a treatment facility ("Facility") at INEL for the treatment of mixed waste, transuranic waste and alpha-emitting mixed low-level waste ("Treatable Waste"). DOE shall execute a procurement contract for the Facility by June 1, 1997, complete construction of the Facility by December 31, 2002, and commence operation of the Facility by March 31, 2003. Commencement of construction is contingent upon Idaho approving necessary permits.

As Mr. Frei testified, Paragraph E says nothing about the plan to blend alpha low-level waste for disposal outside of Idaho. (Frei, pp. 158-59). In fact Paragraph E does not require treatment or removal of any waste, let alone alpha low-level waste, from Idaho. Instead, it requires the treatment of spent fuel, high-level waste, and transuranic wastes "so as to permit ultimate disposal outside the State of Idaho" (Paragraph E.1) and the building of the mixed waste treatment facility (Paragraph E.2). The treatment commitment of Paragraph E.1 speaks only to "spent fuel,

high-level waste, and transuranic wastes....” The treatment facility required by Paragraph E.2 does indicate that it will be able to treat “alpha-emitting mixed low-level waste (‘treatable wastes’)” but does not require such treatment nor removal of any such waste already existing at INEL. Paragraph E.2(a) speaks to the treatment of “treatable wastes” shipped into Idaho for treatment at the new facility and any transuranic wastes received from another site shall be treated and shipped outside Idaho within six months. Therefore, interpreting Paragraph B.1 to require removal of buried transuranic waste does not conflict with the precepts of Paragraph E. As noted previously, this language does not convey any intention that alpha low-level waste would be treated with transuranic waste for shipment to WIPP thereby limiting the waste at issue in the 1995 Agreement to that waste stored at the TSA.

3) Particular Arguments:

a) Subjective Intent:

The United States invites the Court to accept its subjective intent that the 1995 Agreement limited removal of waste to only that waste stored at the TSA and that although alpha low-level waste at TSA is not included in the definition of transuranic waste or expressly required to be removed it would be mixed and removed, as being the understanding and intent of the parties. The Court respectfully declines to do so. While the Federal government now seems to argue that if the State had said something about this it “would of, could of, or should of” clarified the language but argue that regardless this Court should accept its subjective intent as the proper interpretation of the contract language. “[T]he relevant intention of a party is that manifested by him rather than any different undisclosed intention. In cases of misunderstanding, there may be a contract in accordance with the meaning of one party if the other knows or has reason to know of the misunderstanding and the first party does not.” Restatement (Second) of Contracts §§ 200, 201 (1981). “When a party

is thus held to a meaning of which he had reason to know, it is sometimes said that the 'objective' meaning of his language or other conduct prevails over his 'subjective' meaning. Even so, the operative meaning is found in the transaction and its context rather than in the law or in the usages of people other than the parties." Restatement (Second) of Contracts § 212 cmt. a (1981). Simply put, if one party has an intent in mind, but such intent is never articulated to the other party during negotiations and the language of the contract is not changed during negotiations to reflect the subjective intent, the final language of the contract should not be interpreted according to the party's undisclosed subjective intent.

When lawyers, after weeks negotiation, settle on words with a common and accepted meaning such as "all" transuranic waste as defined specifically in the contract and "located at INEL" they should be held responsible for what they agreed to. Parties are held accountable not only for what they say but for what they do not say if there was a duty to speak. It seems only reasonable that if the Federal government intended the agreement to be restricted to the transuranic waste above-ground it would have said so. The words "all transuranic waste now located at INEL" are all inclusive terms and unambiguous, particularly when viewing the evidence of the parties intent.

The United States' failure to make its intentions known is evidenced by the fact that at least two negotiators for the United States testified that they recognized a problem with the language in the contract, but after bringing it to the attention of their primary negotiators, elected not to make an issue of it in favor of reaching a final settlement. That language of the contract is critical to the Court's determination. The negotiators for the United States knew the language of Paragraph B.1 was vague and possibly a problem and informed their supervisors of this concern. The concern, however, was not conveyed to Idaho. There is some indication that the language was not clarified

with the State because the United States' negotiators knew it was a potential "deal breaker" with Idaho. (Frei, pp. 165-172).

