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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. 00-92023
(92-23)

**IDAHO POWER COMPANY'S
REPLY IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY
JUDGMENT ON RECHARGE
SUBORDINATION**

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INTRODUCTION

The cross-motions for summary judgment raised by the parties are intended to address the specific question of whether Idaho Power's water rights subject to the Swan Falls Agreement are subordinate to the use of water for recharge. The State's primary argument is that this question is controlled by the State's policy of maintaining a zero flow at Milner, and not by the subordination provisions of the Swan Falls Agreement signed by the parties, or by the recharge authorization statutes explicitly addressing the relationship between recharge and hydropower. The State of Idaho without question has a history of the Snake River dropping to a flow of zero cfs at Milner during portions of the irrigation season, and a policy that has developed recognizing this state of affairs. In its Response Brief, the State continues to contend that this policy, recognized in the State Water Plan policy document, and acknowledged by the parties to the Agreement, should be made part of the permanent "definition" or an "element" of Idaho Power's hydropower water rights decreed by the SRBA Court. The State is wrong.

The parties' awareness and acknowledgement of the State's zero flow policy does not make it an element of Idaho Power's water right under the Swan Falls Agreement. The Legislature amended I.C. § 42-203B(2) in 1986 to clarify the location of trust water and provide direction regarding general water rights administration. However, that legislative action did not and could not change the fundamental terms of the parties' signed contracts. One of those signed contracts was the Framework, which directly dealt with recharge, by calling for the study of recharge and its impacts, including its impact on hydropower generation.

The 1986 legislative amendments also did not affect the recharge authorization statutes in place at the time the Agreement was executed, and still in effect today, under which water rights for recharge were legislatively deemed "secondary" or subordinate to prior perfected water rights

for other uses, including hydropower specifically. In light of the law in effect at the time the parties signed the Swan Falls Agreement, the subordination provisions of the Agreement are unambiguous, and do not provide for the subordination of Idaho Power's hydropower water right under the Agreement to the use or management of water for recharge.

The Agreement and its attached implementing legislation agreed to by the parties provides for subordination to depletionary upstream beneficial uses, which does not include the non-depletionary use of recharge in the ESPA. Irrespective of whether recharge is considered non-depletionary, however, recharge continues to be subordinate to hydropower water rights, including those of Idaho Power, under the recharge authorization statutes. The Legislature confirmed this in 1994 through its amendments to that legislation. Neither Idaho Power, the State nor this Court need address what further legislative changes the Legislature may or may not make in the future.

The Swan Falls Agreement remains in effect today. Idaho Power has never "consented" or "conceded" to state legislation that is inconsistent with the fundamental terms of the Agreement, or inconsistent with the longstanding legislation making recharge subordinate to hydropower. Those fundamental terms of the Agreement include, but are not limited to, Idaho Power's right to compel the State to take reasonable steps to insure the 3900 and 5600 minimum flows, its entitlement to use water above the minimum flows as available pursuant to the Agreement's subordination provisions, and its right to contest any appropriation of water in accordance with state law. The State does not have unfettered discretion to exercise its regulatory authority to change state law as it sees fit and bind Idaho Power in a manner contrary to the parties' contracts, without being subject to claims for breach of contract and takings.

ARGUMENT

I. THE AGREEMENT DID NOT DEFINE IDAHO POWER'S HYDROPOWER WATER RIGHTS TO INCLUDE AS AN ELEMENT THE STATE'S ZERO FLOW POLICY, OR TO FOREVER PRECLUDE IDAHO POWER FROM RAISING ANY ISSUE CONCERNING WATER USE ABOVE MILNER.

A. Neither the Parties' Awareness of Nor the Agreement's Acknowledgement of the Existence of the State's Zero Flow Policy Makes the Policy an Element of Idaho Power's Hydropower Water Rights.

The State attempts in its Response Brief, as it did in its Opening Brief, to read the history and State policy of managing the Snake River for zero flow at Milner Dam into Idaho Power's hydropower water rights under the terms of the Swan Falls Agreement. As argued in Idaho Power's Response Brief, the terms of the Agreement do not "define" Idaho Power's water rights to include the zero flow policy as an "element" of those water rights. *See* Idaho Power Resp. at 23-30. The State still does not and cannot point to any provision of the Agreement itself that defines Idaho Power's water rights as including the zero flow policy. Instead, the State continues to rely on Exhibit 6 to the Agreement, under which the State and Idaho Power agreed to "recommend" that the State Water Plan incorporate certain policy provisions, including continuation of the policy regarding a minimum daily flow at Milner of zero cfs. *See* State Resp. at 7.¹

Paragraph 7 alone defines Idaho Power's water rights under the Agreement. Paragraph 7 is entitled "Company's Water Right" and begins by stating in plain language that "State and

¹ Before addressing the Agreement itself, the State spends three pages presenting its version of the history leading up to the "two rivers" policy, including how this policy played into the licensing of Idaho Power facilities on the Snake River. *See* State Resp. at 4-6. The State implies in this discussion that Idaho Power "conceded to this principle" in constructing and licensing its facilities at American Falls and Twin Falls. *Id.* at 5. The State is wrong. As Idaho Power detailed in its Opening Brief, the Company specifically negotiated the subordination provisions in these and other pre-1984 license agreements – all of which were limited to irrigation and other consumptive uses. *See* Idaho Power Open. at 19-28. None of Idaho Power's licenses or other approvals for its Snake River facilities even mention the zero flow at Milner policy, much less bind Idaho Power to that policy as the State implies.

Company agree that Company's water rights shall be as follows."² The Company's right, as defined in Paragraph 7, is to "use the flow of the Snake River at its facilities to the extent of its actual beneficial use" (which is 8400 cfs), to "contest any appropriation of water in accordance with state law" and "to compel the State to take reasonable steps to ensure the average daily flows" as defined by the Agreement.³ More specifically, Paragraph 7(A) defines Idaho Power's right, represented by the applicable license numbers, as unsubordinated up to the agreed upon minimum flows at the Murphy Gauge. Paragraph 7(B) defines Idaho Power's right in excess of those flows as "subordinate to subsequent beneficial upstream uses upon approval of such uses by the state in accordance with state law."⁴

Nothing in Paragraph 7 references the State's zero flow policy as an element of Idaho Power's water right defined in the Paragraph or limits the Company's right to below Milner. There is a fundamental difference between the definition of the Company's water right in Paragraph 7 of the Swan Falls Agreement, and the legislative and administrative policies that are discussed in Exhibit 6 to the Agreement. The only legislation agreed to by the parties as part of the Swan Falls Agreement, set forth as Exhibits 7A and 7B to the Agreement, provided that the water held in trust would be subject to "subordination to and depletion by future upstream beneficial users," without reference to zero flow as an element of those rights. The parties did not agree to legislate enactment of the zero flow or two rivers concept as part of the legislative language in Exhibits 7A and 7B.⁵ In fact, the zero flow policy around which the State now

² Gheleta Aff. Ex. F (Swan Falls Agreement (Oct. 25, 1984)) (hereinafter "Agreement") ¶ 7.

³ *Id.*

⁴ *Id.* ¶ 7(B).

⁵ *Id.* exs. 7A and 7B.

bases virtually its entire argument did not appear in legislation until 1986 when the Legislature amended I.C. § 42-203B.

In addition to the Exhibit 6 language referencing the zero flow policy, the State also claims that subparagraph 5 of Exhibit 6, providing for mitigation to Idaho Power for adverse effects of non-irrigation diversions on hydropower generation for the reach between Milner Dam and Murphy Gauge, reflects an intent to limit the Agreement's effectiveness or application to the Snake River below Milner exclusively. *See* State Resp. at 7. But the State fails to point out that Exhibit 6 to the Agreement contains two conditions regarding storage – the mitigation provision applying below Milner in subparagraph 5 that the State cites, and the full utilization inquiry requirement applying upstream of Murphy, including the stretch above Milner, in subparagraph 3 that the State ignores.⁶ The full utilization language in subparagraph 3 provides that "[n]ew storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized."⁷ Thus, before building any new storage above Murphy, the State must examine whether existing storage is being fully utilized. This reference in Exhibit 6 to the Snake River above Murphy, including stretches of river both above and below Milner, cuts against the State's argument that the Agreement exclusively addressed Snake River water management issues below Milner Dam. If the Snake River above Milner was entirely off limits to Idaho Power as the State suggests, there would be no reason to ask whether existing storage was being fully utilized before allowing further downstream storage depletions.

The State next tries to divert the Court's attention from the actual language of the Agreement by repeating the same series of select quotes from Idaho Power and others that it

⁶ *Id.* ex. 6.

⁷ *Id.*

cited in its Opening Brief regarding the zero flow policy, and again arguing that these statements illustrate the parties' intent to incorporate the policy as an element of Idaho Power's water rights. *See* State Resp. at 7-9. In particular, the State focuses on a series of quotes from Tom Nelson at IWRB public information meetings on the Swan Falls settlement "explaining the Milner zero flow and mitigation provisions," and claims that these quotes illustrate Idaho Power's acceptance of the zero flow policy as an element of the Company's hydropower rights under the Agreement. *Id.* at 7. Many of the quotes cited by the State are either incomplete or taken out of context, as Idaho Power pointed out in its Response Brief. *See* Idaho Power Resp. at 30-33. But even taken as presented by the State, these statements prove nothing more than the fact that Idaho Power and others recognized irrigation canals at Milner reduced the flow of the river to zero during the irrigation season, and that the Agreement did not intend to change this state of affairs. This recognition of the zero flow and Idaho Power's historic deference to upstream irrigation and consumptive uses hardly establishes, as the State contends, that Idaho Power agreed as a term of the Swan Falls Agreement that its hydropower water right under the Agreement would be subordinate to all future uses above Milner Dam.⁸

⁸ In fact, although Mr. Nelson recognized the split personality of the Snake River from irrigation diversions during the *summer irrigation season*, he also explained to the IWRB that "winter flows above the critical period are of extreme importance to the company in meeting load." *See* First Orr Aff. Ex. 44 (Tr. of Pub. Info. Meeting on the Swan Falls Agreement (Twin Falls) (Oct. 25, 1984)) at 41. That is precisely why the Company negotiated for, and received, agreement from the State that the State Water Plan would include a provision requiring full utilization of storage above Milner before new storage below Milner was constructed. *See id.* Ex. 46 (Tr. of Pub. Info. Meeting on the Swan Falls Agreement (Boise) (Nov. 1, 1984)) at 47-48 ("As you know, the constraints on water use in a federal reservoir is pretty much a question of federal law, at least initially. And it's our intuitive belief, at least it's intuitive on my part, that there's some water uses built around excess storage, and that to the extent that within the boundaries of federal policy, the state can force the question to be asked, 'is this really the way we want to use the water,' that those questions should be asked. So my feeling is, what we have written, and I think my compatriots agree, is simply a system that asks the question."). And as discussed above, the fact that the State must determine whether upstream storage above Milner is being fully utilized before allowing any further downstream storage supports Idaho Power's position that the zero flow policy is not, as the State presents it, a complete block to the river flowing past Milner.

