

UNDERSTANDING THE 1984 SWAN FALLS SETTLEMENT

CLIVE J. STRONG & MICHAEL C. ORR

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CLIVE J. STRONG* & MICHAEL C. ORR**

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* Chief, Natural Resources Division, Office of the Idaho Attorney General (B.S. Forestry, University of Idaho, 1974; J.D., University of Idaho, 1977; LL.M., University of Michigan, 1983). Mr. Strong was assigned as lead counsel for the State of Idaho in the two Idaho Power Company Swan Falls cases in 1983 and assisted with the drafting of the 1984 Swan Falls Agreement. Mr. Strong has overseen implementation of the 1984 Agreement from its approval to the present and was the lead negotiator of the 2009 Framework Reaffirming the Swan Falls Settlement.

** Deputy Attorney General, Office of the Idaho Attorney General (B.S. Forestry, Michigan State University, 1980; J.D., University of Oregon, 2001). Mr. Orr was lead counsel for the State of Idaho in 2006 SRBA Swan Falls proceedings and assisted with the negotiation of the 2009 Framework Reaffirming the Swan Falls Settlement.

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I. INTRODUCTION

The signing of the Snake River Basin Adjudication’s *Final Unified Decree* in August 2014 represented the culmination of the State of Idaho’s recognition that “[e]ffective management in the public interest of the waters of the Snake River basin” required “a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system.”¹ The Snake River Basin Adjudication (“SRBA”), in turn, was an outgrowth of the Swan Falls hydropower subordination controversy (“Controversy”) of the early 1980s, which has been called “the most convulsive water conflict in Idaho’s history.”²

While the 1984 “Swan Falls Agreement” executed by Governor John V. Evans, Attorney General Jim Jones, and Idaho Power Company Chief Executive Officer and Chairman of the Board James E. Bruce is often cited as the resolution of the Controversy, “the Swan Falls Agreement was not a self-executing instrument, but rather proposed a suite of legislative and administrative action that if implemented would resolve the controversy and the legal issues to the mutual satisfaction of the parties.”³ The Agreement was just one component of the overall Swan Falls settlement (“Settlement”).

While the Settlement addressed the focal point of the Controversy—the question of whether certain hydropower water rights claimed by Idaho Power Company (“IPC”) had

1. Snake River Basin Adjudication—Commencement, 1985 Idaho Sess. Laws 287; IDAHO CODE ANN. § 42-1406A (West 2015) (uncodified). The Snake River Basin Adjudication was heard in the Twin Falls County District Court in Idaho’s Fifth Judicial District. All SRBA decisions, orders, and decrees cited herein were issued by that court, i.e., the “SRBA Court.”

2. Jeffrey C. Fereday & Michael C. Creamer, Swan Falls in 3-D: A New Look at the Historical, Legal and Practical Dimensions of Idaho’s Biggest Water Right Controversy, 28 IDAHO L. REV. 573, 576 (1992).

3. Memorandum Decision and Order on Cross-Motions for Summary Judgment at 26, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (92-23) (Apr. 18, 2008) [hereinafter Memorandum Decision]. See *Miles v. Idaho Power Co.*, 778 P.2d 757, 759, 116 Idaho 635, 637 (1989) (citing the legislation enacted to implement the proposed settlement, including the legislation that ratified the implementing amendments to the State Water Plan). The Agreement did not purport to be the legal authority for defining future development or management of the waters of the Snake River basin; to the contrary, it explicitly recognized that such matters are properly governed by state law and the State Water Plan rather than contractual arrangements between the State and Idaho Power Company (“IPC”). *Agreement*, Idaho-Idaho Power Co., ¶ 14 (Oct. 25, 1984) [hereinafter Swan Falls Agreement]. See *infra* note 129.

been subordinated to other uses of water in the Snake River basin⁴—resolving the Controversy also required the State, IPC, and other water users to come to terms with the larger issue of the need for integrated management of the Snake River and one of its principle tributaries: the Eastern Snake Plain Aquifer (“ESPA”). Implementing this then-new approach required changes to the State Water Plan and the Idaho Code recognizing the need to balance protection for hydropower uses and other instream values against the benefits of future development of the resource.

The “centerpiece” of the legislative implementation of the Settlement was subordination legislation codified at Idaho Code §§ 42-203B and 42-203C.⁵ These statutes introduced the Swan Falls “trust,” and gave rise to the concepts of “trust water” and “trust water rights.” These terms and related elements of the Settlement became the principle focus of several years of SRBA litigation after a dispute arose in 2006 regarding whether the Settlement subordinated IPC’s hydropower water rights to water rights for recharging the ESPA.⁶ Many lingering questions about the intent and effect of the Swan Falls Settlement were finally resolved in the SRBA proceedings. This article reviews the history of the Swan Falls Controversy, the Settlement of the 1980s, the more recent SRBA litigation regarding the Settlement, and the 2009 Framework Reaffirming the Swan Falls Settlement.

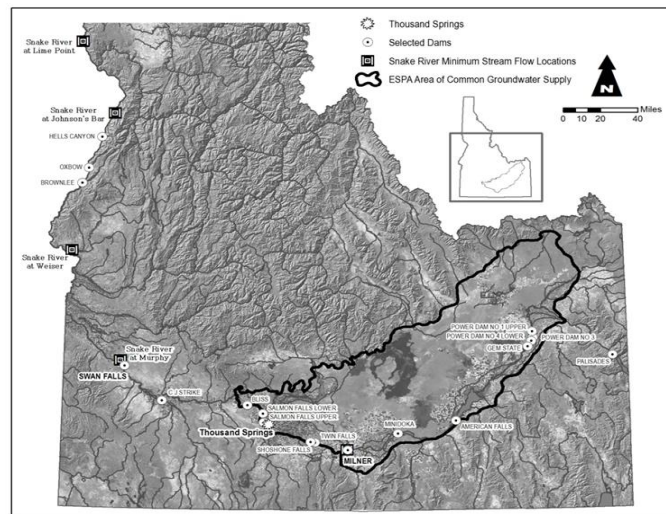
4. See generally *Idaho Power Co. v. State*, 661 P.2d 741, 744–50, 104 Idaho 575, 578–84 (1983).

5. “Statement of Legislative Intent – S 1008,” 1985 JOURNAL OF THE STATE SENATE at 58-61, 59 (Organizational Sess. & 1st Reg. Sess. Of the 48th Legislature of the State of Idaho) (1985) [hereinafter Statement of Legislative Intent].

6. Under Idaho Code § 42-203B(2), hydropower water rights for flows in excess of the Murphy minimum streamflows at certain IPC projects are held in trust by the State of Idaho, and the State has authority to subordinate these hydropower water rights to new uses approved pursuant to State law, including the “public interest” criteria of Idaho Code § 42-203C. Memorandum Decision, *supra* note 3, at 31–32, 39–41. The *res* of the “trust” consists of the hydropower water rights, and “trust water” consists of the flows encumbered by the hydropower water rights held in trust. *Id.* at 40–41. A “trust water right” is “[a] water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho.” Order Granting Joint Motion for Partial Summary Judgment on the “Rebound Call” Issue at 12, *In re SRBA*, Case No. 39576, Subcase No. 00-91013 (Basin-Wide Issue 13) (Nov. 1, 2011) [hereinafter Rebound Call Decision]. A “trust water right,” in short, is a re-appropriation of water originally appropriated under the hydropower water rights held in trust by the State. A “trust water right” is not an appropriation of “unappropriated” water as contemplated by Section 3 of Article XV of the Idaho Constitution.

II. BACKGROUND

The narrow issue presented by the Swan Falls Controversy was the question of subordination of hydropower water rights.⁷ “Subordination” in this context refers to the priority date of a water right. In Idaho, as in other prior appropriation states, each water right has a priority date and in times of shortage, “[p]riority of appropriation shall give the better right as between those using the water.”⁸ Thus, the holder of a water right with a senior priority date may seek administrative regulation or curtailment of diversions under junior priority water rights “when in times of scarcity of water it is necessary so to do in order to supply the prior rights.”⁹ “Subordination” is an exception to these rules that



essentially nullifies priority. A subordinated water right “d[oes] not contain the customary total priority of right but, rather, would be inferior to future upstream depletion.”¹⁰ A senior but “subordinated” water right may not be exercised to curtail junior uses or to protest the development of new uses.