Mr. Guida testified that the State's August 31, 1995 draft contained a significant change to Paragraph B.1 which did not include the word "stored" at INEL but, instead, referred to all transuranic waste located at INEL. (Guida, p. 115) This change, Mr. Guida testified, caused him to question the DOE regarding what the change meant and its implications and to clarify with the DOE that what the State was referring to was still the same material the United States believed to be the subject of Paragraph B.1. (Guida, p. 116). Mr. Guida spoke with either or both of Mr. Urie and Mr. Frie who assured Mr. Guida that in their opinion the material was the same and that if clarification was needed they would do so. (Guida, p. 117). Mr. Guida also acknowledged that he never spoke to the State about the language nor was present when anyone from the United States spoke to the State. (Guida, p. 118).

Mr. Frei also testified that the State's August 31, 1995 draft contained a change in the language of Paragraph B.1. (Frei, p. 166). Mr. Frei stated that he was "concerned" about the language change and whether people outside the parties' negotiating the agreement would know what was meant by the paragraph. (Frei, pp. 166-67). Mr. Frei also raised the issue with DOE officials, Mr. Grumbly in particular. The Federal government officials responded that this was the State's final offer and given the pressures to reach an agreement and not wanting to see the State walk away from the negotiating table, United States' negotiators made a "judgment call" concerning which items to bring back to the table for comment and which items they did not raise for discussion. The judgement was made by senior management to not raise this particular language issue with the State. (Frei, pp. 165 - 172). Frei's testimony is qualified. He did not state that he was afraid Idaho would walk away from the table, but that the United States wanted to raise those

issues that they felt were crucial so that a resolution could be reached quickly. (Frei, pp. 168-169). His concern was as to a misconception to those outside of the negotiations. (Frei, p. 174). In particular, the transcript reads as follows:

Mr. Early: Mr. Frei, you just testified that it was your understanding after the August 31 draft and continuing on into the final draft, that the agreement related to the 65,000 cubic meters. But at the time you received the August 31 draft and looked at it, you saw that if this agreement was read by somebody outside of the DOE that did not have your understanding, that wouldn't be clear, correct?

Mr. Frei: It was my concern that there might be some uncertainty by parties outside of the negotiating parties not understanding what that section meant.

Mr. Early: And you made a judgment call not to raise that with the State of Idaho, correct?

Mr. Frei: Given the conditions the Governor was putting on the Department, the Department elected not to raise that issue in its response back to the August 31 proposal.

Mr. Early: And, indeed, did not raise it, correct?

Mr. Frei: We did not raise it.

(Frei, pp. 173-74).

The Court finds the fact that the United States noticed that the contract language contained some uncertainty as to the United States' intent and their affirmative decision to not clarify their intentions is telling. Both Mr. Guida and Mr. Frei's testimony reveal that the United States' negotiators knew there was a vagueness or, at least, a possibility for misunderstanding. While Mr. Frei qualified his concern to those "outside of the negotiating parties," it begs the question of why, given the importance of the agreement and obvious publicity, the language was not made clear.¹⁸

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Mr. Frei's testimony that DOE officials elected to not raise their concern regarding the language with Idaho is qualified by his statement that his concern was that there would be "uncertainty by parties outside of the negotiations." (Frei, p. 174). This testimony makes clear that DOE believed that everyone, including Idaho, understood the 65,000 cubic meters to refer to waste stored at TSA and to include alpha-low-level waste but it does not evidence that the State was ever

If the United States had a different understanding of the language and realized that the language was unclear, their decision to not raise the issue leaves the United States stuck with the final contract language. Had they wanted to clarify their interpretation the opportunity was present. This issue arose for the United States late in the negotiations and a settlement was needed. (Frei, pp. 165-72).¹⁹ The testimony of both of these witnesses further evidences the fact that the United States' subjective intentions as to the material covered by the agreement was not conveyed and, in this instance, deliberately not clarified with the State. It is somewhat disingenuous for the United States to have known of the language problem but not clarify it at the time of the negotiations and now argue after the fact that their subjective intent should be considered by the Court. The United States cannot now claim that it meant to say something different than what the language of the 1995 Agreement states.

b) Course of Performance:

DOE offered evidence of its course of performance under the 1995 Agreement which it argues supports its interpretation of the contract. Because it has performed under the contract consistent with its understanding of the 1995 Agreement and the State has not objected, the United States contends that its interpretation should control. In particular, DOE points to its completion of the Site Waste Treatment Facility, its compliance with shipments of waste from the TSA out of Idaho, and that it has met most of the other contract deadlines. Mr. Frei testified that the DOE's conduct following the 1995 Agreement has been consistent with its interpretation of the contract in that it implemented construction of the treatment facility as required by Paragraph E. (Frei, pp.

informed of this understanding nor is there evidence in the record which establish this fact.