In short, the zero flow policy and other provisions of Exhibit 6 are policy initiatives to be incorporated into the State Water Plan. But in the definition of the Company's water right they provided no such limitation. And the State's attempt to now rewrite the terms of the Agreement to include these administrative and legislative programs as an element of Idaho Power's vested water rights under the Agreement should be rejected. The language of Paragraph 7 of the Agreement controls the definition of Idaho Power's water rights, and that language alone must guide the Court's decision in this action.

B. The 1986 Amendments to I.C. § 42-203B(2) Recognized the Zero Flow Policy, But Did Not Change the Status of Recharge as Subordinate to Hydropower under the Agreement as Interpreted under Existing Law.

In arguing that the zero flow policy is part of Idaho Power's water rights, the State relies heavily on the Legislature's 1986 amendment of I.C. § 42-203B(2). The State essentially argues that even though the Agreement itself did not clearly define Idaho Power's hydropower rights to include the zero flow policy, the 1986 amendments proceeded to redefine the rights to exclude flows above Milner from the definition of the source of Idaho Power's water rights under the Agreement. However, the "two rivers" language in § 42-203B(2) is not part of the Agreement. It is a legislative provision of general applicability throughout the Snake River Basin. And as discussed below and in Idaho Power's Response Brief, this provision did not modify the terms of the Agreement nor does it control over directly applicable law making recharge secondary to hydropower. *See Idaho Power Resp. at 33-38.*

1. In Finalizing the Water Appropriation Rules to Clarify the Location of Trust Waters, the Parties Did Not Change the Legal Status of Recharge as Subordinate to Hydropower under Existing Statutes.

Before addressing the actual language of the 1986 amendments, the State claims that the "controversy triggered by the Department's proposed administrative rules and regulations for processing applications for appropriations of 'trust water' under the 'public interest' criteria of I.C.

§ 42-203C underscored the central role of the Milner Divide in the Swan Falls settlement." State Resp. at 9. Idaho Power acknowledges that the 1986 amendments were in part a response to IDWR's attempt to define the extent of trust water under the Agreement to include flows above Milner, and that the amendments were intended to clarify that trust water existed only downstream from Milner Dam. As the State points out, Mr. Nelson testified at one of the hearings held by IDWR on the proposed rules that he did not think diversions for recharge above Milner were part of the trust waters and so would not be subject to public interest criteria.⁹ Similarly, Idaho Power's written comments on the proposed rules acknowledged the Company's understanding that trust water flows in the Snake River existed only below Milner Dam.¹⁰

However, the controversy and Idaho Power's response to it was limited to the issue of whether the diversion of water above Milner would take trust water under the Agreement, and had nothing to do with the issue of whether the Swan Falls Agreement subordinated Idaho Power's water rights either above or below Milner to recharge. At no time does Mr. Nelson discuss the zero flow policy as being an absolute bar to Idaho Power's use of water above Milner irrespective of the designated use of that water, nor are the discussions in any way dispositive of whether the Agreement subordinated Idaho Power's water rights to recharge. Because neither the Agreement nor the law existing at the time subordinated Idaho Power's hydropower rights to upstream recharge, Mr. Nelson had no reason to address the recharge subordination issue in testimony regarding the limited question of whether water above Milner was part of the trust established by the Swan Falls Agreement.

For this same reason, none of the other third-party testimony cited by the State addresses

⁹ See Fourth Orr Aff. Ex. 48 (Tr. of IDWR Pub. Info. Meeting (Twin Falls) (May 23, 1985)) at 23-24.

¹⁰ See Fourth Orr Aff. Ex. 71 (Idaho Power's Comments on Proposed Water Allocation Rules (Jan. 27, 1986)).

the issue of recharge or the scope of Idaho Power's subordination under the Agreement. In addition to the quotes from Mr. Nelson, the State cites testimony from Senator Mike Crapo and Attorney General Jim Jones as opposing the Department's inclusion of flows above Milner in the definition of trust water. Again, Idaho Power does not dispute the basic assumption of these individuals that flows above Milner fall outside the definition of trust water. But Idaho Power does not agree with the State's characterization of this testimony as supporting the larger proposition that "flows arising upstream from Milner would not be subject to any of the water rights encompassed in the Swan Falls Agreement." State Resp. at 12. This testimony, like the testimony of Mr. Nelson, was directed towards the narrow question of whether diversions above Milner would take trust water, and did not address the question before this Court, which is whether the Company subordinated its water rights to recharge under the Agreement as interpreted under then-existing law.

2. *The Legislature's 1986 Amendments to I.C. § 42-203B(2) Clarified the Location of Trust Waters and Water Rights Administration, But Did Not Amend Either the Parties' Signed Contracts or Existing Statutes Making Recharge Subordinate to Hydropower.*

The State takes the position that the issue of whether Idaho Power's hydropower water rights are subordinate to recharge, or vice-versa, is controlled exclusively by the Legislature's 1986 amendment of I.C. § 42-203B(2), irrespective of the parties' signed Framework, 1180 Contract and Agreement. According to the State, Idaho Power "expressly conceded to, and agreed not to challenge" the State's exercise of authority to "regulate and limit" Idaho Power's hydropower rights as expansively interpreted by the State in this litigation. State Resp. at 15. As support for these assertions, the State cites statements from Senator Crapo and Tom Nelson as captured in minutes taken of Senate Committee proceedings.

Statements reported in Committee minutes by no means can be seen as controlling over the parties' signed contracts and existing statutes under which those contracts were executed that directly subordinated recharge to hydropower. To start with, Senator Crapo's statement in the minutes that the bill "*seemed to be acceptable* to the concerned parties"¹¹ certainly does not constitute Idaho Power's express concession to the legislative amendments as expansively interpreted by the State now. This is particularly the case where such an interpretation in the context of recharge subordination cannot be squared with provisions of the signed Agreement and Framework as well as existing legislation directly governing the relationship between hydropower and recharge. Moreover, while the minutes reported Senator Crapo stating that the 1986 legislative amendments were "*merely clarification*" of the Agreement and that "*nothing was changed* in the [A]greement," at the same time the minutes reported Mr. Nelson stating that Idaho Power supported "*the change*."¹² This raises questions as to whether the 1986 amendments purported to clarify, change or not change the parties' signed contracts. Idaho Power maintains that Mr. Nelson at most was expressing support for "the change" to the statute and not any change to the Agreement itself. Indeed, the subsequent statute could not have

¹¹ First Orr Aff. Ex 62 (Minutes, Senate Res. & Env't Comm. (Feb. 12, 1986)) at 1 (emphasis added).

¹² *Id.* The full text of the Committee's consideration of Senate Bill 1358 was as follows:

Senator Crapo explained the bill contained revisions of the Swan Falls legislation passed last year and is intended to *merely clarify the agreement*. IDWR proposed regulations implementing the Swan Falls legislation raised a number of issues concerning the interpretation of the legislation. As a result, negotiations were entered into by all interested parties and this bill is the result and seems to be acceptable to the concerned parties. He again pointed out, nothing was changed in the agreement, but *this is merely clarification*. He said he would like to send the bill to the 14th order as there was a change to be made on lines 42-43, page 1.

Sherl Chapman, Water Users, said this organization supported the legislation and concur in the proposed amendment.

Tom Nelson, attorney for Idaho Power, agreed with Senator Crapo on the legislation and said they too supported the bill and *the change*.

Id. (italics added).

changed the parties' executed contract. The signed Framework and Agreement should control in such circumstances.

Moreover, in supporting "the change" without specifying in further detail what that meant, Mr. Nelson may have simply been concurring with the legislation's resolution of the specific issue that prompted the amendments – the location of trust water, and specifically whether trust water existed above Milner. Agreeing that no trust water existed above Milner is vastly different than expressly consenting to redefinition of Idaho Power's water right under the Swan Falls Agreement to categorically exclude flows above Milner as a "source" of the water right. There is no evidence of any express consent to such a change in the Agreement.

Moreover, the Legislature could not make such a change itself and bind all of the parties. If it attempted to do so, Idaho Power would have a claim based on breach of contract or takings. In addressing the possibility of a discrepancy between the signed Agreement and subsequent state legislation, the Court in its earlier Summary Judgment Order stated that "[w]hile the State may still be able to enforce the terms of the statute, to the extent its provisions are alleged to vary from the terms of the Agreement it would not be able to do so without implicating claims for breach of contract or takings." Summ. J. Order at 23.

The State also goes too far in arguing that through these brief paraphrased statements in the minutes, Idaho Power conceded that it was not even entitled to the 3900 cfs and 5600 cfs minimum flows, a fundamental part of the bargain represented by the Agreement, in the event that water originating above Milner is necessary to provide such flows. Certainly, such an overly broad interpretation which undercuts the basic subordination provision of the Agreement itself would certainly amount to a "change" in the Agreement, yet Senator Crapo said that "nothing was changed" through the 1986 amendments.

The State further argues that the plain statutory language, the legislative history and the administrative record on the proposed rules and regulations demonstrate that the 1986 amendments represented the parties' "original intent" in signing the Agreement two years earlier. Yet the State fails to explain what language in the Agreement was being clarified, confirmed, or changed. Moreover, it is Idaho Power's position that the language in Paragraph 7(B) of the Agreement making Idaho Power's hydropower rights subordinate to "subsequent beneficial upstream uses" upon approval of such uses under State law is unambiguous, and can be interpreted under the existing law at the time of the Agreement. Accordingly, it is not necessary or proper to resort to extrinsic evidence from subsequent rule making and legislative proceedings – two years removed from the signing of the Agreement – to determine the parties' original intent behind the unambiguous subordination provisions in the Agreement.

The State's contention that Idaho Power "expressly conceded to, and agreed not to challenge" the State's authority to "regulate and limit" Idaho Power's hydropower rights finds no support in the Agreement, subsequent proceedings, or the Court's earlier summary judgment ruling. The Court held earlier that Idaho Power consented to the State's exercise of regulatory authority for purposes of placing the water rights into the trust. As the Court stated, "[r]ather than transferring or assigning its rights, they were placed in trust pursuant to the State's regulatory authority. Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority." Summ. J. Order at 31. In conceding to the State's regulatory authority for this limited purpose, Idaho Power was certainly not giving the State the blank check the State now claims to "regulate and limit" as it chooses "the legal scope and effect" of the Swan Falls water rights, whose priority predates the 1928 constitutional amendment. *See* State Resp. at 15.