In Idaho, the policy of subordinating hydropower water rights to other uses of water has a long history.¹¹ The policy arose from the fact that hydropower depends on water remaining in the stream, while most other uses of water—and in particular irrigation—require that water be diverted out of the stream. Thus, there is an inherent tension between hydropower and consumptive uses of water such as irrigation: an unsubordinated senior hydropower water right could be asserted to curtail or prevent future irrigation uses upstream of the power plant.¹²

7. See *Idaho Power Co.*, 661 P.2d at 744–50, 104 Idaho at 578–84.

8. IDAHO CONST. art. XV § 3.

9. IDAHO CODE § 42-607 (2015).

10. *Idaho Power Co.*, 661 P.2d at 745, 104 Idaho at 579.

11. See generally Clive J. Strong & Michael C. Orr, *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A Century of Conflict and Cooperation*, 46 IDAHO L. REV. 119, 120 (2009).

12. This “inevitable conflict . . . was foreseen prior to statehood” and discussed during the Idaho constitutional convention. Memorandum Decision, *supra* note 3, at 5.

While water resources development policy in Idaho (and many western states) reflexively favored irrigation over hydropower during the early years of the 20th century,¹³ the unique geology and hydrology of the Snake River basin in southern Idaho presented opportunities for both types of development.

The Snake River as it arcs across southern Idaho is naturally divided at the location of Milner Dam. Upstream from Milner Dam the Snake River is not deeply entrenched,¹⁴ while “[b]elow Milner Dam . . . the river enters a deep canyon which made significant irrigation development below that point impractical by surface diversion methods.”¹⁵ As a result, irrigation use predominated above Milner, while hydropower was seen as the primary use of the river below Milner.¹⁶ Thus, “the Upper Snake River Basin effectively came to be treated as separate from the portion located downstream from Milner for purposes of water delivery and administration of rights.”¹⁷ This view—also known as the “two rivers”¹⁸ concept—was the foundation of water resource planning and development in the Snake River basin for many years.¹⁹ Under the “two rivers” approach, irrigation and hydropower could co-exist with minimal conflict, at least in theory.

13. For instance, while the first sentence of Section 3 of Article XV of the Idaho Constitution as adopted simply provided that “[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied,” it was amended in 1928 to add the following qualification: “except that the state may regulate and limit the use thereof for power purposes.” IDAHO CONST. art. XV § 3; see also Dennis S. Colson, IDAHO’S CONSTITUTION: THE TIE THAT BINDS 187–88 (Special Legis. ed. 2003).

14. IDAHO WATER RES. BD., IDAHO STATE WATER PLAN 44 (2012), available at <http://www.idwr.idaho.gov/waterboard/WaterPlanning/StateWaterPlanning/PDFs/ADOPTED%20State%20Water%20Plan%202012.pdf> [hereinafter 2012 IDAHO STATE WATER PLAN].

15. State Of Idaho Response To Federal Energy Regulatory Commission Request For Additional Information, In The Matter Of Petition For Declaratory Order By Idaho Power Company, No. EL85-38-000, at 2 (Fed. Energy Reg. Comm’n, May 18, 1987) [hereinafter Response to Federal Energy Commission]; see Fereday & Creamer, *supra* note 2, at 581 (describing Milner Dam as “the last point on the river at which large-scale gravity diversions are feasible.”).

16. See Bd. Of Eng’rs, Report of the Bd. Of Eng’rs to Consider Projects in Snake River Valley Which May Affect The Proposed American Falls Reservoir 5 (Apr. 10, 1920) [hereinafter Bd. Of Eng’rs] (on file with the authors) (“The waters flowing in the stream below Milner Dam are not susceptible of diversion to any considerable amount, and therefore become of primary use in connection with the production of power.”).

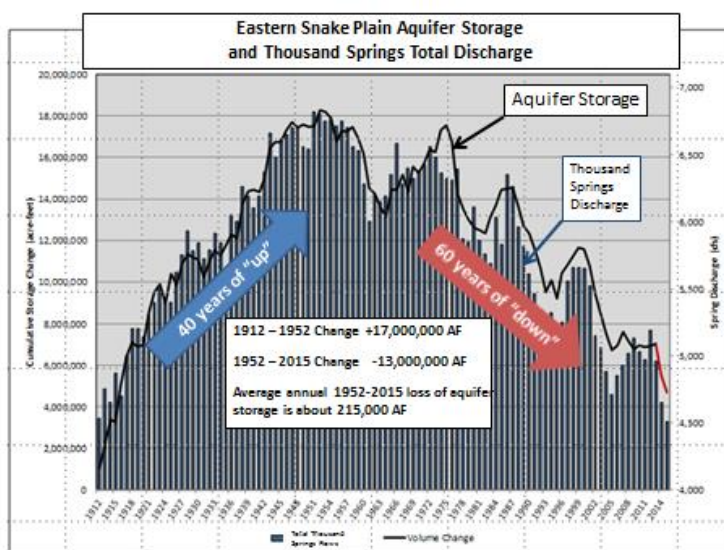
17. Fereday & Creamer, *supra* note 2, at 589.

18. 2012 IDAHO STATE WATER PLAN., *supra* note 14, at 44–45.

19. See Bd. Of Eng’rs, *supra* note 16, at 5 (recommending development under a “principle . . . to secure as nearly as possible a total use of the waters for irrigation above Milner Dam, and to secure the greatest possible use for power below Milner Dam.”).

The hydrology of the ESPA lent support to this theory. The ESPA discharges into the reach below Milner via numerous springs, such as the Thousand Springs in the Hagerman Valley.²⁰ Seepage from many years of gravity irrigation on the Snake River Plain “caused a significant increase in groundwater levels throughout the aquifer” in the first half of the 20th century, “and a corresponding increase in aquifer discharges [springs] into the Snake River, particularly in the reach below Milner.”²¹

Thus, much of the water diverted out of the river above Milner for irrigation water made its way back into the river below Milner, enhancing the flows available for hydro-



power projects in the canyon. As a result of the Milner Divide, the ESPA, and the springs, irrigation development above Milner and hydropower development below Milner occurred simultaneously with relatively little conflict.²² For many years they were in some respects even symbiotic, because the regulating effects of the ESPA and the springs smoothed the peaks and valleys of seasonal variations in the reach below Milner Dam, resulting in more consistent and reliable flows for hydropower generation at IPC’s projects.²³ Further, irrigation pumping provided a market for the power produced at IPC’s

20. See Fereday & Creamer, *supra* note 2.

21. *Id.* at 583; see also LEGISLATIVE COUNCIL COMM., 1994 LEGISLATIVE COUNCIL COMM. REPORT ON THE SNAKE RIVER BASIN ADJUDICATION, at 3 [hereinafter 1994 LEGISLATIVE COUNCIL] (“[I]rrigation diversions to the north side of the Snake River provide ground water recharge that increases the flow of ground water discharged from the springs”).

22. See Bd. Of Eng’rs, *supra* note 16, at 5–6 (“To a moderate extent these interests [irrigation use and power use] conflict with each other but fortunately on account of the large accretions to the stream below Milner Dam the power resource is restored . . . and the injury to that resource which would be susceptible of future development is relatively not very great.”); see Memorandum Decision, *supra* note 3, at 6 (“Throughout the first half of the 20th century, diversions from the Snake River for irrigation and other consumptive uses paralleled the development of hydropower projects without any apparent consequence.”).