¹⁹

Governor Batt testified that the August offer was final because "it was time to bring the matter to some closure and the public was still demanding and expecting some action out of me, rightly so. So I submitted this offer, along with the public statement that it was the final offer." (Batt, p. 97).

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158-59). Mr. Rasch also testified regarding the site treatment plan and modifications made to the schedule to align the FFA/CO and the 1995 Agreement time frames. (Rasch, pp. 53-56). The site treatment plan was required by the FFA/CO for management, treatment, and development of treatment technologies for the treatment of waste. (Rasch, pp. 46).

Evidence of course of performance is relevant to contractual interpretation. See Restatement (Second) § 202(4) (1981) (“Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.”). Though DOE may be correct that they have acted in accordance with their understanding of the terms of the 1995 Agreement, no evidence has been provided to the Court that establishes the State has acquiesced to the performance or waived its right to challenge DOE’s performance under the contract.

Regardless of DOE’s conduct, the court finds the plain language of the 1995 Agreement does not support the DOE’s interpretation. Moreover, there is no indication that the State acquiesced to change the terms of the 1995 Agreement once DOE began performance. This lawsuit itself is evidence of the State’s objection. In addition, the State voiced its disagreement when Ms. Trever met with Ms. Green. (Green, pp. 27-28). DOE’s performance cannot be used to bind the State of Idaho to contract terms not expressed in the agreement nor can performance overcome the express language of the contract. See Restatement (Second) of Contracts § 203 (1981) (“express terms are given greater weight than course of performance...”).

c) Post Contract Statements:

The United States offered evidence of statements made immediately following the finalization of the 1995 Agreement which it argues proves that Idaho’s understanding was

consistent with United States' interpretation. In particular the United States points to Governor Batt's statements as reported in various newspapers following his appearance at a public forum, other published speeches, and statements in his book. Other evidence presented by the United States are a fact sheet issued by the State to answer public questions regarding the 1995 Agreement and other similar public releases by the State and statements made at legislative hearings by officials for both parties. (Ex. 33). United States also presented evidence that the public response to the 1995 Agreement was unfavorable and, in fact, resulted in efforts to remove Governor Batt from office and a ballot initiative to invalidate the 1995 Agreement. The United States argues the State's failure to correct statements which were inconsistent with the State's interpretation of the 1995 Agreement evidence that the State knew of and agreed with United States' interpretation. The Court finds this evidence to be inconclusive and unpersuasive.

The newspaper articles are four separate accounts of Governor Batt's appearance in Burley, Idaho in December of 1995, a month and a half after the 1995 Agreement was finalized.²⁰ (Exs. 85-88). The articles were all published on December 7, 1995 and are nearly identical with respect to the portions emphasized by the United States regarding statements Governor Batt allegedly made in response to challenges by Dr. Peter Rickards at the Burley forum. The articles either quote or report that Governor Batt had stated that buried waste was not part of the negotiations of the 1995 Agreement but was instead covered by another agreement. (Batt, pp. 119-129). Generally newspaper articles and the statements made therein are considered hearsay and precluded by Federal Rule of Evidence 801(d) as are quoted statements reported in newspaper articles. See Larez v. City of Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991). An exception to this rule exists where the "extraordinary circumstances" surrounding the proffered articles provide sufficient guarantees

²⁰ Two of the articles were written by named reporters (Exs. 86, 87) and the other two articles were associated press articles (Exs. 85, 88).

of trustworthiness such that they can be admitted under the residual hearsay exception. Id. at 643. In Larez the Ninth Circuit found that such extraordinary circumstances were present where the statements were reported by three independent newspapers and the statements were attributed the declarant who did not dispute making the statements; determining that upon these facts the reports were trustworthy thereby satisfying the first two sub-sections of then Rule 803(24).²¹ Id. The Ninth Circuit did, however, determine the admissibility of the reports was in error as they were not the best evidence of the statements; noting the reporters' testimonies subject to cross-examination would have been the best evidence. Id. at 644. Here, although the exhibits were admitted because they contained some guarantee of trustworthiness, the Court does not find them to be persuasive evidence of the intent of the parties at the time of these negotiations.