3. *The 1986 Amendments to I.C. § 42-203B(2) Preclude Neither Idaho Power's Summary Judgment Motion Nor Idaho Its Right to Ensure that Water Uses Above Milner Comply with State Law.*

The State takes the position that Idaho Power's motion for partial summary judgment on the issue of recharge subordination is "precluded" to the extent that it seeks rulings that apply above Milner Dam. State Resp. at 15-17. In making this argument, the State raises issues concerning water rights administration, suggesting that Idaho Power's water rights may not be "asserted or enforced" against other water rights and uses upstream from Milner Dam.¹³ *Id.* Idaho Power is before this Court not to enforce or administer its water rights, but rather to have the elements of those water rights adjudicated in the SRBA. Under the SRBA commencement statute enacted pursuant to the Swan Falls Agreement in 1985, I.C. § 42-1406A, the SRBA Court has jurisdiction to adjudicate the nature, extent and priority of all water rights in the Snake River Basin. Idaho Power must assert its water right claims like any other user or risk waiving them.¹⁴ Accordingly, the State's assertion that Idaho Power's motion for partial summary judgment on the issue of recharge subordination must be denied simply because it seeks rulings that apply above Milner Dam should be rejected.

Indeed, if the State's argument is taken to its logical extreme, Idaho Power would be precluded from ever seeking any "rulings that apply to water rights diverting from surface water or ground water flows upstream from Milner Dam." State Resp. at 17. Such a result would be

¹³ To the extent that the State is complaining about enforcement of Idaho Power's water rights of their administration in relation to others, the State's argument is premature. Indeed, even the State itself has contended throughout this proceeding that the Court may not resolve issues of water rights administration raised by a party until that party has exhausted administrative remedies. *See, e.g.,* Memo. in Supp. of State of Idaho's Mot. to Dismiss, filed May 7, 2008, at 2 (May 30, 2008) ("Idaho law is clear that a party must exhaust its administrative remedies before seeking judicial relief for matters of water rights administration . . .").

¹⁴ This legislation provides that the Director's petition commencing the adjudication may specify uses of water recommended to be excluded from the adjudication proceeding. *See* I.C. § 42-1406A(1)(b). Idaho Power is aware of no petition excluding from the SRBA proceedings Idaho Power's water rights and uses, or uses of water above Milner.

contrary to the language of the Agreement itself, which provided that the "Company retains its right to contest any appropriation of water in accordance with State law" and "further retain[ed] the right to compel State to take reasonable steps to insure the average daily flows" provided for under the Agreement.¹⁵ Moreover, the State's argument would also preclude any other party with water rights below Milner from ever raising any issue regarding water use above Milner, since the language of the 1986 amendments providing that "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" in determination and administration of water rights is language of general applicability to all parties in the Snake River Basin, not just Idaho Power.¹⁶ Water users above Milner are not insulated from all challenges by water users below Milner, and clearly must comply with state law like everyone else.

II. THE SWAN FALLS AGREEMENT REMAINS IN EFFECT AND LIMITS THE AUTHORITY OF THE STATE TO SUBORDINATE IDAHO POWER'S WATER RIGHT TO RECHARGE.

In section III of its Response Brief, the State argues that the law of the case under the Court's Summary Judgment Order establishes that the State's authority to subordinate Idaho Power's water rights derives not from the Swan Falls Agreement, but by operation of law. The State argues that the Agreement amounted to nothing more than Idaho Power's concession to the exercise of State authority. State Resp. at 23.

Idaho Power agrees with the State that the law of this case is that by the Agreement, Idaho Power conceded to the placement of the subordinatable portion of its water rights into trust

¹⁵ Gheleta Aff. Ex. F (Agreement) ¶ 7(B).

¹⁶ See State Open. at 27, n.114 ("[T]he State will contend in the appropriate proceedings that the 1986 amendment to Idaho Code § 42-203B(2) applies to all water rights diverting downstream from Milner Dam . . .") (emphasis in the original).

by operation of law pursuant to I.C. § 42-203B.¹⁷ As the Court said, "[r]ather than transferring or assigning its rights, they were placed in trust pursuant to the State's regulatory authority. Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority."¹⁸ Summ. J. Order at 31.

However, the Court's holding in this regard deals only with the mechanics of placing the Company's water rights into trust. It does not address the standards, criteria or authority under which the State could subordinate the Company's rights, since that issue was not before the Court. Thus, the State takes the Court's Summary Judgment Order a step too far. It argues that the effect of I.C. § 42-203B is to render the Agreement a nullity, and to vest the State with unfettered discretion to subordinate Idaho Power's water right in any manner or to any use or purpose as the State may see fit. The State's authority is not so unlimited, because the Agreement remains in effect.

By agreeing to the *placement* of its subordinatable water right into trust by operation of law, Idaho Power did not lose all its rights under the Agreement with respect to how, under what conditions, and to what uses that right could be subordinated by the State. The Company specifically did not want to nor did it agree to give the State unrestricted control in subordinating

¹⁷ While recognizing the law of this case, Idaho Power does not waive any of its rights or arguments on appeal.

¹⁸ The Court did not hold that the State has the constitutional authority to unilaterally subordinate hydropower rights, only that under the Agreement Idaho Power conceded to such authority with respect to its rights. The Court said:

The State urges the Court to decide the issue of ownership based solely on the application of I.C. § 42-203B. For the reasons discussed below, this Court holds that the issue can and should be decided based on analysis of the Swan Falls Agreement, which incorporates provisions of I.C. § 42-203B. The Court declines to decide the issue based solely on the State's general regulatory authority.

Summ. J. Order at 22.

its right.¹⁹ There would be no point to the creation of a trust if the State were to have unfettered discretion as to the subordination of the rights. The Company could have simply conveyed its right to the State, but it did not. So, like any other trust, the Swan Falls trust arrangement limits the authority of the State as trustee to act as fiduciary for the benefit of the Company and the people of the State as beneficiaries. The State's duties as trustee are defined and circumscribed both by the definition of the Company's right under Paragraph 7 of the Agreement, and by the statutory criteria in I.C. § 42-203C and the State Water Plan.

The State's discretion is first limited by the public interest criteria set forth in I.C. § 42-203C, and by the State Water Plan.²⁰ Idaho Power recognizes that the Legislature may amend I.C. § 42-203C and the State Water Plan may also be amended pursuant to state law, consistent with the Agreement.²¹ The public interest criteria were specifically adopted both as a procedural

¹⁹ As Idaho Power's attorney Tom Nelson testified before the Senate Resources and Environment Committee in 1985:

[O]ne of the obvious factors involved was the public interest criteria and that was I think, as I look back on it, both the state and power company wanted *some element of state control* over the allocation of that water. . . . Part of this was kind of put up or shut up situation on both sides. The Company said it didn't want to be watermaster; the state said OK, then take yourself totally out of vestige of any control over the rights that you have defined. We said alright, but *if you are going to be the watermaster then you get out and you take care of it*. . . . The trust provision was an idea I think of the state. I seized upon it because it filled what I saw as a major problem of the Company had in this thing throughout, which was we could get the state to sign, but *how did we get the state to live up to what they said they would do* and that was a major problem from our side. The trust provision could get us around the subordinated versus the subordinatable nature of the water above minimum flow. It remains unsubordinated but its held in trust by the state and it neatly side-stepped the problem but *it left us we think with another club to use against the state if it tries to ignore the standard set by the legislation*.

First Orr Aff. Ex. 11 (Minutes, Senate Res. & Env't Comm. (Feb. 1, 1985)) at 4-5 (emphasis added).

²⁰ See Gheleta Aff. Ex. G (Statement of Legislative Intent, S.B. 1008, Senate Res. & Env't Comm. (Feb. 1, 1985)) at 4 ("The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan[.]").

²¹ However, the State may not have unlimited discretion to amend the Swan Falls statutes without liability to Idaho Power, if such an amendment would violate the Agreement. As this Court held in its Summary Judgment Order:

Accordingly, to the extent there is an alleged discrepancy or ambiguity between the Agreement and the legislation, the starting point is the Agreement, not the legislation. While the State may

process for the granting of permits to new uses, and also to provide substantive criteria to assure that the impacts of new depletionary uses on hydropower generation and other components of the state's economy would be considered.

The State in its role as trustee is also constrained by the limitations on and definition of the Company's right set forth in Paragraph 7(B) of the Agreement. The Court has held that this right is, after all, the *res* of the trust. Summ. J. Order at 47. As the beneficiary continuing to hold an interest in the water right, the Company retains rights under the Agreement. The Agreement's continuing effect is specifically acknowledged in the Agreement itself, as the Court stated:

[A]ny subsequent changes in the law were not intended to affect the validity of the Agreement. Paragraph 17 of the Agreement provides:

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

As such, if the status of the State's regulatory authority changed in the future, it would not affect the status of Idaho Power's rights as originally agreed.

Summ. J. Order at 32. Thus, the law of this case is that the enactment of the Swan Falls Agreement's implementing statutes did not render the Agreement a nullity. The *res* of the trust – the Company's subordinatable right – is described and defined by Paragraph 7 of the Agreement,

still be able to enforce the terms of the statute, to the extent its provisions are alleged to vary from the terms of the Agreement it would not be able to do so without implicating claims for breach of contract or takings. The resolution of breach of contract or takings claims would require an examination of the intent of the parties as evidenced by the underlying Agreement.

Summ. J. Order at 23. Since the Legislature has not amended the Swan Falls statutes except in 1986, that question is not at issue here.

which remains in full force and effect.²² The Agreement's definition of the subordinatable right and the conditions of subordination in Paragraph 7(B) control over legislation or policy in the State Water Plan. For example, the State and Idaho Power agreed to recommend that the State amend the State Water Plan to establish minimum flows in the State Water Plan coincident with the Company's Swan Falls right.²³ However, the quantity of the Company's unsubordinatable right established by Paragraph 7(A) of the Agreement is independent of and cannot be changed by state law or amendment of the State Water Plan.²⁴

Likewise, Paragraph 7(B), which describes the subordinatable portion of the Company's water right, also describes several rights that the Company retains with respect to that water right. The Company "retains its right to contest any appropriation of water in accordance with State law," and also "to compel the State to take reasonable steps to insure the average daily flows" at Murphy established by the Agreement.²⁵

²² Paragraph 7 is not the only provision of the Agreement that remains in effect, it is simply the most relevant provision for purposes of determining whether the right described in Paragraph 7(B) is subordinatable to recharge. The Agreement remains in effect in its entirety.