23. See Fereday & Creamer, *supra* note 2, at 583 (“Idaho Power actually experienced a trend of increasing flows at Swan Falls in the years prior to World War II due to the increased aquifer recharge and surface return flows resulting from flood irrigation.”).

hydropower projects below Milner,²⁴ particularly in the “boom” years of ESPA ground water development.²⁵

Even so, there was always potential for conflict between irrigation and power as development continued, and development policy generally favored irrigation.²⁶ Perhaps in recognition of this, IPC for many years generally agreed that its hydropower water rights were subordinate to irrigation uses.²⁷ This only delayed the “inevitable conflict”²⁸ between irrigation and hydropower as development of the Snake River basin continued and progressively less and less water remained available for new uses. The conflict played out in two landmark controversies: at Hells Canyon in the 1950s, and at Swan Falls in the 1980s.

The Hells Canyon controversy of the late 1940s and early 1950s reverberated on the national level and is only briefly summarized in this article.²⁹ The Hells Canyon controversy centered on the question of federal versus private development of the hydropower potential of Hells Canyon, with IPC and federal agencies submitting competing development proposals. IPC prevailed in this competition, but needed irrigators’ support., IPC reaffirmed that its use of water for power generation was subordinate to future upstream uses by agreeing to the inclusion of a subordination clause in its the state water right license for its C.J. Strike project, and also “proposed that the FPC license for the Hells Canyon project contain a clause subordinating its rights to future upstream depletion without condition.”³⁰ At the time, this resolution was seen as effectively subordinating all of IPC’s Snake River projects to future irrigation development.³¹

24. IPC’s main stem Snake River projects downstream from Milner Dam are located at Twin Falls, Shoshone Falls, Bliss, Upper Salmon Falls, Lower Salmon Falls, C.J. Strike, Swan Falls, and the Hells Canyon complex (Brownlee, Oxbow, and Hells Canyon). The tributary projects include the upper and lower Malad River facilities, and several facilities using spring flows in and near the Hagerman Valley. As of 1984, only C.J. Strike project water right no. 02-2080, Brownlee water right no. 03-2024, and Oxbow water right no. 03-2025 were expressly subordinated to upstream consumptive uses. The federal power licenses for the Hells Canyon and Twin Falls projects, however, included subordination provisions. *Idaho Power Company v. State, Dep’t of Water Res.*, 661 P.2d 741, 745, 104 Idaho 575, 579 (1983).

IPC also operates a project at Milner Dam pursuant to an agreement with Twin Falls Canal Company and North Side Canal Company. See <http://www.tfcanal.com/milner.htm> (“To pay for reconstruction the canal companies made a mutually beneficial agreement with Idaho Power to rehabilitate the dam and build a new 57.5-megawatt power plant downstream.”). The water right license for the Milner project includes a provision stating, “the diversion and use of water for hydropower purposes under this water right shall be subordinate to all subsequent upstream beneficial depletionary uses, other than hydropower, within the Snake River Basin of the state of Idaho.” *State of Idaho Dep’t of Water Resources, Water Right License, Water Right No. 1-07011* (Nov. 1, 2011).

25. 1994 LEGISLATIVE COUNCIL, *supra* note 21, at 5.

26. See Bd. of Eng’rs, *supra* note 16, at 30–31 (“In granting power rights in the future the Federal Government and the State should so far as possible provide restrictions requiring its eventual surrender when and as the waters are required for application to the land.”).

27. SUSAN M. STACY, *LEGACY OF LIGHT: A HISTORY OF THE IDAHO POWER COMPANY*, 81 (Idaho Power Co. 1991) (referring to IPC’s “rules of thumb,” one of which was to subordinate its hydropower water rights “to present and future irrigators.”).

28. Memorandum Decision, *supra* note 3, at 5; see STACY, *supra* note 27, at 192 (referring to “the inevitable collision between hydro uses and irrigation[.]”).

29. For a thorough discussion and analysis of the Hells Canyon controversy, see KARL B. BROOKS, *PUBLIC POWER, PRIVATE DAMS: THE HELLS CANYON HIGH DAM CONTROVERSY* (U. of Wash. Press 2009).

30. *Idaho Power Co.*, 661 P.2d at 746, 104 Idaho at 580.

31. Patrick D. Costello & Patrick J. Kole, *Commentary On Swan Falls Resolution*, W. NAT. RESOURCE LITIG. DIG. COMMENT 11, 13 (Summer 1985) (“it was generally assumed that the other water

As the Hells Canyon controversy played out, new pumping technology and a reliable supply of relatively cheap electricity provided by IPC made feasible large-scale irrigation development of the ground water of the ESPA,³² and “groundwater appropriations from the Aquifer increased dramatically.”³³ IPC stood ready to serve this rapidly expanding market: “Idaho Power celebrated the revolution and encouraged more.”³⁴ The ground water revolution, however, planted the seeds of the Swan Falls Controversy.

The increased ground water pumping, in combination with reduced seepage to the ESPA due to conversions from gravity irrigation systems to sprinklers, resulted in decreased spring discharges below Milner Dam. The decrease in spring discharges, in turn, resulted in a reduction in the stream flows available for hydropower use at IPC’s projects.³⁵ These events set the stage for the second round of the “inevitable conflict” between hydropower and irrigation.³⁶

III. THE SWAN FALLS CONTROVERSY AND SETTLEMENT

The main issue in the Swan Falls Controversy was the question of subordination of hydropower water rights claimed by IPC to existing and futures uses of water.³⁷ While this question can be narrowly characterized as a dispute over the validity of IPC’s claimed water rights, it implicated water resources policy issues of the highest order to the people

rights of the company in the Snake River system above Hells Canyon were subordinated through the [Hells Canyon] agreement. . . . Public pronouncements of state policies and company practices . . . were consistent with this understanding.”). In the 1980s this assumption was proven to be incorrect, and the Swan Falls Controversy resulted. *See Idaho Power Co.*, 661 P.2d at 756, 104 Idaho at 590 (“[W]e hold that that subordination clause applies only to the Hells Canyon project water rights, and not to those at Swan Falls or any other dams upriver.”).

32. *See* 1994 LEGISLATIVE COUNCIL, *supra* note 21, at 5 (“The combination of cheap hydroelectric power and better pumps created a boom in Idaho agriculture. . . . This development occurred on the Snake River Plain by pumping ground water. . . .”); STACY, *supra* note 27, at 133 (“The big pumps transformed the relationship between electricity and agriculture in Idaho”); Costello & Kole, *supra* note 31, at 13 (referring to “[t]he advent of better methods for pumping water directly from the aquifer”).

33. *Clear Springs Food, Inc. v. Spackman*, 252 P.3d 71, 75, 150 Idaho 790, 794 (2011); *see* STACY, *supra* note 27, at 133 (“Word spread fast, and ‘things went hog-wild.’”).

34. STACY, *supra* note 27, at 135; *see* 1994 LEGISLATIVE COUNCIL, *supra* note 21, at 5 (“Idaho Power actively encouraged this development . . .”).

35. *Idaho Power Co. v. Idaho Dep’t of Water Resources*, 255 P.3d 1152, 1154, 151 Idaho 266, 268 (2011); *see* Costello & Kole, *supra* note 31, at 13 (“These developments . . . reduced the return flows to the Snake River upon which existing electrical generation capacity depended.”).

36. As the SRBA Court stated:

[W]ith the advent of deep well groundwater irrigation from sources hydraulically connected to the Snake River and high lift pumping from the river, along with increased demand for electric power . . . it became obvious that downstream, unsubordinated use of water for hydropower production would soon hinder development of upstream consumptive uses of water or *vice versa*.

Memorandum Decision, *supra* note 3, at 6.