The Court admitted the articles not for the truth of the statements but, as the United States argued, as one piece of evidence in the Federal Government's case which they asserted would be tied in with subsequent testimony bearing on the issues presented here. (Vol. I, 126-29).²² These articles were not "linked up" with other testimony or evidence that the State knew and did not intend for the 1995 Agreement to cover buried waste. Moreover, the reliability of the articles was drawn into question. During testimony, Governor Batt stated that he did not recall exactly what was said at the Burley appearance and that he could have been misquoted and that the portions of the articles the United States was pointing to were "speculation" and/or the reporters' own accounts of the Burley event. (Vol. I, p. 121). In addition, the articles alone are not the best evidence of the statements made at the Burley appearance. See Larez, 946 F.2d at 644.

²¹ Federal Rule of Evidence 803(24) has since become Rule 807.

²² Vol. I relates to the rough transcript of record from the first day of trial.

The United States puts considerable weight on the challenges and statements made by Dr. Rickards to Governor Batt regarding buried waste at the Burley appearance. The evidence shows that Dr. Rickards and Governor Batt did not see eye to eye on many political matters, particularly matters related to nuclear waste. In fact, Dr. Rickards was vocally opposed to the 1995 Agreement and had initiated the recall drive against Governor Batt as well as being a candidate for the Republican nomination for an Idaho congressional seat at the time of these reports. Governor Batt testified that he was not eager to engage in an exchange with Dr. Rickards. (Batt, p. 119-21, 141). Dr. Rickards was also not called as a witness or subject to cross-examination during the trial and his statements made to Governor Batt as reported in the newspaper articles are hearsay without any indicia of trustworthiness. Accordingly, Dr. Rickards' statements in the articles are not given any weight as evidence of the State's intentions regarding the 1995 Agreement.

As to Governor Batt's statements in speeches, his book, and the like the Court likewise does not find that they provide significant evidence of the State's interpretation of the 1995 Agreement. (Exs. 38, 58, 106, 107, and 141). In his book, the United States points to a top ten list of accomplishments of the 1995 Agreement with number ten referring to a previous agreement which addressed the buried waste. (Ex. 58). Likewise, Governor Batt also made one statement during this trial that the FFA/CO, as he understood it, required DOE to remove buried waste at INEL. (Batt, p. 115). The FFA/CO does not require such removal. This single response during his testimony and the bullet point in his book, however, are less persuasive than the bulk of Governor Batt's testimony which reflects that while he possessed a general understanding of the contract obligations at issue here, he had clearly and unequivocally conveyed that Idaho's position was that buried waste must be removed from INEL. Governor Batt stated that he was the policymaker and left the details of the contract to his staff to finalize but demanded that the agreement satisfy the three goals he had set forth. (Batt, pp. 106, 109, 111-12, 146-46). This is evident from the record. Many of his public

statements in 1995 and even his testimony here used general laymen's terms to describe the contracts at issue and the obligations therein but the stated goals of the State remained clear and consistent. The Court finds the evidence of Governor Batt's three goals, which he made clear to his own staff and to the United States, are more telling of the State's intentions than any of the other more generalized statements he may have made after the 1995 Agreement was finalized. Moreover, these isolated statements made following the negotiations do not accurately reflect the big picture of what the State's intentions were as reflected by the totality of the evidence presented. Governor Batt testified he was the policy maker, not the drafter of the details of the 1995 Agreement. While it is true Governor Batt signed the 1995 Agreement on behalf of the State, nothing in the record establishes he was aware of the United State's subjective intent regarding what was to be removed from the INEL. Public statements by Governor Batt weeks after the 1995 Agreement was signed are not determinative of the parties' intent at the time the 1995 Agreement was executed.