²³ See Gheleta Aff. Ex. F (Agreement) ex. 6.

²⁴ In the legislative hearings, Mr. Nelson made this point clear:

Senator Crapo: With regard to the portion of the contract that says that subsequent legislative changes don't impinge on the contract. Would you clarify what subsequent legislative changes would do to the status of Idaho Power water right with regard to changes in the minimum flow?

Tom Nelson: As the contract and the statute work together, the state could obviously increase the minimum flow at Murphy anytime they wanted. The Company would have no rights involved in that decision. If the state wanted to reduce that minimum flow below the seasonal 3900 and 5600 it certainly is at liberty to do that. However, the contractual recognition of the Company's water rights at that level would remain at those levels and therefore the Companys [sic] rights would not follow the minimum flow down in that instance. The contract would still define it as the seasonal 3900 and 5600.

First Orr Aff. Ex. 11 (Minutes, Senate Res. & Env't Comm. (Feb. 1, 1985)) at 3.

²⁵ Gheleta Aff. Ex. F (Agreement) ¶ 7(B).

Paragraph 7(B) also provides that the subordinatable right shall be "subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law."²⁶ The term "beneficial upstream uses" must be defined in a manner consistent with state law existing at the time of the Agreement. At the time of the Agreement, recharge was severely limited as a use, and was explicitly subordinate to hydropower. Moreover, as argued below, upstream beneficial uses were specifically referenced in the proposed legislation attached to the Agreement as "depletionary." This term obviously had meaning, and it did not include recharge. Rather, recharge was at the time and remains a management tool subordinate to hydropower. Accordingly, recharge cannot be construed as a use to which the Company's right was subordinatable.

Paragraph 7(B) concludes by stating "[t]his paragraph shall constitute a subordination condition."²⁷ There is no meaning that can be ascribed to this sentence other than that the description and definition of the subordinatable right limits the ability of the State to subordinate the right. The subordination conditions described in Paragraph 7(B) are inherent in and a part of the Company's right, and therefore must be read in conjunction with and limit the State's authority to subordinate the right under the Swan Falls Agreement implementing legislation.

Of course, Paragraph 7(B) must be read in conjunction with the other provisions of the Agreement, the Framework, and the 1180 Contract, all of which were executed by the State and Idaho Power. As argued by Idaho Power in its Opening Brief, aquifer recharge is specifically mentioned in the Framework as one of a number of "methods . . . to enhance streamflows in the

²⁶ *Id.*

²⁷ *Id.*

Snake River," but which because of its impacts on hydropower should be studied further.²⁸ *See* Idaho Power Open. at 7-15. In the Agreement, the State and Idaho Power agreed to support funding for such studies.²⁹ Thus, recharge was specifically designated not as a use to which Idaho Power's right could be subordinated under Paragraph 7(B), but as a management tool which whose implementation was dependent on future studies, State funding and policy considerations.

The fact that recharge was not a "beneficial upstream use" to which Idaho Power's right could be subordinated under the Agreement is further confirmed by the legislative language proposed by the parties, the legislative history of I.C. § 42-203C, and the State Water Plan amendments considered at the time. The legislation proposed by the parties and adopted by the Legislature as the Swan Falls legislation was attached to the Agreement as Exhibits 7A and 7B. Exhibit 7A, enacted as I.C. § 42-203B(6), confers on the Director the authority to subordinate hydropower rights to "subsequent upstream beneficial *depletory* uses."³⁰ Exhibit 7B, Section 1.1, enacted as I.C. § 42-203B(1), assures the holder of a subordinatable water right the ability to keep using that right "pending approval of *depletory* future beneficial uses."³¹ Exhibit 7B, Section 1.2, enacted as I.C. § 42-203B(2), provides that the rights held in trust are subject to subordination to "and *depletion* by future upstream beneficial users" acquiring rights under state law.³² Exhibit 7B, Section 1.3, enacted as I.C. § 42-203B(3), provides for the subordination of

²⁸ Gheleta Aff. Ex. A (Framework) at 7.

²⁹ *See* Gheleta Aff. Ex. F (Agreement) ¶ 6(D).

³⁰ *Id.* ex. 7A, at 1 (emphasis added).

³¹ *Id.* ex. 7B, § 1.1 (emphasis added).

³² *Id.* § 1.2 (emphasis added).

water rights for power purposes not defined by agreement to "*depletion* by future upstream beneficial users."³³

It is evident that the State, the Legislature and Idaho Power all contemplated at the time of the Agreement that agriculture, domestic, commercial, municipal and industrial uses – not recharge – were the depletionary uses to which Idaho Power's right could be subordinated. First, the State and Idaho Power assumed that a 600 c.f.s. "block of water" might be available for subordination under the Company's right.³⁴ They agreed to advocate that a portion of this water be reserved, and subordinated to domestic, commercial, municipal and industrial (DCMI) uses.³⁵ In the State Water Plan approved by the Legislature contemporaneously with its adoption of the Swan Falls legislation, the Legislature provided that 150 c.f.s. of that 600 c.f.s. block of water be reserved for DCMI uses.³⁶ The remaining "block of water" was to be subordinated to "new and supplemental irrigation requirements which conform to Idaho Code 42-203A, 203B, 203C, and 203D."³⁷ Moreover, the adopted State Water Plan references the additional depletionary and non-depletionary beneficial uses of hydropower; navigation; aquaculture; fish, wildlife, and recreation; water quality and pollution control; new surface storage; and stored water for management purposes to meet the Swan Falls minimum flows.³⁸ *Nowhere* in the State Water Plan adopted at the time of the Swan Falls legislation is recharge even mentioned.³⁹

³³ *Id.* § 1.3 (emphasis added).

³⁴ Although this amount was not guaranteed, it was arrived at by subtracting the agreed minimum flow of 3900 c.f.s. from the previous historic low flow of 4500 c.f.s. *See* First Orr Aff. Ex. 11 (Minutes, Senate Res. & Env't Comm. (Feb. 1, 1985)) at 2, 4, 9.

³⁵ *See* Gheleta Aff. Ex. F (Agreement) ex. 6, ¶ 4.

³⁶ *See* First Orr Aff. Ex. 11 (Minutes, Senate Res. & Env't Comm. (Mar. 4, 1985)) Attach. IDWR Resolution in the Matter of Policy 32 of the State Water Plan.

³⁷ *Id.* at 4.

³⁸ *See id.*

In summary, the Agreement remains in effect, and Idaho Power continues to have rights under the Agreement. The subordination of the Company's right by the State must be constrained by the definition of the right and the subordination conditions described in the Agreement. Recharge is not a depletionary use to which the Company's right can be subordinated.⁴⁰

III. THE SWAN FALLS AGREEMENT'S FAILURE TO PROVIDE FOR SUBORDINATION OF IDAHO POWER'S HYDROPOWER RIGHTS TO RECHARGE, AS INTERPRETED UNDER THEN-EXISTING LAW PROVIDING JUST THE OPPOSITE, DOES NOT DEPEND ON RECOGNITION OF RECHARGE AS BEING NON-CONSUMPTIVE OR NON-DEPLETIONARY,

The legislation proposed by the parties, attached to the Agreement as Exhibits 7A and 7B, and adopted by the Legislature as the Swan Falls implementing legislation repeatedly described the beneficial uses to which Idaho Power's water right was subordinatable as "depletionary" beneficial uses, as discussed in the section directly above. The scope of subordination pursuant to the Agreement should be interpreted accordingly. The State, however, expends considerable effort in its Response Brief arguing that recharge is not necessarily a depletionary or non-consumptive use. Idaho Power maintains that under the Agreement's subordination provision in Paragraph 7(B), interpreted under existing statutes at the time of the Agreement expressly making recharge secondary to hydropower, Idaho Power's hydropower water rights are not subordinate to recharge. While the Agreement contemplated subordination

³⁹ In fact, it was not until the 1996 State Water Plan that "managed ground water recharge" was included as a beneficial use. See Third Gheleta Aff. Ex. A (Excerpted pages of 1996 State Water Plan (Dec. 1996)) at 5.

⁴⁰ The balance of the State's argument in Section III of its Response Brief constitutes an inappropriate and irrelevant *ad hominem* attack on the Company and its alleged motives. See State Resp. at 24-27. The Company will not respond except to state that it has no desire to be the "water master" of the River, whatever that means. It is simply seeking to define its right in the context of this adjudication. At the same time, the State is not a "water master" that may subordinate Idaho Power's contractually agreed upon water rights, and administer other water rights on the river, irrespective of Idaho Power's rights under the Swan Falls Agreement.

to only depletionary beneficial uses, as shown by Exhibits 7A and 7B, the secondary status of recharge and its subordination to hydropower does not depend on whether recharge is a depletionary use. Idaho Power nevertheless responds to the State's primary arguments on this point below.

A. Recharge Is Secondary or Subordinate to Hydropower Because the Recharge Authorization Statutes at the Time of the Agreement So Provided, Not Because Recharge is a Non-Consumptive or Non-Depletionary Use.

As part of its argument regarding interpretation of the Swan Falls Agreement and its Paragraph 7(A) subordination provision, Idaho Power presented a number of examples of historic subordination of its hydropower rights, much as the State has presented what it believes to be the historical context of its zero flow policy. *See* Idaho Power Open. at 19-26. Idaho Power demonstrated that its use of water for hydropower generation has been historically subordinated only to irrigation and other upstream consumptive and depletionary uses, which is shown by subordination provisions in the Company's licenses for its Hells Canyon, C.J. Strike and Twin Falls facilities. *Id.* Because recharge is a non-consumptive and non-depletionary use, Idaho Power has not historically subordinated its water rights to the use of water for recharge.

The State's argument that Paragraph 7(B) of the Agreement and the public interest criteria in I.C. § 42-203C do not specifically refer to "consumptive" uses, to "irrigation," or to "recharge" is misguided. Because recharge was legislatively made secondary or subordinate to hydropower under the existing statutes authorizing water rights for recharge, there was no need for Paragraph 7(B) to reference recharge for the parties to understand its status in relation to hydropower. Indeed, in light of the existing law subordinating recharge to hydropower, the parties would have had to *expressly* provide for subordination to "recharge" if their intent was to override that law or render it inapplicable to the hydropower water rights encompassed by the Agreement. The absence of any express reference to "recharge" in Paragraph 7(B) therefore confirmed that the

existing law would continue to apply and govern the relationship between water rights for recharge and hydropower.