37. *See Idaho Power Co. v. State*, 661 P.2d 741, 745–54, 104 Idaho 575, 579–87 (1983) (discussing subordination). Under the prior appropriation doctrine as established by Idaho law, holders of water rights senior in priority to upstream water rights diverting from the same source may seek curtailment of the junior priority diversions “when in times of scarcity of water it is necessary to do so in order to supply the prior rights. . . .” IDAHO CODE § 42-607 (2015); *see also* IDAHO CONST. art. XV § 3 (“Priority of appropriation shall give the better right as between those using the water. . . .”) A “subordinated” water right, in contrast, does not include “the customary total priority of right, but, rather, would be inferior to future upstream depletion.” *Idaho Power Co.*, 661 P.2d at 745, 104 Idaho at 579.

of the state.³⁸ The question of future development was particularly important,³⁹ especially with respect to the ESPA.⁴⁰ The ESPA is “one of the most prolific and productive ground-water systems in the world”⁴¹ and since the late 1940s had been “the major water source for sustaining growth of new irrigation.”⁴²

The Controversy forced IPC, other water users, and the State to confront the limits of the water resource development in the Snake River basin. Key to resolving the Controversy was the litigants’ recognition that that “[a]chieving a proper balance among competing demands for a limited resource such as water in the Snake River system is a fundamental public policy question,” and that “adversary proceedings may not necessarily yield solutions which reflect the broad public interest.”⁴³ The Swan Falls Settlement embraced these principles and provided the legal authority and tools for the State to protect water rights and develop policy for guiding and managing further development of the resource. The SRBA was one of the cornerstones of this framework, and one of its major purposes was “to resolve the legal relationship between the rights of the ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam.”⁴⁴

A. The Lawsuits

The Controversy’s triggering event was a ratepayer complaint filed with the Idaho Public Utilities Commission (“IPUC”) in 1977, alleging IPC had failed to protect its Swan Falls water rights from upstream depletion, and therefore had wasted assets, overstated capital investment, and overcharged ratepayers.⁴⁵ IPC responded by filing a lawsuit in Ada County district court seeking declarations that its Swan Falls water rights were not subject to upstream depletion, and that the 3,300 c.f.s. minimum stream flow established at the Murphy gaging station four miles below Swan Falls dam by the 1976 State Water Plan (Murphy minimum stream flow) constituted a “taking” of IPC’s Swan Falls water rights, which totaled 8,400 c.f.s.⁴⁶

38. *Idaho Power Co.*, 661 P.2d at 744, 104 Idaho at 578.

39. See Statement of Legislative Intent, *supra* note 5 at 58 (“At issue was whether the water rights of Idaho Power Company should be subordinated to future appropriators. . . .”); Fereday & Creamer, *supra* note 2, at 573 (“the controversy was about whether Idaho Power Company, holding senior rights for its Swan Falls powerplant on the Snake River, would be able to block future diversions by junior upstream irrigators”).

40. Fereday & Creamer, *supra* note 2.

41. *Id.* at 577.

42. Response to Federal Energy Commission, *supra* note 15, at 15.

43. Framework For Final Resolution Of Snake River Water Rights Controversy (1984), at 1 [hereinafter Framework] (on file with the authors). The Framework was signed by: John V. Evans, Governor of the State of Idaho; Jim Jones, Attorney General of the State of Idaho; and James E. Bruce, Chairman of the Board and C.E.O., Idaho Power Company.

44. Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 76, 150 Idaho 790, 795 (2010) (quoting the report of a 1994 interim legislative committee charged with reviewing the progress of the SRBA); A & B Irrigation Dist. v. Idaho Conservation League, 958 P.2d 568, 579, 131 Idaho 411, 422 (1997) (same).

45. *Idaho Power Co.*, 661 P.2d at 748, 104 Idaho at 582 (1983); STACY, *supra* note 27, at 194; Costello & Kole, *supra* note 31, at 13. The ratepayer complaint, in turn, was an outgrowth of IPC’s unsuccessful attempt to obtain approval to build a coal-fired power plant south of Boise—the “Pioneer” project. See STACY, *supra* note 27, at 177–89.

46. *Idaho Power Co.*, 661 P.2d at 748, 104 Idaho at 582. While the company’s permits, licenses and decrees for Swan Falls dam totaled 9,450 c.f.s., it was undisputed that the hydroelectric capacity of the

The district court concluded in a summary judgment decision that the subordination provision in the Federal Power Commission (FPC) license for IPC's Hells Canyon complex had subordinated all of IPC's hydropower water rights for the entire Snake River watershed, and that the State Water Plan's 3,300 c.f.s. Murphy minimum stream flow did not "take" IPC's Swan Falls water rights.⁴⁷ On appeal, the Idaho Supreme Court agreed the Murphy minimum stream flow did not constitute a "taking,"⁴⁸ but held the subordination provision of the FPC license applied only to the water rights for the Hells Canyon complex.⁴⁹ The Court remanded for proceedings on affirmative defenses alleging IPC had lost some or all of its Swan Falls water rights under various legal and equitable theories, including abandonment, forfeiture, and waiver.⁵⁰

The Idaho Supreme Court's ruling undermined a widely-held belief that in agreeing to subordination provisions for its Hells Canyon and C.J. Strike projects,⁵¹ IPC had also agreed to subordinate all its other Snake River hydropower water rights to existing and future irrigation development.⁵² Even IPC officials and their counsel believed IPC had

project was only 8,400 c.f.s., "and therefore the water rights at Swan Falls [we]re limited to 8400 c.f.s." *Id.* at 744, 104 Idaho at 578.

47. Article 41 of the FPC license required that the Hells Canyon complex be operated to "not conflict with the future depletion in flow of the waters of the Snake River . . . or prevent or interfere with future upstream diversion and use of such water . . . for the irrigation of lands and other beneficial consumptive uses in the Snake River water[shed]." *Idaho Power Co.*, 661 P.2d at 752, 104 Idaho at 586. The 1976 State Water Plan established "protected" average daily flows at three Snake River gaging stations: c.f.s. at Milner, 3,300 c.f.s. at Murphy, and 4,750 c.f.s. at Weiser. IDAHO WATER RES. BD., THE STATE WATER PLAN—PART TWO 116 (1976), available at http://www.idwr.idaho.gov/waterboard/WaterPlanning/State-WaterPlanning/State_Planning.htm [hereinafter 1976 IDAHO STATE WATER PLAN]. The same minimum flows had been established by a 1978 statute, IDAHO CODE § 42-1736A(2), that was repealed in 1985 when the Legislature ratified the State Water Plan amendments adopted to implement part of the overall Swan Falls settlement. 1985 Idaho Sess. Laws 514.

48. *Idaho Power Co.*, 661 P.2d at 755, 104 Idaho at 589 ("There is no requirement . . . that the Snake River be depleted to 3300 c.f.s. . . the plan only prohibits a reduction below 3300 c.f.s.. To that extent, if anything, it protects the Swan Falls rights to the extent of 3300 c.f.s..").

49. *Id.* at 756, 104 Idaho at 590.

50. *Id.* The Idaho Supreme Court's decision was issued November 19, 1982, but upon denial of a petition for rehearing was withdrawn and replaced with an amended opinion dated March 31, 1983. The date of the initial decision remained significant, however, because as discussed below the Court's decision reversed the widespread belief that all of IPC's projects had been subordinated. The date of the original decision (November 19, 1982) was used in subsequent legislation and contracts as the cutoff for separating water uses that had been established when it was thought the Hells Canyon licenses subordinated all of IPC's water rights, from uses initiated after the Court ruled otherwise. IDAHO CODE § 61-539 (2012). In short, to distinguish "existing" uses from "future" uses. The State and IPC subsequently agreed, however, that October 1, 1984 is the date that separates "existing" uses from "future" uses for purposes of the Settlement. See *infra* Part IV.D.2.

51. *Idaho Power Co.*, 661 P.2d at 746, 104 Idaho at 580. The hydropower water rights for IPC's Hells Canyon and C.J. Strike projects were fully subordinated before the Swan Falls Controversy arose. The water rights for Hells Canyon and C.J. Strike were not addressed in the Swan Falls Settlement and remained fully subordinated.