Finally, the United States points to the State's refusal or failure to respond to public opinion and comments which were contrary to the State's interpretation. Without a doubt, there was strong public opinion expounded following the finalization of the 1995 Agreement much of which was in opposition to the terms of the agreement. This public reaction was understandable given the complexity of the interrelationship between the two agreements regarding buried waste and, as a result, the public's general misunderstanding regarding the buried waste and the requirement that it be removed. The public response highlights the level of importance this issue held to the citizens of Idaho and the State's officials during the negotiations. The fact that, as the United States argues, if the State had a different intention from that reported in the media it would have made that intention known is an argument dispelled by the State during testimony. At trial, the State officials testified that they made a conscious decision to not respond to many of the reports for various

reasons. (Batt, pp. 142-43, Trever, p. 149). Governor Batt testified that his office generally did not respond to the criticisms in the media "because to do so would only give public forum to the accuser" and the articles offered by the United States were "the type of thing [his office] did not respond to."²³ (Batt, p. 143). Likewise, the State official's testimony at the legislative hearings is consistent with Idaho's position here and the fact that DOE officials testified differently without objection by the State officials is attributable to the nature of legislative hearings. (Trever, pp. 152-57). These reports and statements were made subsequent to the parties signing and finalizing the 1995 Agreement. What was said between the parties during the negotiations is more reflective of the parties intentions.

4) Conclusion:

Ultimately the interpretation of this contract has been a search for the common meaning of the parties at the time they entered into the 1995 Agreement. It is hard to imagine that the parties to the 1995 Agreement intended anything other than what was put in writing. The final draft was the result of intense negotiations with multiple drafts going back and forth between the parties. The Court's interpretation of the parties' obligations under the 1995 Agreement assures that the concerns of both parties will be met.²⁴ The United States has been and will be able to store spent nuclear fuel at INEL and the ultimate removal of buried waste from INEL will continue to progress on the timetable established in the FFA/CO and in accordance with the requirements of CERCLA. The State of Idaho is assured that waste will be removed and such waste will no longer endanger

²³

Ms. Trever testified that the State was aware of the articles but "a decision was made that trying to clarify these and other reporting errors relating to the agreement would give opponents of the agreement another day with reporters, the decision was made not to take any action in terms of issuing a written statement or demand for retraction." (Trever, p. 149).

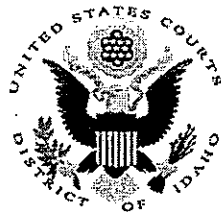
²⁴ "The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding...." Restatement (Second) of Contracts § 201 cmt. c (1981).

the Snake River aquifer. The waste located at the TSA will be removed upon the time schedule outlined in the 1995 Agreement and the buried waste shall be removed, once it is determined if and how it can safely be moved, as directed by the FFA/CO and CERCLA. This decision also resolves the question posed by the Ninth Circuit. The ambiguity identified by the Ninth Circuit was not an ambiguity in the wording itself, but only whether the 65,000 cubic meters figure was a reasonable estimate of transuranic waste. Ms. Trever's testimony establishes that the Federal government's own documents support that the amount of transuranic waste, as defined in the 1995 Agreement, above and below ground was approximately 65,000 cubic meters.

ORDER

Based on the foregoing and being fully advised in the premises the Court **HEREBY ORDERS** as follows:

- 1) Defendants' Motion for Declaratory Judgment (Dkt. No. 223) is **GRANTED**.
- 2) Jurisdiction is retained by this Court as stated herein.
- 3) Defendants' Motion in Limine (Dkt. No. 324) was **DENIED** at trial.



DATED: May 25, 2006

A handwritten signature in cursive script, appearing to read "Edward J. Lodge".

Honorable Edward J. Lodge
U. S. District Judge

MEMORANDUM ORDER
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Reply in Support of State of Idaho's
Amended Motion for Summary Judgment
on Issue of Recharge Subordination

Appendix D:

Pages 1 & 22-26 of Idaho Power Company's
Response to State of Idaho's First Set of
Requests for Admission and Requests for
Production of Documents (Nov. 19, 2007)

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Attorneys for Plaintiff Idaho Power Company

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

In Re SRBA)

Case No. 39576)

IDAHO POWER COMPANY,)

Plaintiff,)

v.)