The State also seeks support from language of Paragraph 19 in the Agreement, providing that "[t]his Agreement sets forth all covenants, promises, provisions, agreements, conditions, and understandings between the parties, and there are no covenants, promises, provisions, agreements, conditions, or understandings, either oral or written between them other than are herein set forth."⁴¹ If anything, this merger language establishes that the Agreement is an integrated contract, with the result that the Court should not consider the extrinsic evidence the State seeks to introduce – including the historic status of the State's zero flow policy, the 1986 statutory amendments, proceedings related to negotiation and implementation of the Agreement, and public information meetings concerning amendment of the State Water Plan.⁴² Rather, the Court should focus on the language within the four corners of the integrated Agreement itself. When interpreted in light of existing law at the time, the language of the Swan Falls Agreement did not subordinate Idaho Power's hydropower water rights to the legislatively mandated "secondary" use of water for recharge.

⁴¹ Gheleta Aff. Ex. F (Agreement) ¶ 19.

⁴² The purpose of a merger clause such as Paragraph 19 is "to establish that the parties have agreed that the contract contains the parties' entire agreement," and the presence of the clause itself "proves the agreement is integrated." *Howard v. Perry*, 141 Idaho 139, 142, 106 P.3d 465, 468 (2005). Once it is determined that an agreement is integrated, "evidence of a prior or contemporaneous oral agreement relating to the same subject matter is inadmissible to vary, contradict, or enlarge the terms of the written contract." *Tapper Chevrolet Co. v. Hansen*, 95 Idaho 436, 439, 510 P.2d 1091, 1094 (1973); *see also* BLACK'S LAW DICTIONARY 726 (5th ed. 1979) (defining an "integrated contract" as a "[c]ontract which contains within its four corners the entire agreement of the parties and parol evidence tending to contradict, amend, etc. is inadmissible; the parties having made the contract the final expression of their agreement.").

B. The State's Selective References Do Not Establish That the Parties Had Any Specific Intent as to Whether Subordination under the Agreement Included Recharge, Consumptive or Non-Consumptive Uses.

Despite the State's acknowledgement of the Agreement's merger clause in Paragraph 19, the State continues to hinge its argument on materials subsequent to the parties' signing of the Agreement, including the State Water Plan. The State quotes selectively from Paragraph 11 of the Agreement in support of its assertions regarding the "central role" of the State Water Plan in the Swan Falls settlement. State Resp. at 31-32. Paragraph 11 actually provides that "together with" the State Water Plan, *"the resolution of Company's water rights and recognition thereof by State"* provides a comprehensive plan for Snake River Basin management.⁴³

The State cites to criteria set forth in Policy 1 of the 1982 State Water Plan which recommended amending the Idaho Water Code to provide that both consumptive and non-consumptive uses would be deemed to have "equal desirability as beneficial uses." State Resp. at 32. The list of "consumptive and non-consumptive uses" specified in Policy 1 consisted of "irrigation, municipal, industrial, *power*, mining, fish and wildlife, recreation, aquatic life, and water quality."⁴⁴ Significantly, the 1982 State Water Plan *did not list recharge* as a "beneficial use" having "equal desirability" among all beneficial uses. This failure of the State Water Plan policy document to include recharge as a "beneficial use" with "equal desirability" is consistent with the status of recharge under Idaho statutory law as "secondary" to all prior perfected water rights, including those for generation of power (which was listed as one of the co-equal beneficial uses). This omission of recharge further indicates that recharge was not even

⁴³ Gheleta Aff. Ex. F (Agreement) ¶ 11.

⁴⁴ Fifth Orr Aff. Ex. 3 (1982 State Water Plan) at 21 (emphasis added).

considered a "beneficial use" under the 1982 State Water Plan, the version in effect when the parties executed the Swan Falls Agreement.⁴⁵

The State misses the mark again in its assertion that the Court in Ada County Case No. 62237 decided that recharge is a consumptive use, and thus that the parties to the Agreement also must have understood recharge to be a consumptive use. State Resp. at 32-35. Idaho Power dealt with this more fully in its Response Brief. See Idaho Power Resp. at 14-15. But briefly, the subordination provision at the Hells Canyon complex at issue in that proceeding prevented operation of the project in a manner conflicting with future upstream diversion and use "*for the irrigation of lands* and other upstream beneficial consumptive uses."⁴⁶ Accordingly, on Idaho Power's motion to reconsider and amend the Court's summary judgment ruling, the court held that diversions to offstream storage during the non-irrigation season, "*if done for the purposes of providing waters for irrigation* during the summer months," fell within the subordination provisions of the Hells Canyon license.⁴⁷

Contrary to the State's assertions, the Court did not hold that recharge was within the scope of the Hells Canyon subordination. Because Idaho Power in its motion had described recharge proposals as "*[p]roposals for other than irrigation ... to skim waters as available from the Snake River*" to recharge the aquifer, the ruling did not address recharge and similar

⁴⁵ Policy 1 also proposed amending the Idaho Water Code to "provide . . . protection for all existing water rights. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho." *Id.* This protection of existing vested rights would include the hydropower water rights of Idaho Power. See *Idaho Power Co. v. State*, 104 Idaho 575, 586, 661 P.2d 741, 753 (1983) ("Here Swan Falls water rights were vested, having been acquired in the early part of this century").

⁴⁶ Fifth Orr Aff. Ex. 4 (Mem. Decision & Order, *Idaho Power Co. v. State*, Case No. 62237, 4th Jud. Dist., Ada County (Dec. 10, 1979)) at 372.

⁴⁷ Fourth Orr Aff. Ex. 25 (Mem. Decision, *Idaho Power Co. v. State*, Case No. 62237, 4th Jud. Dist., Ada County (May 16, 1980)) at 432.

"proposals for other than irrigation" raised in the briefing.⁴⁸ Thus, the Ada County Court's ruling would not have given the parties to the Agreement any understanding that recharge was a consumptive use. If anything, the analysis of the parties and court distinguishes recharge from irrigation and other consumptive uses. This distinction is consistent with Idaho Power's historic subordination to irrigation and other consumptive uses, but not to recharge. *See Idaho Power Open.* at 19-26.

C. The Agreement Did Not Have to Expressly Mention Recharge in its Subordination Provision in Order for Recharge to be Secondary or Subordinate to Hydropower Under Existing Law at the Time of the Agreement.

As Idaho Power has established, existing legislation in place at the time of the Swan Falls Agreement provided that water rights for recharge were secondary to all prior perfected water rights, expressly including those for hydropower. When the Agreement is interpreted under that existing law, the absence of any reference in Paragraph 7(B) to subordination of Idaho Power's hydropower rights to recharge means that the legislatively secondary status of recharge to hydropower continued to apply to the water rights subject to the Agreement. The State turns this analysis on its head, arguing that "it would have been necessary for the parties to **expressly** exclude 'recharge' from the scope of subordination under Paragraph 7(B)" in order for recharge to be subordinated to hydropower. *State Resp.* at 35 (emphasis in the original). This analysis is illogical and erroneous, given the express legislative subordination of recharge to hydropower.

In particular, the State is incorrect that its position requiring express exclusion of subordination to recharge in the Agreement is supported by the Framework executed by the

⁴⁸ Fourth Orr Aff. Ex. 24 (Pl's. Mem. in Supp. of Mot. to Reconsider & Amend Summ. J. (Feb. 19, 1980)) at 3. The State is also wrong in its assertion that Idaho Power did not include the ruling in its appeal to the Idaho Supreme Court. The Court issued an Amended Summary Judgment expressly referencing its Memorandum Decision on the matter. *See Second Gheleta Aff. Ex. C* (Amended Summary Judgment entered in *Idaho Power Company v. State of Idaho*, Case No. 62237 (June 3, 1980)). Idaho Power filed a Notice of Appeal on that final Amended Summary Judgment. *See Fourth Orr Aff. Ex. 26* (Notice of Appeal, Case No. 62237 (June 14, 1980)) at 4.

parties in conjunction with the Agreement. The Framework in Section 5 called for future study of "recharge" and other "methods . . . suggested to enhance stream-flows" to determine "their impact on hydropower generation."⁴⁹ In calling for only study, the Framework explicitly recognized that Idaho Power's hydropower water rights were not subordinated to recharge, consistent with existing legislation. The physical and topical separation cited by the State between Section 5, calling for study of impacts from recharge, and Section 2, calling for establishment of public interest criteria against which proposed new development could be weighed, actually supports Idaho Power's argument that the Framework dealt with recharge uses separately from uses subject to subordination under the public interest criteria.⁵⁰

The State maintains that recharge was "an integral component of, and subsumed in" the higher 5,600 cfs minimum flow provided for under the Agreement, but produces no materials which make this tie. In fact, the State's argument is contradicted by the affidavit testimony of its longtime Water Master Ronald Carlson submitted by the Upper Snake Water Users in this case. According to Mr. Carlson:

The agreement provided for a higher minimum flow at Murphy during the winter [i.e., 5,600 cfs]. *This increase simply reflected the anticipated change in river flows between Buhl and King Hill after the high-lift pumps were shut off.* The computed change was found to be an additional 1,700 cfs [i.e., 3,900 + 1,700 = 5,600].⁵¹

⁴⁹ See Gheleta Aff. Ex. A (Framework) § 5, at 7. Idaho Power's Opening Brief erroneously referenced "Section 6" of the Framework in discussing the provisions of Section 5. See Idaho Power Open. at 10.

⁵⁰ The Framework also provided that legislation should be adopted "which expressly recognizes hydropower generation benefits as an element of such public interest determination" for proposed new development. See Gheleta Aff. Ex. A (Framework) § 2, at 5. This reference in the Framework is contrary to the State's assertion now that the parties intended for the State to be able to change state law in the future as it chooses, including adoption of new public interest criteria – which conceivably could even attempt to improperly eliminate hydropower generation benefits entirely from consideration in allocation of trust water.

⁵¹ Second Affidavit of Ronald D. Carlson (Nov. 7, 2008) ¶ 5, at 3 (emphasis added). Mr. Carlson purports to be uniquely qualified to speak to these matters, as he states in his affidavit that "at the time of the Swan Falls negotiations, I had a better understanding of ESPA recharge than any other person in the world." *Id.* ¶ 3, at 2.

It is disingenuous of the State to argue that the Agreement's 5,600 cfs minimum flow provided Idaho Power with "protection from recharge," State Resp. at 36-37, when the State now argues that the 1986 amendment to I.C. § 42-203B(2) "excludes flows arising above Milner" for purposes of "definition ... of **any** water right below Milner, which necessarily includes Idaho Power's water right to seasonal flows of 3,900 and 5,600 c.f.s. as measured at Murphy." State Resp. at 14. Stripping Idaho Power of the minimum flows that the State committed to insure under the Agreement certainly is not a "clarification" of the parties' original Agreement, but instead would deprive Idaho Power of the fundamental benefit of the bargain.