52. See STACY, *supra* note 27, at 196 (quoting Senator Laird Noh as stating the Idaho Supreme Court's decision "came as a shock to everyone."); Deposition of Patrick Daniel Costello, *In re SRBA*, No. 39576; Subcase No. 00-92023, at 17 [hereinafter Costello Deposition] (on file with authors) ("the State Supreme Court decision . . . was a surprising unexpected development that kind of caught everyone by surprise"); *Id.* at 17 ("it was viewed as an exotic theory that somehow those [Swan Falls] rights weren't effectively subordinated until the decision of the Supreme Court"); Costello & Kole, *supra* note 31, at 13 ("it was generally assumed that the other water rights of the company in the Snake River system above Hells Canyon were subordinated through the [Hells Canyon] agreement Public pronouncements of state policies and company practices . . . were consistent with this understanding."); Fereday & Creamer, *supra* note 2, at 599 ("Over the years high officials in the Company, and their outside counsel, had assured irrigators that the

effectively waived its rights to object to upstream development.⁵³ The Court's decision expanded IPC's potential ratepayer liability beyond Swan Falls, opening the door to allegations that IPC had failed to protect its water rights for upstream projects.⁵⁴ The ruling also presented an opportunity for IPC, however. The Court's decision provided a legal basis for IPC to use its water rights at Swan Falls and other projects for a purpose previously thought to be beyond reach: "to prevent consumptive uses from depleting the flow of the Snake River above Swan Falls."⁵⁵

IPC responded to the Idaho Supreme Court's decision by filing a second lawsuit in Ada County district court that named approximately 7,500 defendants,⁵⁶ which came to be known as "the 7500 suit" or "Idaho Power versus the World."⁵⁷ IPC's lawsuits "cast a legal cloud over thousands of Snake River water rights and prevented any new development,"⁵⁸ and spawned "one of the most bitterly contested water wars fought in the State of Idaho. . . ."⁵⁹ The controversy raised the question of whether IPC would be allowed "to keep and control the remaining water in the Snake"⁶⁰ and "block future diversions by junior upstream irrigators."⁶¹ In short, the controversy implicated public policy issues of the first order regarding future development and use of the waters of the Snake River basin.⁶²

Key to understanding the nature and intensity of the Swan Falls Controversy is the fact that "the 7500 suit," unlike IPC's first lawsuit, asserted IPC's water rights against

Company's water rights would not be used to block irrigation development."); *Minutes, Senate Res. & Env't Comm.* 20 (Idaho Mar. 27, 2006) ("And [IPC] went to court . . . and . . . I think it was a bit of a surprise when it went to court, but it found out from the Idaho Supreme Court that its water rights on the Middle Snake were not subordinated.") (statement of IPC attorney).

53. In 1953, for example, IPC's counsel stated in the Federal Power Commission licensing hearings for IPC's Hells Canyon project: "Historically, the applicant has always conceded that water rights for future irrigation development shall have precedence over hydroelectric water rights." 1994 LEGISLATIVE COUNCIL, *supra* note 21 at 4 (quoting Minutes of Federal Power Commission, *In the Matter of Idaho Power Company*, Project Nos. 1971, 2132, 2133 at 1240 (Jul. 1953)). "Until 1977, officers of Idaho Power Company continued to take this legal position." *Id.*; see also Memorandum from Thomas G. Nelson to James E. Bruce (Jun. 22, 1976), at 7 ("CONCLUSION: The Idaho Power Company's water rights for its Swan Falls plant cannot be used to prevent consumptive uses from depleting the flow of the Snake River above Swan Falls.") (on file with the authors). Mr. Nelson was IPC's attorney and represented IPC in the subsequent Swan Falls litigation and settlement negotiations. Mr. Bruce was IPC's C.E.O. and Chairman of the Board and subsequently signed the Swan Falls Agreement on behalf of IPC.

54. STACY, *supra* note 27, at 196.

55. Memorandum from Thomas G. Nelson to James E. Bruce, *supra* note 53, at 7.

56. *In re Snake River Basin Water Sys.*, 764 P.2d 78, 80, 115 Idaho 1, 3 (1988).

57. Fereday & Creamer, *supra* note 2, at 598.

58. Costello & Kole, *supra* note 31, at 13–14; see Fereday & Creamer, *supra* note 2, at 600 ("The Department reacted to the crisis by imposing a moratorium on the processing or approval of all applications seeking the consumptive use of water in the Snake River Basin upstream from Swan Falls pending the outcome of the district court litigation.").

59. Costello & Kole, *supra* note 31, at 11; see Fereday & Creamer, *supra* note 2, at 577 ("the most convulsive water conflict in Idaho's history").

60. STACY, *supra* note 27, at 195.

61. Fereday & Creamer, *supra* note 2, at 573.

62. See STACY, *supra* note 27, at 197 (quoting Senator Laird Noh) ("the most important long-term question in the Swan Falls controversy is who shall control the destiny of our state—a single public utility that gained an unexpected windfall from a Supreme Court decision, or the people of the state of Idaho"); (quoting Governor John Evans) ("I want Idaho to become the Snake River water master, not the Idaho Power Company.").

uses upstream of Milner Dam.⁶³ As previously discussed, Milner Dam is located at a physical divide of paramount importance in the historic development of the water resources of the Snake River basin. The “two rivers concept”⁶⁴ had been incorporated into the first State Water Plan in 1976 in the form of the “zero c.f.s.” minimum flow established for Milner Dam.⁶⁵ “The purpose of allowing a zero river flow at Milner Dam was to maximize the amount of water available for development above the dam, including development in the [Eastern Snake Plan] Aquifer.”⁶⁶ Irrigation interests had long assumed IPC’s projects downstream from Milner Dam “had no claim on any flows in the Snake River above Milner Dam.”⁶⁷ IPC’s second lawsuit was contrary to this historic understanding, which explains “why various interests, including the Idaho Legislature, responded as they did to the Swan Falls controversy.”⁶⁸

B. The Legislative Subordination Battle

After the Idaho Supreme Court issued its decision, the Swan Falls Controversy quickly expanded into the Legislature, and supporters of power interests and supporters of irrigation interests alike attempted repeatedly in 1983 and 1984 to achieve their objectives through legislation, resulting in “bitter” and ultimately inconclusive legislative battles.⁶⁹

The only legislation enacted to resolve the Swan Falls Controversy during the 1983–84 legislative sessions was Senate Bill 1180. This legislation was enacted in 1983 with IPC’s support and authorized negotiation of a contract between the State and IPC allowing it to dismiss from “the 7500 suit” persons who were already beneficially using water or had made “substantial investments” in establishing a water right pursuant to a valid

63. While IPC’s original lawsuit had limited its claims to the Snake River and its tributaries downstream of Milner Dam (Idaho Power Co v. State, No. 62237 at 30–33 (4th Jud. Dist., Ada County Nov. 8, 1977)), the second lawsuit included the area upstream from Milner Dam. Deposition of Thomas G. Nelson, at 105, *In re SRBA Case No. 39576* (State v. United States) (Oct. 31, 1990). [hereinafter Nelson Deposition] (on files with authors).

64. 2012 IDAHO STATE WATER PLAN, *supra* note 14, at 44–45.

65. 1976 IDAHO STATE WATER PLAN, *supra* note 47, at 116. One of the significant results of the Swan Falls Controversy was the enactment of a statute to confirm the “two rivers” concept and the historic understanding that uses downstream from Milner Dam are not allowed to call for water from above Milner Dam. See *Clear Springs Foods, Inc.*, 252 P.3d at 80, 150 Idaho at 799 (“One of the statutes enacted to implement the Swan Falls Agreement sought to separate water administration above and below the dam.”) (citing IDAHO CODE § 42-203B(2)’s provision that for purposes of determining and administering “rights to the use of the waters of the Snake River or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.”).