STATE OF IDAHO; C.L. "BUTCH" OTTER,)
Governor of the State of Idaho; LAWRENCE G.)
WASDEN, Attorney General of the State of)
Idaho; IDAHO DEPARTMENT OF WATER)
RESOURCES; and DAVID TUTHILL, Director,)
Idaho Department of Water Resources)

Defendants.)

Consolidated Subcase No. 92-00023

IDAHO POWER COMPANY'S
RESPONSE TO STATE OF IDAHO'S
FIRST SET OF REQUESTS FOR
ADMISSION AND REQUESTS FOR
PRODUCTION OF DOCUMENTS

RECEIVED BY

NOV 27 1997

OFFICE OF THE
ATTORNEY GENERAL

MAIL 97020

Request for Admission No. 49. Admit that the exhibit referenced in the immediately preceding Request is admissible as evidence in this action.

Response to Request for Admission No. 49.: Plaintiff denies this request for admission. Plaintiff cannot ascertain for what purposes the document described in Request for Admission No. 48 might be proffered as evidence at the trial of this action, and for this reason cannot determine whether the document described in Request for Admission No. 48 would or would not be admissible as evidence in this action.

Request for Admission No. 50. Admit that attached hereto as Exhibit 30 is a genuine true and correct copy of Idaho Department of Water Resources Water Right Permit No. 01-7054.

Response to Request for Admission No. 50.: Plaintiff has reviewed the document attached as Exhibit 30 to the State's first discovery requests. Exhibit 30 appears to be the document described in Request for Admission No. 50, however, as this document has not been produced from files maintained by Plaintiff nor has this document been within the custody and control of Plaintiff, Plaintiff cannot verify the authenticity of the document, and therefore denies the same.

Request for Admission No. 51. Admit that the exhibit referenced in the immediately preceding Request is admissible as evidence in this action.

Response to Request for Admission No. 51.: Plaintiff denies this request for admission. Plaintiff cannot ascertain for what purposes the document described in Request for Admission No. 50 might be proffered as evidence at the trial of this action, and for this reason cannot determine whether the document described in Request for Admission No. 50 would or would not be admissible as evidence in this action.

Request for Admission No. 52. Admit that Idaho Power subordinated its water rights to Water Right No. 01-7054 pursuant to the terms of the "Swan Falls" Agreement.

Response to Request for Admission No. 52. Plaintiff objects to Request for Admission No. 52 on a number of grounds. First, the request seeks an admission regarding a purely legal conclusion, and is therefore not permissible under I.R.C.P. 36(a). Second, the Stipulation of April 11, 2006 ("2006 Stipulation") between the State of Idaho and Idaho Power provides: that "neither party by entry into this Stipulation waives any legal position or arguments it may have regarding any legal disputes that may exist between the parties," that "[n]othing in this Stipulation shall be construed as an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding," with limited exceptions not applicable here, and that "nothing in this Stipulation shall be construed or interpreted to affect the authority of the State as provided by constitution, statute or regulation." To the extent that this request seeks, "an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding," this request is barred by and constitutes a breach of the 2006 Stipulation.

Without waiving these objections, Plaintiff avers that the 1984 Swan Falls Agreement speaks for itself with regard to the subordination of water rights held by Idaho Power, and that Idaho Power holds water rights that were not subordinated by the Swan Falls Agreement. Plaintiff therefore denies Request for Admission no. 52. Plaintiff does, however, admit consistent with the 2006 Stipulation, that water right permit nos. 01-7054 and 37-7842 are subject to the Swan Falls Agreement and that all provisions of the Swan Falls Agreement and the implementing legislation shall continue to apply to those water right permits. The 2006 Stipulation further provides that Idaho Power agrees that said permits may be exercised in a manner consistent with state law and that the Idaho Department of Water Resources will appropriately investigate said permits to ensure that

they meet applicable requirements and that the licensed or decreed water rights will fully comply with state law. Idaho Power reserves the right to contest whether said permits, and other permits, are being exercised in a manner consistent with state law.

Request for Admission No. 53. Admit that attached hereto as Exhibit 31 is a genuine true and correct copy of Idaho Department of Water Resources Water Right Permit No. 37-7842.