D. The State Has Failed to Refute the Conclusions of IDWR's 1999 Recharge Feasibility Report that Recharge is Non-Depletionary and that Uncertainty Existed in 1999 Regarding Whether Idaho Power's Hydropower Rights Were Subordinate to Recharge.

In its Opening Brief, Idaho Power used excerpts from the State's own report, the 1999 Recharge Feasibility Study prepared by IDWR, to demonstrate that recharge is a non-consumptive and non-depletionary use which nevertheless impacts hydropower water use. Idaho Power Open. at 3-4. The State responds to Idaho Power's recitation of basic hydrology from language in the IDWR report, not with an affidavit or technical evidence, but with legal argument. According to the State, the terms "non-depletionary" and "non-consumptive" are "nothing more than [Idaho Power's] argumentative gloss." State Resp. at 37. The State even accuses Idaho Power have "trying to have it both ways" by presenting IDWR's basic hydrologic description of recharge in the ESPA as initially *depleting* stream flows as water is recharged into the aquifer, and then *augmenting* stream flows through spring discharge into the river from the aquifer. *Id.* at 40; *see also* Idaho Power Open. at 4, n.4 (citing 1999 Feasibility Study).

The State's legal arguments raising issues as to whether recharge is non-consumptive and non-depletionary are of no consequence to the instant motions. The recharge authorization

statutes in place at the time of the Swan Falls Agreement (and today), and the Agreement as interpreted under those statutes, do not make recharge secondary to hydropower based on whether recharge is considered non-consumptive or non-depletory as a matter of fact. They make recharge secondary as a matter of law. Indeed, these statutes were enacted prior to the 1984 Agreement based on pilot projects whose hydrologic effects could not be known until the projects were in operation. Accordingly, in the Framework the parties called for study of recharge, including its effects on hydropower.

The 1999 Feasibility Study is an example of the very type of study the parties agreed to undertake pursuant to the Framework. Therefore, the State's contention that the Feasibility Study was not in existence at the time of the Agreement and could not inform the intent of the parties only serves to prove Idaho Power's point. The parties dealt with recharge by providing for study of it and not subordination to it.

The State's assertion that the 1984 Agreement and the 1986 legislative amendments resulted in the subordination of Idaho Power's hydropower rights to recharge, and that all parties have consistently recognized this, is belied by the 1999 Feasibility Study. The Study reveals that, more than a decade later, there remained considerable uncertainty even in IDWR's mind regarding the status of recharge in relation to hydropower, providing:

The most significant institutional constraints on managed recharge are the water rights claimed by Idaho Power Company (IPCo). *IPCo flow rights have the potential to dramatically restrict or prevent recharge diversions.* The magnitude of restrictions will depend on the ultimate impact of recharge on IPCo power generation in the middle and lower Snake River, as well as *the legal status of recharge diversions under Idaho law and the Swan Falls Agreement . . .*⁵²

⁵² Gheleta Aff. Ex. B (Feasibility Study) at ix (emphasis added).

IDWR's Feasibility Study further acknowledges that "Section 42-4201, Idaho Code as amended in 1994, of the statutes specifically subordinates diversions for recharge to hydropower rights, including those subordinated to other uses by the Swan Falls Agreement."⁵³

Idaho Power demonstrated in its Opening Brief that while the extent of recharge was limited to a handful of pilot projects at the time of the 1984 Agreement, the 1999 Recharge Feasibility Report described later State proposals for large-scale recharge that could not have been envisioned by the negotiating parties at the time they signed the Agreement. *See* Idaho Power Open. at 26-28. In its Response Brief, the State fails to contest Idaho Power's factual allegations on these points, nor can it since Idaho Power derived them directly from the State's own study.

IV. IDAHO POWER'S ARGUMENT THAT ITS HYDROPOWER RIGHTS ARE NOT SUBORDINATE TO RECHARGE IS NOT PRECLUDED BY THE DISMISSALS OR STIPULATION REGARDING EXISTING WATER RIGHTS, PARTICULARLY GIVEN THE STATE'S CONTENTION OF SUBORDINATION UNDER ITS ZERO FLOW POLICY.

Under the first ground stated in Idaho Power's motion for partial summary judgment on recharge subordination, Idaho Power seeks a ruling that "[p]ursuant to the 1984 Swan Falls Agreement, Idaho Power Company did not subordinate its hydropower water rights to the diversion or management of water for aquifer recharge." Mot. for Partial Summ. J. at 2. The State plays word games in its Response Brief, asserting that because the Agreement made Idaho Power's water rights only "subordinatable" to future uses, Idaho Power's motion must be limited

⁵³ *Id.* at 43. As set forth in the appendix to the Feasibility Study:

Because recharge was not recognized as a beneficial use of water (and therefore could not be the basis for a water right appropriation) at the time the Swan Falls Agreement was negotiated, the 1994 legislation further provided that any permits or licenses issued by the director for recharge purposes were "secondary to all prior perfected water rights", including any water rights held by IPC that may have been subordinated by the Swan Falls Agreement. *See*: I.C. § 42-4201A.

Id. at 233 (Appendix C – Idaho Power Company Issues).

to seek only a ruling concerning existing uses, since such uses were the only ones to which Idaho Power immediately "subordinated" under the Agreement. The Court should reject such gamesmanship and rule on all issues before it concerning recharge subordination.

As discussed throughout the briefing, Idaho Power's position is that the subordination provisions of the Swan Falls Agreement did not make Idaho Power's hydropower rights subordinate or subordinatable to recharge uses since, under existing statutes at the time of the Agreement, recharge water rights were legislatively deemed secondary to all prior perfected water rights including those for hydropower.⁵⁴ Thus, future uses for recharge are subordinate to hydropower, not the other way around. Moreover, the State, in arguing that the Swan Falls Agreement subordinates Idaho Power's hydropower water rights to all uses above Milner including existing and future recharge uses, has put the issue of subordination to future recharge uses squarely before the Court.

The State appears to be attempting to obtain a ruling regarding a water right that is outside the scope of its own motion for summary judgment. Pursuant to the State's October 17, 2008 Amended Motion for Summary Judgment on Issue of Recharge Subordination ("State's Amended Motion"), the State seeks a ruling "[t]hat the water rights at issue in this consolidated subcase are subordinate to ground water recharge water right permits nos. 01-7054 and 37-7842, as finally licensed." State Am. Mot. at 2. In its Response Brief, the State now argues that Idaho Power agreed to subordinate its hydropower water rights "to recharge water rights nos. 01-7054, 37-7842 and 21-7166." State Resp. at 17 (emphasis added). The basis upon which the State seeks this additional ruling is that these three water rights were dismissed from Ada County Case No. 81375. *Id.* at 18. The State should not be able to belatedly obtain a ruling regarding

⁵⁴ See Idaho Power Company's Mot. for Partial Summ. J. on Recharge Subordination at 2.

subordination to a water right that was not pled in either the State's original or amended motions for summary judgment, and which therefore was not subject to discovery as were the other two recharge claims now held by the Idaho Water Resource Board, 01-7054 and 37-7842.⁵⁵

In short, the Court should reject the State's argument that Idaho Power is not entitled to a ruling that it "did not subordinate" the hydropower water rights at issue to recharge uses or water rights. The cross-motions for summary judgment present the issue of whether recharge uses are subordinate to Idaho Power's hydropower water rights, or whether Idaho Power's rights are subordinate or subordinatable to future recharge uses.

V. THE RECHARGE STATUTES IN EFFECT IN 1984 SHOULD BE INCORPORATED INTO THE AGREEMENT AND CONFIRM THAT IDAHO POWER DID NOT SUBORDINATE ITS RIGHTS TO RECHARGE.

A. The Extant 1984 Recharge Statutes Were Incorporated Into The Agreement.

The State admits that under Idaho law a contract incorporates existing relevant law, but argues that the 1982 recharge statute subordinating recharge to hydropower rights did not become a part of the Agreement because the parties demonstrated a contrary intent. *See* State Resp. at 43. This intent, the State claims, stems from Idaho Power's concession to not challenge the State's application of regulatory authority under any circumstances.⁵⁶

⁵⁵ If the Court issues any ruling regarding subordination to water right no. 21-7166, it should find that the quantity to which Idaho Power subordinated was that contained in the permit of the dismissed water right, which is 1.00 c.f.s. *See* Fourth Orr Aff. Ex. 52 (Copy of Recordings of IDWR Public Hearings on Proposed Rules & Regulations for Water Appropriation (Jan. 15, 1986)) (Permit No. 21-7166 approved for "1.00 cubic feet per second," although application states, "Traditionally, much more than 1.00 cfs has been diverted for groundwater recharge and the company intends to submit a claim to record their history of use").

⁵⁶ In support, the State cites to the Court's statement in its Summary Judgment Order that Idaho Power was "conceding to and agreeing not to challenge the State's regulatory authority" when it agreed to placed its water rights in trust pursuant to the State's regulatory authority. *See* State Resp. at 43 (citing Summ. J. Order at 31). But the Court in this statement was simply stating that Idaho Power agreed not to challenge the State's regulatory authority in its establishment of the trust to avoid directly assigning or transferring its water rights to the State. The Court made clear elsewhere in its Order that the State did not have the authority to impact Idaho Power's contractual water rights through subsequent enactment. *See* Summ. J. Order at 32.

The State's argument is based upon a false premise. Idaho Power does not dispute that the State may, as a general proposition, change its laws, and agrees that neither the Agreement nor the recharge legislation "froze" State water policy. What the State may not change, however, are the terms of Idaho Power's bargained-for water rights established under Paragraph 7 of the Agreement. Those terms that define Idaho Power's water rights also define the nature and scope of the Company's property interest, the alteration of which would require compensation in the absence of Idaho Power's consent. *See, e.g., Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984) ("A water right is tantamount to a real property right, and is legally protected as such."); *Bennett v. Twin Falls N. Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915) ("When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor."). The terms of these rights include the essential fact that Idaho law at the time of the Agreement plainly subordinated recharge to hydropower rights.

The State asks the Court to believe that Idaho Power would have entered into the Agreement with the understanding that the State could, at any time and in any manner, limit or even vanquish its rights by simply changing the law. Yet this Court has already rejected this claim:

[I]f the status of the State's regulatory authority changed in the future, it would not affect the status of Idaho Power's rights as originally agreed. . . . [T]his 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.

Summ. J. Order at 32.