66. *Clear Springs Foods, Inc.*, 252 P.3d at 79, 150 Idaho at 799. The “Milner zero minimum flow” is sometimes incorrectly interpreted as a “maximum,” that is, as a requirement that flows never exceed “zero c.f.s.” at Milner Dam. This is not the case. As the Idaho Supreme Court stated in *Clear Springs*, the Milner zero minimum flow allows uses above Milner Dam to reduce flows at the dam to zero c.f.s. but does not require a “zero” flow. See *id.* (referring to “allowing a zero river flow at Milner Dam” and “that ‘[t]he exercise of water rights above Milner Dam has and may reduce flow at the dam to zero.’ Idaho Water Resource Bd., The State Water Plan 17 (1996).” (emphasis added)).

67. Fereday & Creamer, *supra* note 2, at 591.

68. *Id.* at 594; see also *id.* at 589 (“Any attempt to describe the historical underpinning of the Swan Falls controversy must include at least a brief discussion of how . . . the Upper Snake River Basin effectively came to be treated as separate from the portion located downstream from Milner . . .”).

69. Costello & Kole, *supra* note 31, at 13; see STACY, *supra* note 27, at 198–200 (discussing attempts to legislatively resolve the controversy); see also Fereday & Creamer, *supra* note 2, at 598–99.

permit.⁷⁰ While the Department of Water Resources and IPC negotiated what came to be known as “the 1180 Contract”,⁷¹ the Governor refused to sign the 1180 Contract because its constitutionality was challenged, and its failure to subordinate IPC’s hydropower water rights to future uses meant it was not a full settlement of all issues.⁷²

C. The Negotiations

In 1984 after numerous unsuccessful attempts to legislatively subordinate IPC’s water rights,⁷³ the State and IPC entered into negotiations to resolve the Controversy. The principals to the negotiations were Governor John V. Evans, Attorney General Jim Jones, and IPC Chairman of the Board and C.E.O. James E. Bruce.⁷⁴ They were represented in the negotiations by attorneys Patrick D. Costello, Patrick J. Kole, and Thomas G. Nelson.⁷⁵

The parties had little difficulty reaching agreement that IPC would subordinate its claimed hydropower water rights to existing uses.⁷⁶ Essentially all of the existing uses had been established without protest or objection by IPC,⁷⁷ and it was generally agreed that even under the best litigation outcome IPC could reasonably hope for, it would be deemed to have waived its rights as against existing users.⁷⁸

The question of subordinating IPC’s hydropower operations to future uses was more complex and hinged largely on the question of whether the State or IPC would be in the position of controlling future development. As a result of the Idaho Supreme Court’s decision, IPC was “de facto in charge of the river” because when IPC’s water rights were in priority they commanded the entire flow of the river and gave IPC “the

70. 1983 Idaho Sess. Laws 689–91. IPC had also sued persons who had filed permit applications but had not yet initiated the use of water nor made a “substantial investment.” The legislation provided the IPUC would have no jurisdiction over matters relating to IPC’s failure or refusal to protect its hydropower water rights from depletions caused by the persons dismissed from the lawsuit. *Id.* at 690.

71. *Id.* at 689–91. The formal title of the 1180 Contract is “Contract To Implement Chapter 259, Sess. Laws, 1983.” [hereinafter 1180 Contract] (on file with authors) (*available at* <http://www.idwr.idaho.gov/News/Issues/SwanFalls/Archive.htm>).

72. See Costello Deposition, *supra* note 52, at 28–31 (discussing the 1180 Contract). Ultimately the Swan Falls Agreement and the 1180 Contract were executed together, as a package. Swan Falls Agreement ¶ 9. The 1180 Contract is sometimes referenced as the “Swan Falls Contract,” to distinguish it from the “Swan Falls Agreement.”

73. Costello Deposition, *supra* note 52, at 34–35.

74. Costello & Kole, *supra* note 31, at 14; STACY, *supra* note 27, at 200. Jim Jones is currently a Justice of the Idaho Supreme Court.

75. Thomas G. Nelson went on to become a Circuit Judge of the United States Court of Appeals for the Ninth Circuit.

76. See Costello & Kole, *supra* note 31, at 16 (“the power company had already indicated a willingness to subordinate its rights as to existing water users . . .”).

77. See *supra* notes 30–31 and accompanying text.

78. See Transcript of Proceedings, Public Information Meeting On the Swan Falls Agreement, Twin Falls, Idaho (Idaho Water Res. Bd.) (Oct. 25, 1984) at 15–16 (stating that if IPC “effectively won about as clean a victory as you could postulate it would win, you’d have probably the result that people in place would remain in place . . .”) (statement of IPC’s attorney) (on file with authors); Costello & Kole, *supra* note 31, at 16 (stating “the best the power company could hope to do in court was to establish an unsubordinated water right at the 4,500 c.f.s. level,” which hydrologists had estimated would be the amount of water remaining in the river at Murphy on the lowest flow day of the irrigation season in a critical water year under full development of all existing uses).

ability to manage the resource,” and “[f]rom the State’s point of view that was untenable.”⁷⁹

One of the State’s “principal objectives” in the negotiations was to “regain control over the waters of the Snake River.”⁸⁰ Governor Evans proposed raising the Murphy minimum flow and using it rather than IPC’s water rights as the standard for managing future development, if IPC would agree to confine its unsubordinated water right to the level of the increased Murphy minimum flow.⁸¹

IPC officials “were initially skeptical that new minimum flows could be the vehicle for a settlement,”⁸² in part because of IPC’s view “that the state lacked the commitment in legal authority and resources to enforce any minimum flow.”⁸³ IPC believed improvements were necessary to address “institutional inadequacies in the state’s water management system” before IPC could have “confidence in the state’s ability to deliver on any promised minimum flow.”⁸⁴ Nonetheless, IPC “agreed to enter into discussions of that concept with the State.”⁸⁵

“[O]nce both sides agreed that the State should be in charge,”⁸⁶ it was necessary to develop proposals to address perceived inadequacies in the State’s water management authority so the new minimum flow could be meaningfully implemented and enforced.⁸⁷ The key measures for this purpose included: a general adjudication of the entire Snake

79. Deposition of Patrick Jerome Kole, *In re* SRBA, Case No. 39576 (Nov. 14, 1990), at 33 [hereinafter *Kole Deposition*] (on file with authors). Mr. Kole stated that from the State’s viewpoint, the principal issue was whether the State or IPC would “run the river”:

Q. What was the principal element of the negotiation? Was it the quantity of water that Idaho Power Company was entitled to?

A. The principal issue was who would run the river, whether it would be a private utility or whether it would be public ownership. And the State had always wanted to make it clear that this was their job to be the water master and not a private utility. And once both sides agreed that the State should be in charge, that [sic] it just then became a question of protecting everybody’s water rights throughout the system and making sure that everybody was treated fairly and equitably.

Q. Why did Idaho Power Company or did Idaho Power Company want to run the river?

A. Well, whether they wanted to or not, they were as a result of the [Idaho Supreme Court] decision de facto in charge of the river because of the way they could assert or not assert their water right against different uses that would give them the ability to manage the resource. From the State’s point of view that was untenable.

Id. at 32–33.

80. The State had “three principal objectives. First, the state must regain control over the waters of the Snake River. Second, the state wants to insure an adequate supply of water to maintain its low cost hydropower rates. Third, development that is in the public interest must be permitted to go forward.” Memorandum to the Honorable John V. Evans, Governor, from Swan Falls Litigation Task Force (Oct. 23, 1984), at 4 (on file with the authors).

81. See Costello & Kole, *supra* note 31, at 14.

82. *Id.*

83. *Id.* at 15.

84. *Id.*

85. *Id.* at 14.

86. Kole Deposition, *supra* note 79, at 32.

87. See Costello & Kole, *supra* note 31, at 14; see also Kole Deposition, *supra* note 79, at 59 (“the State really did not have a good management system in place.”).

