

Issue #1: The proposed language inappropriately suggests that water rights owned by Idaho Power are to be considered fluctuations resulting from operation of Company facilities.

In the process of converting the original Swan Falls Agreement language to the SRBA Partial Decree language, certain word tailoring apparently was undertaken to fit the new context. However, in at least one instance, this wording change may have inadvertently altered the substance of the provision. In particular, the wording changes in connection with the last sentence of the first "Other Provision" is of concern. As originally stated in the Swan Falls Agreement, this provision read as follows:

Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.

Swan Falls Agreement, paragraph 7E.

As currently proposed, Other Provision No. 1 for example for Water Right No. 2-4000A, including the pertinent last sentence, now reads as follows:

1. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A collectively entitle Idaho Power Company to an unsubordinated water right, except as provided in paragraph nos. 3 and 4 below, to average daily flows of 3900 CFS from April 1 to October 31 and 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2. These flows are not subject to depletion, except for depletions caused by the lawful exercise of those water rights identified in paragraph nos. 3 and 4 below, and except for depletions resulting from any diversions or uses of the waters identified in paragraph 5 below. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A are satisfied when the average daily flows set forth herein are met or exceeded. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall

be considered fluctuations resulting from the operation of Idaho Power Company facilities.

The concern here is that the proposed Partial Decree language suggests that any water rights owned by Idaho Power would be “considered fluctuations resulting from the operation of Idaho Power Company facilities,” which of course is not intended. On the other hand, paragraph 7E of the Swan Falls Agreement suggested that other acquisitions of water would be considered such fluctuations. Accordingly, it appears appropriate to replace the new proposed language in this regard with the original Swan Falls Agreement, paragraph 7E language.

Issue #2: The meaning of “future” beneficial uses is unclear.

The first “Other Provision” proposed for the water rights to be held in trust by the State also contains an ambiguity in that it refers to “future” beneficial uses without an indication as to the operative date for which such future beneficial uses are determined:

1. Legal title to this water right is held in trust by the State of Idaho, by and through the Governor, for the benefit of Idaho Power Company as the user of the water for power purposes and for the benefit of the people of the State of Idaho. In addition to the subordination defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by future beneficial uses under water rights acquired pursuant to applicable state law, unless any such water right is unlawfully exercised or such use depletes or will deplete the average daily flow of the Snake River below 3900 CFS from April 1 to October 31 or below 5600 CFS from November 1 to March 31 as measured at the “Murphy Gaging Station” described below in paragraph no. 2. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.

This language appears to be based on certain language in paragraph 7B in the original Swan Falls Agreement, which in pertinent part reads as follows:

The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers. 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 03-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A)....

In the original Swan Falls Agreement, the term “subsequent” was used instead of “future.” In the context of the original Swan Falls Agreement, the term “subsequent” appears to refer to beneficial uses occurring at some point in time after the Swan Falls Agreement. However, the use of the word “future” in the proposed Partial Decree Other Provision suggests that the covered beneficial uses would be those subsequent to the issue date of the respective Partial Decree in the SRBA which is likely to be some time later this year, in 2009. At a minimum, the use of the word “future” in the Partial Decrees creates an ambiguity as to the operative date for determining which rights are protected by this subordination.

Issue #3: Submit into the record a list of the water rights dismissed from Case No. 81375 to avoid potential ambiguity as to which rights are covered by this subordination.

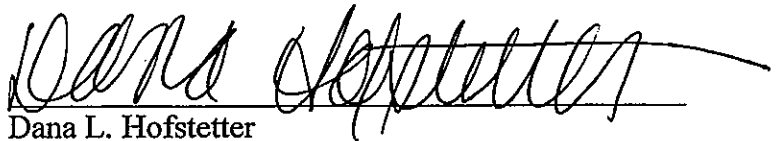
Other Provision paragraph 3 of the proposed decree for Idaho Power’s rights (and paragraph 4 of the proposed Other Provision for the trust water rights) subordinates the respective rights to those water rights of persons dismissed from Case No. 81375 of the Fourth Judicial District. It appears that it would be a good idea for a list of these water right numbers

or, perhaps, the actual respective dismissal notices listing these water rights to be included in the record to ensure that there is no confusion over the water rights covered by this provision.

Issue #4: Senior beneficial use water rights first claimed in the SRBA apparently would not be protected by subordination while certain junior rights would be.

Other Provision No. 4 for the proposed Partial Decrees for Idaho Power's water rights (and Other Provision No. 5 for the trust water rights) subordinates the respective rights to "water rights of those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985." The problem with this language is that it apparently will not cover the numerous senior beneficial use rights that were first legally claimed in the SRBA after 1985. Thus, this subordination provision may not cover certain very senior water rights at the same time it protects certain rights first used, for example, in the early 1980s. This appears to violate constitutional provisions concerning priority of water rights and it may also create a rebound call situation where senior rights unprotected by this subordination would potentially be in a position to place a call against junior rights that would be protected by subordination. The best way to address these potential issues would be to add to the end of this provision the words "or in the SRBA."

RESPECTFULLY SUBMITTED this 5th day of August, 2009.


Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document this 5th day of August 2009, by U.S. Mail postage pre-paid to:

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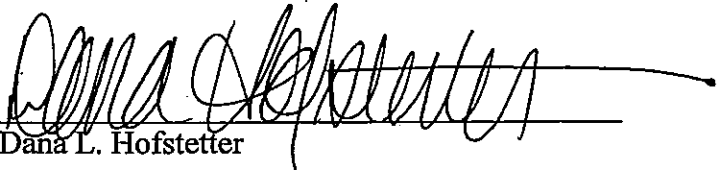
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