The State offers no reason or motive as to why Idaho Power would enter into such a one-sided agreement. Moreover, the State can cite to no provision in the Agreement that even hints

that Idaho Power agreed to subject itself to the radical step of binding the delineation of its property rights in the Agreement to subsequent changes in the law. While the State cites to Paragraph 17 of the Agreement in support of its argument, that provision made clear that subsequent changes in State law could **not** impact Idaho Power's water rights under the Agreement: "Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of this Agreement."⁵⁷ As this Court has already held, a plain reading of this provision reveals the intent of the parties that future changes in the law "would not affect the status of Idaho Power's rights" as defined by the Agreement. Summ. J. Order at 32. This hardly suggests an intent by the parties that existing law impacting Idaho Power's rights – including existing recharge authorization law subordinating recharge to hydropower rights – would not be incorporated in the Agreement.

Without any such evidence of a "contrary intent" within the Agreement itself, the State seeks to imply this intent by arguing that, because the state cannot contract away its police powers, it could not have bound itself to the law in effect at the time of contracting. *See generally* State Resp. at 44. This invocation of the state's police power is simply out of place. The Agreement is a contract, which by definition attaches duties and responsibilities to each of the contracting parties. Regardless of the state's police power, the material provisions of the Agreement may nevertheless not now be abrogated by the adoption of a contrary statutory provision. *See Straus v. Ketchen*, 54 Idaho 56, 83, 28 P.2d 824, 834 (1933) (holding that "[t]he legislature cannot . . . authorize under the police power of the state the creation of a contracting agency and permit the contracting of obligations, and by the same power destroy its contracts

⁵⁷ Gheleta Aff. Ex. F (Agreement) ¶ 17.

and abolish its obligations"). As stated earlier, the State is free to change the law, but the State may not adopt legislative changes that impair Idaho Power's rights as set forth in Paragraph 7 of the Agreement. *See Bennett*, 27 Idaho at 651, 150 P. at 339; *see also Moore v. Village of Ashton*, 36 Idaho 485, 493, 211 P. 1082, 1084 (1922) (distinguishing between the police power, or the "authority to legislate for governmental functions," and "the power to contract, which is similar in its effects to the right of contracting as exercised by natural persons").

Finally, the State cites to statements by Idaho Power attorney Tom Nelson for evidence of a contrary intent not found in the Agreement itself. *See State Resp.* at 45. To the extent that Mr. Nelson's statements mean anything in light of the unambiguous terms of the Agreement, they do not support the State's position. Mr. Nelson's statements in fact confirm that Idaho Power intended that its rights under the Agreement – its "contractual recognition of the company's water rights at the Murphy gauge" – not be impacted by subsequent legislative pronouncements.⁵⁸ Mr. Nelson nowhere suggests that the State can change Idaho Power's water rights through subsequent legislative fiat.

All of this demonstrates that the parties did not "intentionally reject[]" incorporation of the relevant recharge statutes. As the State admits, existing law becomes part of a contract unless a contrary intent is disclosed. *See State Resp.* at 43. The State has failed to show any such intent.

B. The Swan Falls Water Rights Are Still "Held By" Idaho Power as the Beneficial User of the Water Represented by those Rights.

The State next argues that, even if the existing recharge statutes are part of the Agreement, those statutes do not apply to the Company's water rights because they make recharge rights secondary to senior hydropower rights "held by any privately-owned electrical

⁵⁸ Second Gheleta Aff. Ex. J (Minutes, House Res. & Conservation Comm. (Feb. 11, 1985)) at 1.

generating company." State Resp. at 47 (citations omitted). This provision did not apply to Idaho Power's rights to excess flows under the Agreement, the State claims, because these rights are held in trust by the State. *See id.* This argument hinges upon a hypertechnical interpretation of the term "held" and ignores Idaho Power's ownership and equitable rights to excess flows under the Agreement.

Idaho Power acknowledges that this Court has determined that Idaho Power's water rights are held in trust by the State. But Idaho Power still retains an ownership interest in this water within the terms of the recharge statutes. In negotiating the concept of the trust, the State initially "insisted that it have ownership over those waters" in excess of the minimum flows, while Idaho Power insisted that it "retain control" over those waters until they were subsequently reallocated.⁵⁹ The trust was a compromise that stopped short of transferring ownership to the State and enabled the State to assert that the Snake River remained fully appropriated by Idaho Power while still authorizing new uses upon reallocation of the water.⁶⁰ As Pat Costello explained before the Legislature in 1985: "The trust was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. Soon as this agreement becomes binding this statute takes effect."⁶¹

⁵⁹ Third Gheleta Aff. Ex. B (Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008 (Jan. 18, 1985)) at 3.

⁶⁰ *See generally id.* A voluntary transfer of Idaho Power's water rights to the State would have been unlawful under the Public Utilities Commission statutes, and the parties desired to avoid allegations of an unlawful transfer similar to those that served as the basis for the complaint brought against Idaho Power by ratepayers in the dispute that precipitated the entire Swan Falls controversy. Furthermore, allowing the State to assert that the Snake remained overappropriated was important in light of the constitutional provision that "the right to divert and appropriate the *unappropriated* waters of any natural stream to beneficial uses, shall never be denied" Idaho Const. art. XV, § 3 (emphasis added). By establishing a trust to reallocated already appropriated water, the state could thereafter impose the public interest criteria restrictions upon new applications without violating this constitutional provision.

⁶¹ Gheleta Aff. Ex. H (Minutes, Senate Res. & Env't Comm. (Jan. 18, 1985)) at 11.

The Statement of Legislative Intent that the Idaho Senate adopted in relation to SB-1008 confirmed this dichotomy. The Statement made clear that, under the trust arrangement, the State would possess legal title to Idaho Power's rights above the agreed-upon minimum flows, while Idaho Power "holds equitable title to those water rights subject to the trust."⁶² As such, Idaho Power still "held" the right to the use of those water rights that were made subject to the trust provisions.

Under Idaho law Idaho Power's right of use constitutes a legal property interest. The Idaho Supreme Court explained in *United States v. Pioneer Irrigation District* that "as a matter of Idaho constitutional and statutory law title to the use of the water is *held by* the consumers or users of the water." *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007) (emphasis added). In *Pioneer*, the court addressed an SRBA appeal over the ownership interests of the United States and various irrigation entities in certain water rights, with the irrigation entities holding contracts with the United States for the storage and delivery of that water. In determining that the irrigators maintained an interest in the water derived from the beneficial use of that water and not based exclusively on the contracts with the United States, the court noted that "it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right."

Finally, the State argues that the legislative committees that considered the Agreement in 1985 "also considered the question of aquifer recharge," so much so that the "prominence and visibility of recharge issues during the 1985 legislative session" must have informed the committee during their deliberations on Swan Falls. State Resp. at 48-49. Idaho Power agrees, and this is all the more reason to incorporate the existing recharge statutes into the Agreement.

⁶² Gheleta Aff. Ex. G (Statement of Legislative Intent, S.B. 1008, Senate Res. & Env't Comm. (Feb. 1, 1985)) at 4.

While deliberating over the Agreement in 1985, the Legislature adopted HB-266, which specifically amended section 42-4201A(2) to provide that recharge rights acquired by irrigation districts, as well as by recharge districts, would be secondary to all prior perfected water rights, including those held by a privately-owned electric generating company.⁶³ Thus, as the parties deliberated over the fine points of the Agreement, the Legislature took action to amend the very sentence of the very statute that subordinates recharge to hydropower rights without altering the secondary status of recharge.

VI. THE 1994 AMENDMENTS CONFIRM THAT RECHARGE WAS SECONDARY TO HYDROPOWER RIGHTS SUBORDINATED UNDER THE SWAN FALLS AGREEMENT.

The State's argument regarding the 1994 amendments to the recharge authorization statutes hinges on three highly disputable claims, each of which it must prevail upon. The State first claims that under the Agreement, Idaho Power's rights are explicitly made secondary to recharge. The State then argues that the 1994 amendment flips this relationship on its head by making recharge secondary to hydropower: "The 1994 amendments must be read as changing the subordination relationship between recharge and the water rights held in trust by the State, not confirming it." State Resp. at 51. Finally, the State claims that the Legislature may repeal or amend the 1994 amendment without causing any legally cognizable injury to Idaho Power. *Id.* at 50. All three of the State's assertions are without merit.

Taking the last assertion first, the State misconstrues the relief Idaho Power seeks here. The State postures that Idaho Power is arguing that the State may not amend or repeal the 1994 amendments, and claims that Idaho Power seeks a ruling that repealing the amendments would impair Idaho Power's rights. *Id.* Idaho Power nowhere makes that claim or seeks such a ruling.

⁶³ See Third Gheleta Aff. Ex. C (H.B. 266, 48th Leg., 1st Reg. Sess. (Idaho 1985)).

Indeed, such a question would not be ripe for any decision at this time. *See Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984) (distinguishing a justiciable controversy from a dispute of a hypothetical or abstract character). While this may indeed be a possible future dispute, it is not now before the Court. Idaho Power instead discusses the 1994 amendment to demonstrate that the Legislature in 1994 confirmed what was already apparent under the 1978 and 1982 aquifer recharge statutes as well as the Swan Falls Agreement – that recharge is and always has been secondary to prior perfected hydropower water rights. *See Idaho Power Open.* at 32, 34.

The State is also incorrect in its claim that Idaho Power's rights are explicitly made secondary to recharge under the Agreement. As discussed in detail above, the plain language of the Agreement cannot be reasonably interpreted to include a subordination of Idaho Power's hydropower rights to recharge. The Agreement does not provide for Idaho Power's subordination to recharge, does not describe the recharge concept, and does not even mention the term "recharge" at all. While Idaho Power subordinated its water rights to certain "subsequent beneficial upstream uses," it did not subordinate these rights to recharge.

Finally, the State's claim that the 1994 amendments reverse the subordination hierarchy established in the Agreement is unconvincing. The State admits that "the plain language of the [recharge] statutes is controlling," but fails to address the fact that nowhere does the legislation suggest, or even hint, of such a reversal. *State Resp.* at 50. Rather, the amendments confirm that Idaho Power's rights under the Swan Falls Agreement are not subordinate to recharge:

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

I.C. § 42-4201A(2) (emphasis added).⁶⁴

The State's argument must rely upon the insertion of the words "to recharge" after "may otherwise by subordinated" to support its position. But adding this language assumes the precise question at issue here – whether the Agreement subordinated Idaho Power's water rights to recharge. The State's argument also requires an explicit alteration of the statute through the addition of language the Legislature saw fit to omit, a method of statutory interpretation that no court has sanctioned. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (recognizing and upholding "our duty to refrain from reading a phrase into the statute when Congress has left it out"); *Roe v. Hopper*, 90 Idaho 22, 28, 408 P.2d 161, 164 (1965) ("Where the language of a statute is clear . . . the court cannot speculate upon the intention of the legislature, much less read something into the statute which is not there . . ."). By contrast, Idaho Power's view of this provision that recharge rights are secondary to its prior perfected rights arises from the plain language of the statute without the need to insert "clarifying" language.