River basin; the collection of the hydrologic data to accurately predict the effects of new water development; the articulation of a state water resource development policy encouraging the most efficient uses of the remaining supply; and giving the Idaho Department of Water Resources (IDWR) sufficient regulatory authority to implement the policy through the permitting process.⁸⁸

The answer to the next question—how much to increase the Murphy minimum flow—was provided by a classic compromise. Consulting hydrologists had advised the parties that “in a critical water year,” and assuming full development of existing uses, the lowest average daily flow at Murphy during the irrigation season would be approximately 4,500 c.f.s.⁸⁹ The State Water Plan’s existing minimum flow at Murphy, on the other hand, was 3,300 c.f.s.⁹⁰ In short, the best litigation outcome IPC could realistically hope for was recognition of an unsubordinated right to 4,500 c.f.s. as measured at the Murphy gaging station,⁹¹ while “[a]t the other extreme, if the state prevailed in court, the Murphy minimum flow would have remained at 3300 c.f.s.”⁹² From a litigation perspective the parties were thus separated by 1,200 c.f.s.—the difference between 4,500 c.f.s. and 3,300 c.f.s.

The compromise consisted of splitting the 1,200 c.f.s. difference—that is, the parties agreed to support an increase of 600 c.f.s. in the Murphy minimum flow, from 3,300 c.f.s. to 3,900 c.f.s.⁹³ As IPC’s negotiator Thomas G. Nelson wryly stated in addressing the question of “how the 3,900 was arrived at” during a Senate committee hearing on the settlement: “It was very scientific. There is [4],500 in the river now. The water plan says 3,300, halfway is 3,900.”⁹⁴ The parties also proposed raising the non-irrigation season minimum flow at Murphy by a greater margin, to 5,600 c.f.s., in recognition of the potential that new storage projects in the Milner to Murphy reach of the Snake River could adversely affect winter hydropower flows.⁹⁵

D. The Settlement “Framework”

The basics of the parties’ proposal regarding the thorny question of future development were outlined in the “Framework For Final Resolution Of Snake River Water Rights Controversy” (“Framework”), which was signed on October 1, 1984.⁹⁶ The Framework

88. See Costello & Kole, *supra* note 31, at 15.

89. *Id.* at 16; see Nelson Deposition, *supra* note 63 at 122 (“we used the 4500 as a worst case number.”).

90. 1976 IDAHO STATE WATER PLAN, *supra* note 47, at 116.

91. See Fereday & Creamer, *supra* note 2.

92. Costello & Kole, *supra* note 31, at 16.

93. See *id.*

94. *Transcript of Proceedings, Meeting on SB 1006 & SB 1008, Sen. Res. & Env’t Comm.* (Idaho Feb. 1, 1985), at 20 (on file with authors).

95. See Framework, *supra* note 43, at 2–3; see also Costello & Kole, *supra* note 31, at 16.

96. See generally Framework, *supra* note 43. While the parties had agreed in principle that IPC’s rights would be fully subordinated to “existing” uses, see Costello & Kole, *supra* note 31, at 16 (“the power company had already indicated a willingness to subordinate its rights as to existing water users”), the Framework did not address or reference this important aspect of the contemplated settlement. See Fereday & Creamer, *supra* note 2, at 603 (observing that the Framework “for some reason does not mention subordination”).

did not purport to resolve the future development issue, but rather described the important features of the settlement the parties hoped to achieve on this question.⁹⁷

The Framework incorporated the parties' compromise on the new levels for the Murphy minimum streamflow (hereafter, "3900/5600 at Murphy").⁹⁸ While the compromise made possible future development of flows in excess of the new Murphy minimum flows, the Framework stated that "additional water use development potential is limited" and proposed that "each new development should be carefully scrutinized against express public interest criteria."⁹⁹ This was intended to "maximize long-term economic benefit to all sectors of society"¹⁰⁰ and avoid "a 'land-rush' reaction in which rights to all of the remaining water would be claimed quickly with little resultant benefit to society in general."¹⁰¹ The Framework contemplated that the "public interest criteria" would favor "projects which promote Idaho's family farming tradition and which will create jobs," and would weigh "the benefits to be obtained from each development against the probable impact it will have on the Company's hydropower resources."¹⁰²

To achieve these ends, the Framework proposed the final settlement be structured to "allow the State to utilize Idaho Power Company's asserted water right to augment the State's existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest."¹⁰³

The Framework addressed the concern that "the state lacked the commitment in legal authority and resources to enforce any minimum flow"¹⁰⁴ by identifying several measures to enable meaningful implementation of the new Murphy minimum flows.¹⁰⁵ These proposals included commencement of a general adjudication of the Snake River Basin, the encouragement of an effective water marketing system, the funding of hydrologic and economic studies, and the enactment of legislation clarifying that the rate-payers will benefit from a utility's sale of hydropower water rights.¹⁰⁶

97. The Framework "identified a series of judicial, legislative, and administrative actions which we agree should be taken in the public interest" and "would resolve the outstanding legal issues to our mutual satisfaction." Framework, *supra* note 43, at 5; see Memorandum Decision, *supra* note 3, at 7; see also Fereday & Creamer, *supra* note 2, at 602 (stating the Framework "could be described as a listing of goals toward which the parties agreed to work in good faith"). As IPC's attorney and negotiator Thomas G. Nelson explained in a subsequent deposition:

Q. Now it's entitled framework. Why was it entitled framework?

A. Well, these were the major components of the agreement that we felt had to be worked out in order to resolve the controversy. And this document was so general that you couldn't say it was the agreement, but certainly it established the outlines of what the parties had agreed to. And so I think the framework was selected as a word descriptive of, say, the quality of the effort to that point.

Nelson Deposition, *supra* note 63, at 45.

98. Framework, *supra* note 43, at 2.

99. *Id.* at 4 (capitalized in original).

100. *Id.*

101. Costello & Kole, *supra* note 31, at 16.

102. Framework, *supra* note 43, at 4.

103. *Id.* at 5. As IPC attorney and negotiator Thomas G. Nelson explained, part of the intent was that "Idaho Power Company's water rights on the Snake would be used to buttress the state's authority to impose those new criteria. . . ." Nelson Deposition, *supra* note 63, at 44.

104. Costello & Kole, *supra* note 31, at 15.

105. *Id.*

106. Framework, *supra* note 43, at 5-8.

In sum, the settlement outlined by the Framework was based on State management and control of further development through: (1) the establishment of new minimum flows at Murphy; and (2) the enactment of legislation providing the State with the legal authority and tools to protect water rights, to enforce the minimum flows, and to implement state water resource policy to promote the most efficient and beneficial development of the remaining flows.¹⁰⁷ As IPC's attorney and negotiator Thomas G. Nelson explained in a Senate committee hearing:

Part of this was kind of a 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. So it was in that context that you find the adjudication requirement the thought being it doesn't make a lot of sense to try and define what's in the river when you haven't the foggiest idea really of the details of the water uses now going on above Swan Falls.¹⁰⁸

E. The "Trust" Concept

Negotiations and finalization of the proposed settlement continued following execution of the Framework, but in mid-October settlement efforts were almost derailed over a lurking issue not squarely addressed in the Framework: the subordination of IPC's claimed water rights for flows in excess of 3900/5600 at Murphy.¹⁰⁹ The question was whether the hydropower water rights in excess of 3900/5600 at Murphy would be immediately "subordinated" to future uses, or would only be "subordinatable."¹¹⁰ The State favored immediate subordination (or full State ownership) of the rights,¹¹¹ while IPC favored unsubordinated but "subordinatable" hydropower water rights that IPC would subordinate only when a new water right was approved, and only to the extent of the new water right.¹¹²

There were two issues underlying the "subordinated" versus "subordinatable" disagreement. One was the question of whether the authority to control subordination of the hydropower water rights would be in the State or IPC. The State was concerned that if IPC was allowed to "retain control" over unsubordinated water rights, IPC "would be

107. Costello & Kole, *supra* note 31, at 15.

108. *Minutes, Senate Res. & Env't Comm.* 4–5 (Idaho Feb. 1, 1985). Likewise, in a subsequent deposition Mr. Nelson stated the Agreement called for a general adjudication "partly in response to that argument that if you want to be the water master, then you better give yourself the tools to be the water master." Nelson Deposition, *supra* note 63, at 55.