Response to Request for Admission No. 53.: Plaintiff has reviewed the document attached as Exhibit 31 to the State's first discovery requests. Exhibit 31 appears to be the document described in Request for Admission No. 53, however, as this document has not been produced from files maintained by Plaintiff nor has this document been within the custody and control of Plaintiff, Plaintiff cannot verify the authenticity of the document, and therefore denies the same.

Request for Admission No. 54. Admit that the exhibit referenced in the immediately preceding Request is admissible as evidence in this action.

Response to Request for Admission No. 54.: Plaintiff denies this request for admission. Plaintiff cannot ascertain for what purposes the document described in Request for Admission No. 53 might be proffered as evidence at the trial of this action, and for this reason cannot determine whether the document described in Request for Admission No. 53 would or would not be admissible as evidence in this action.

Request for Admission No. 55. Admit that Idaho Power subordinated its water rights to Water Right No. 37-7842 pursuant to the terms of the "Swan Falls" Agreement.

Response to Request for Admission No. 55.: Plaintiff objects to Request for Admission No. 52 on a number of grounds. First, the request seeks an admission regarding a purely legal conclusion, and is therefore not permissible under I.R.C.P. 36(a). Second, the Stipulation of April 11, 2006 ("2006 Stipulation") between the State of Idaho

and Idaho Power provides: that "neither party by entry into this Stipulation waives any legal position or arguments it may have regarding any legal disputes that may exist between the parties," that "[n]othing in this Stipulation shall be construed as an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding," with limited exceptions not applicable here, and that "nothing in this Stipulation shall be construed or interpreted to affect the authority of the State as provided by constitution, statute or regulation." To the extent that this request seeks, "an admission against interest or tendered or used as evidence to support or oppose any party's claims or objections in any administrative or judicial proceeding," this request is barred by and constitutes a breach of the 2006 Stipulation.

Without waiving these objections, Plaintiff avers that the 1984 Swan Falls Agreement speaks for itself with regard to the subordination of water rights held by Idaho Power, and that Idaho Power holds water rights that were not subordinated by the Swan Falls Agreement. Plaintiff therefore denies Request for Admission no. 52. Plaintiff does, however, admit consistent with the 2006 Stipulation, that water right permit nos. 01-7054 and 37-7842 are subject to the Swan Falls Agreement and that all provisions of the Swan Falls Agreement and the implementing legislation shall continue to apply to those water right permits. The 2006 Stipulation further provides that Idaho Power agrees that said permits may be exercised in a manner consistent with state law and that the Idaho Department of Water Resources will appropriately investigate said permits to ensure that they meet applicable requirements and that the licensed or decreed water rights will fully comply with state law. Idaho Power reserves the right to contest whether said permits, and other permits, are being or will be exercised in a manner consistent with state law.

Request for Admission No. 56. Admit that attached hereto as Exhibit 32 is a genuine true and correct copy of Idaho Department of Water Resources Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area issued November 3, 1988.

Response to Request for Admission No. 56. Plaintiff has reviewed the document attached as Exhibit 32 to the State's first discovery requests. Exhibit 32 appears to be the document described in Request for Admission No. 56, however, as this document has not been produced from files maintained by Plaintiff nor has this document been within the custody and control of Plaintiff, Plaintiff cannot verify the authenticity of the document, and therefore denies the same.

Request for Admission No. 57. Admit that the exhibit referenced in the immediately preceding Request is admissible as evidence in this action.

Response to Request for Admission No. 57. Plaintiff denies this request for admission. Plaintiff cannot ascertain for what purposes the document described in Request for Admission No. 56 might be proffered as evidence at the trial of this action, and for this reason cannot determine whether the document described in Request for Admission No. 56 would or would not be admissible as evidence in this action.

II. REQUEST FOR PRODUCTION OF DOCUMENTS

Request for Production No. 1: Produce all documents identified in or related to your response to Requests for Admission Nos. 1 through 57 above.

Response to Request for Production No. 1: Attached hereto is a copy of the 2006 Stipulation signed by Attorney General Lawrence Wasden for the State of Idaho and James Tucker for Idaho Power Company.