The State must offer a distorted interpretation of the amendments' legislative history to support its interpretation. The State cites Sherl Chapman's comment that the 1994 amendments were intended to "protect and verify the agreement on Swan Falls" as referring to "the Milner divide." State Resp. at 51. But Mr. Chapman was specifically referring to the subordination provision: "Chapman noted language was added [to the amendment], referring to privately

⁶⁴The Upper Snake Water Users argue that the 1994 amendments to the recharge authorization legislation are inapplicable above Milner, but do not address the actual language of the legislation. Instead, they cite the Legislature's appropriation of approximately \$1 million to fund recharge in Water District in 1995, the year after the amendments, coupled with the lack of an objection to this from Idaho Power. Upper Snake Resp. at 15. However, as the Affidavit of Ronald Carlson observes, "the Idaho Legislature appropriated \$960,000 to purchase stored water to facilitate aquifer recharge in Water Division 1." Affidavit of Ronald D. Carlson (Oct. 17, 2008) ¶ 16, at 7 (emphasis added). Section 42-4201A(2), as amended in 1994, pertains to IDWR's issuance of permits and licenses for new appropriations of water for recharge purposes, which are deemed secondary to hydropower water rights. By contrast, the 1995 legislative program involved the purchase of stored water previously appropriated for other purposes under pre-existing water rights. *See* Third Gheleta Aff. Ex. D (Senate Bill 1260, 53d Leg., 1st Reg. Sess. (Idaho 1995)).

owned electrical generating companies, to protect and verify the agreement on Swan Falls."⁶⁵ This statement can only be read as undercutting the State's claim that the amendments reversed the subordination relationship between recharge and hydropower under the Agreement. Idaho Power agrees with Mr. Chapman's comment in its full context. The subordination language in the 1994 amendments protected and verified Idaho Power's rights under the Agreement, including the right to have its water rights not subordinated to recharge.⁶⁶

Additionally, the State fails to address the omission and reintroduction of the subordination language in the amendments, except to mention the testimony of Senator Dan Cameron in 2006 that "[i]t's my understanding that that language was inserted at the request of Idaho Power." State Resp. at 53. But this is not the case. The existing subordination provision in section 42-4201A was struck in draft legislation prepared by the Idaho Water Users Association and submitted to the Interim Committee on Aquifer Recharge on November 10, 1993. That omission was first recognized by IDWR's representative, Norm Young, in prepared comments submitted to the Interim Committee on November 30, 1993:

The purpose for striking the subordination to existing hydropower rights is not clear. If the intent is to subordinate hydropower to recharge, a definite statement of that intent needs to be made. If that is not the purpose, the existing language needs to be retained to avoid confusion with the subordination of hydropower rights in Section 42-203B, Idaho Code.⁶⁷

⁶⁵ Gheleta Aff. Ex. AA (Minutes, Senate Res. & Env't Comm. (Mar. 11, 1994)) at 1.

⁶⁶ There is no evidence suggesting, as the State maintains, that Sherl Chapman was referring to the 1994 amendments preserving the zero flow at Milner policy. Mr. Chapman made no reference to this in any of his statements during the negotiations and enactment of the 1994 legislation, and certainly the State fails to mention any such statement. And the plain language of the 1994 amendments "protecting" the Agreement contain no geographic limitation and plainly subordinates recharge rights to Idaho Power's rights upstream and downstream of Milner Dam.

⁶⁷ Gheleta Aff. Ex. Z (Memo. from Norm Young to Wayne Haas (Nov. 30, 1993)) at 2.

Subsequently, sections 42-234 and 42-4201A were amended by separate bills in 1994, both of which as introduced included the language making recharge secondary to Idaho Power's rights.⁶⁸ Sherl Chapman and Norm Young each specifically highlighted the subordination provisions in their testimony before the Senate Resources and Environment Committee on March 11, 1994, with Mr. Young testifying that "[t]he language subordinating recharge to any water right, including hydropower, is included."⁶⁹ Following this testimony, Senator Cameron moved for both bills to be forwarded to the floor without amendment and with a do-pass recommendation.⁷⁰ Thereafter, the bills passed out of the House Resources and Conservation Committee in the same form and with little recorded discussion, and were approved unanimously without amendment by the full Senate and House.⁷¹

The State also misconstrues the legislative history by claiming that Idaho Power's comments in 1994 demonstrated its belief that its rights were subordinate to recharge. The State ignores, however, the statement by Idaho Power's Larry Taylor in a Memorandum to the Committee on Aquifer Recharge dated January 19, 1994:

In paragraph (2) of the proposed amendments to S 42-4201A, the committee has suggested deletion of the reference to hydropower rights. The reason for the deletion is unclear. As originally enacted, S. 42-4201A provided that any water rights to recharge acquired by a recharge district would be secondary to all prior perfected rights including downstream hydropower rights. The Company agrees with Norm Young's comments (dated November 30, 1993), unless the intent is to subordinate hydropower rights to recharge rights, the provision should be

⁶⁸ See Third Gheleta Aff. Ex. E (Senate Bills 1564 and 1565, 52d Leg., 2d Reg. Sess. (Idaho 1994)). These bills were subsequently reintroduced as S.B. 1575 and S.B. 1574 in identical form but with an emergency clause added to each.

⁶⁹ Gheleta Aff. Ex. AA (Minutes, Senate Res. & Env't Comm. (Mar. 11, 1994)) at 1.

⁷⁰ *Id.* at 3.

⁷¹ See Third Gheleta Aff. Ex. F (Minutes, House Res. & Conservation Comm. (Mar. 21, 1994)) at 1; *id.* Ex. G (Minutes, House Res. & Conservation Comm. (Mar. 23, 1994)) at 2; *id.* Ex. H (Excerpted pages of Senate Journal (Mar. 17, 1994) and House Journal (Mar. 28, 1994)).

retained. If that is the intent of the deletion, the Company objects [to] the deletion and cautions the Committee that any such subordination provision would raise due process and compensable taking issues.⁷²

Clearly, the assertion of due process and compensable takings in this context makes sense only if Idaho Power believed its rights under the Agreement were not secondary to recharge.

VII. THE COURT SHOULD ADDRESS PROCEDURAL MATTERS SUCH AS THE STATUS OF BASIN-WIDE ISSUE 91-13 AND THE STATUS OF THE CURRENTLY SCHEDULED TRIAL IN THIS CONSOLIDATED PROCEEDING AT THE SUMMARY JUDGMENT HEARING.

The City of Pocatello ("Pocatello") filed a Response to the motions for partial summary judgment filed by Idaho Power, the State and the Upper Snake Water Users. Pocatello's Response discusses its views as to various matters pertaining to the relation of this Consolidated Subcase 00-92023 to Basin-Wide Issue 91-13. In the Court's August 23, 2004 Order Designating Basin-Wide Issue 91-13, it described the issue as: "To what extent, if any, should the *Swan Falls Agreement* be addressed in the SRBA or memorialized in a decree?" August 23, 2004 Order Designating Basin-Wide Issue 91-13, at 8.⁷³ Idaho Power does not specifically reply here to Pocatello's statements, because Basin-Wide Issue 91-13 is currently stayed pursuant to the August 23, 2004 Order and subsequent orders of the Court. It is Idaho Power's understanding that the Court intends to take up Basin-Wide Issue 91-13 once the proceedings are complete in this Consolidated Subcase No. 00-92023.

Idaho Power also respectfully requests that in conjunction with the upcoming December 4, 2008 hearing on the cross-motions for partial summary judgment on recharge subordination,

⁷² Gheleta Aff. Ex. Y (Idaho Power's Comments to Interim Committee on Aquifer Recharge (Jan. 19, 1994)) at 3 (underline in original).

⁷³ Given the issues before the Court regarding recharge subordination, Idaho Power observes that in its order designating the basin-wide issue, the Court stated: "In general terms, the Swan Falls Agreement subordinated a certain flow of Idaho Power Company's hydropower rights to *upstream consumptive uses* in exchange for certain guaranteed minimum flows and the development of a comprehensive plan for managing the watershed." August 23, 2004 Order Designating Basin-Wide Issue 91-13, at 1, n.1 (emphasis added).

the Court and the parties have the opportunity to address remaining proceedings currently scheduled in this case.⁷⁴ Idaho Power believes, as perhaps do the other active parties, that it will be necessary to have a ruling from the Court on the pending cross-motions for partial summary judgment in order to know what, if any, factual issues remain to be tried. Obviously, it may take some time for the Court to issue a written ruling on the cross-motions, which involve a number of complex issues on which the parties have submitted hundreds of pages of briefing.

CONCLUSION

There is a fundamental difference between definition of Idaho Power's water rights, which is accomplished in Paragraph 7 of the Swan Falls Agreement, and the policy programs discussed in the Framework and exhibits to the Agreement. The State and the Company have expressed support for these state policy programs, but they do not create or fix vested rights, and are subject to change and evolution in the future like all public policy. In contrast, the SRBA Court is concerned with the definition of the elements of water rights and the creation of property rights in the use of water. The parties to the Swan Falls Agreement were aware of the State's zero flow at Milner policy, and that policy received support in the course of proceedings surrounding the Swan Falls Agreement. But that policy was not included as an element in the Agreement's definition of the Company's water right. This result was fully consistent with the law in effect at the time of the Agreement, and still in effect today, under which recharge water rights are secondary or subordinate to vested hydropower water rights.

For all of the foregoing reasons, and the reasons set forth in Idaho Power's Opening and Response Briefs, Idaho Power respectfully requests that the Court grant its Motion for Partial

⁷⁴ The Court's May 28, 2008 scheduling order contains the following dates:

January 13, 2009 -	Pre-Trial Statements Including Final Witness and Exhibit Lists
January 22, 2009 -	Final Pre-Trial Conference
February 2, 2009 -	Trial (2-4 weeks) 9:00 a.m. at the SRBA Courthouse

Summary Judgment, and hold that Idaho Power did not subordinate its water rights under the Swan Falls Agreement to the use or management of water for recharge. The State's and the Upper Snake Water Users' Motions for Summary Judgment should be denied on all grounds.

Dated this 21st day of November, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2008, I caused to be served a true and correct copy of the foregoing document entitled **IDAHO POWER COMPANY'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON RECHARGE SUBORDINATION** via the method indicated below, and addressed to each of the following:

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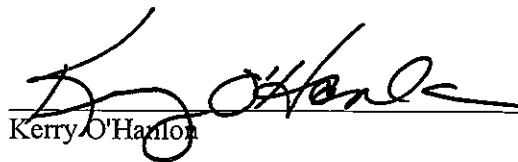
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