109. See Costello Deposition, *supra* note 52, at 58 ("It was lurking in the background then. We papered over the difference in the framework because we didn't have to get into that detail as to how this extra water was going to be made available.").

110. *Minutes, Senate Res. & Env't Comm.* 5 (Idaho Feb. 1, 1985); *Minutes, Senate Res. & Env't Comm.*, 3 (Idaho Jan. 18, 1985); see Kole Deposition, *supra* note 79, at 52 ("Probably the biggest area of controversy would have been the difference between a subordinated water right and a subordinatable water right.").

111. Prepared Testimony of Jim Jones, Idaho Attorney General on Senate Bills 1006 and 1008, presented to the Senate Res. & Env't Comm., 1 (Jan. 18, 1985) (attached to *Minutes, Senate Res. & Env't Comm.*) (Idaho Jan. 18, 1985).

112. *Minutes, Senate Resource & Env't Comm.*, 4–5 (Idaho Feb. 1, 1985); Kole Deposition, *supra* note 79, at 52.

required to protest every application for water, thus frustrating the objective of making additional Snake River water available for appropriation.”¹¹³ The second issue was whether applying the “public interest criteria” would violate the Idaho Constitution’s provision that the right to appropriate “unappropriated” waters “shall never be denied.”¹¹⁴ IPC was concerned that a court might view water used under fully subordinated water rights as essentially “unappropriated,” and therefore void the “public interest criteria” as an unconstitutional attempt to “deny” the right to appropriate.¹¹⁵ The divergent views and concerns of the State and IPC on “subordinated” versus “subordinatable” hydropower water rights led to a stalemate in the negotiations, and for a few days the anticipated settlement appeared to be in danger of unraveling.¹¹⁶

The logjam was broken by the trust concept proposed by Rexburg attorney Ray Rigby.¹¹⁷ Under this proposal, the hydropower water rights for flows in excess of 3900/5600 at Murphy would be “subordinatable,” but the State as trustee would hold legal title to the water rights.¹¹⁸ The trust proposal resolved the impasse by leaving the flows in excess of 3900/5600 at Murphy “unsubordinated” while “mak[ing] clear the

113. Prepared Testimony of Jim Jones, *supra* note 111, at 2–3.

114. IDAHO CONST. art. XV, § 3.

115. As subsequently explained by the SRBA Court:

[I]n order for the State to impose the public interest criteria restrictions on the appropriation of future water rights and avoid the risk of Article 15 § 3 challenges, the river had to be considered a fully appropriated source A straight subordination of Idaho Power’s rights would not accomplish [this] result as the river would not have been fully appropriated.

Memorandum Decision, *supra* note 3, at 40–41; see Transcript of Proceedings, Public Information Meeting On the Swan Falls Agreement, Lewiston, Idaho 36 (Idaho Water Res. Bd.) (Oct. 31, 1984) (“In this agreement we did not immediately subordinate the hydropower right above the minimum stream flow because we wanted to be able to say we had a fully-appropriated river system so that we can impose this public interest criteria”) (on file with the authors).

During the Senate committee hearings, IPC’s negotiator was asked whether this theory was effectively just an “end run” around the constitutional prohibition against denying the right to appropriate, and replied: “I’m morally certain as I stand here that some person with an undeveloped permit who would be adversely affected by this way of doing business is going to challenge it, and we think it’s an argument worth having.”

Transcript of Proceedings, Meeting on SB 1006 – To provide that the Director of the Department of Water Resources shall have the power to promulgate rules and regulations; SB 1008 – Water rights for power purposes, Sen. Res. & Env’t Comm., 22–23 (Idaho Jan. 18, 1985) (on file with authors). As it happened, however, no such challenge materialized.

116. *Minutes, Senate Res. & Env’t Comm.* 3 (Idaho Jan. 18, 1985) (“we were ‘laugerheaded’ [sic] on the question”); Costello Deposition, *supra* note 52, at 58 (“we basically reached an impasse over it. Things were falling apart”).

117. Stapilus, *Through the Waters – An Oral History of the Snake River Basin Adjudication* 49–50 (2014)..

118. As the Governor’s negotiator explained to the Senate resources committee:

So [the trust] simply was a mechanism to sever, in lawyer’s terms, to sever the legal and equitable title to the water immediately so there’s some immediate change in position of the parties, that as soon as this agreement becomes binding and this statute takes effect, legal title to the water will go to the state

Transcript of Proceedings, Meeting on SB 1006 & SB 1008, Sen. Res. & Env’t Comm. (Idaho Feb. 1, 1985), at 53 (on file with authors); see Memorandum Decision, *supra* note 3, at 13 (quoting same).

state's control of the allocation of the water."¹¹⁹ As the Attorney General's negotiator explained in an Idaho Water Resource Board (IWRB) public information meeting on the Swan Falls Agreement shortly after it was signed: "And what we ended up agreeing to was to, in essence, have the water right placed in trust in the ownership of the state in exchange for which we went with the concept of the subordinatable water right."¹²⁰ IPC's negotiator gave a similar explanation to the Senate Resources and Environment Committee when it was considering the trust legislation: "The trust provision could get us around the subordinated versus the subordinatable nature of the water above the minimum flow. It remains unsubordinated but it's held in trust by the state and it neatly sidestepped the problem."¹²¹

Implementing the trust presented a hurdle, however: IPC could not simply transfer legal title to its hydropower water rights to the State without potentially exposing itself to new ratepayer claims.¹²² The parties therefore drafted "subordination legislation"¹²³ under which the State as trustee would take legal title by exercise of the State's constitutional authority to "regulate and limit" hydropower water rights.¹²⁴ The proposed trust provisions of the "subordination legislation" were attached to the Agreement as Exhibit 7B.¹²⁵ Under the Exhibit 7B legislation, the State would obtain legal ownership of the hydropower water rights for flows in excess of 3900/5600 at Murphy by operation of law rather than through a conveyance or transfer.¹²⁶

119. *Minutes, Sen. Res. & Env't Comm.* 3 (Idaho Jan. 18, 1985); see Memorandum Decision, *supra* note 3, at 13 (quoting same). It was common at the time to refer to both "subordination" and "reallocation" in connection with the of the hydropower water rights held in trust by the State; the term "reallocation" also appears in the SRBA Court's *Memorandum Decision* and in the title of the "public interest criteria" statute, IDAHO CODE § 42-203C. The record is clear that "subordination" was intended to refer to the water rights and "reallocation" was intended to refer to the water; i.e., subordination of the hydropower water rights held in trust to new water rights approved under the "public interest criteria" was seen as analogous to "reallocating" to a new use water that formerly had been used for hydropower purposes. Experience has shown, however, that the term "reallocation" creates confusion. This article therefore refers only to "subordination" of the hydropower water rights held in trust to new water rights approved pursuant to state law, including the "public interest criteria" in IDAHO CODE § 42-203C.

120. Transcript of Proceedings, Public Information Meeting on the Swan Falls Agreement, Idaho Water Res. Bd. 45-46 (Idaho Water Res. Bd.) (Nov. 1, 1984). (on file with the authors).

121. *Minutes, Senate Res. & Env't Comm.* 4-5 (Idaho Feb. 1, 1985).

122. "It was important that Idaho Power not be perceived to have voluntarily transferred its water rights because such transfer could have subjected Idaho Power to additional claims that it did not protect its water rights." Memorandum Decision, *supra* note 3, at 13 n. 9.

123. Swan Falls Agreement, *supra* note 3, at ¶ 13(a)(vii).

124. The Idaho Constitution provides that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the state may regulate and limit the use thereof for power purposes.*" IDAHO. CONST. art. XV, § 3 (emphasis added). The "regulate and limit" language was added in 1928. DENNIS C. COLSON, IDAHO'S CONSTITUTION – THE TIE THAT BINDS 173 (Univ. of Idaho Press 1991). The "subordination legislation" proposed by the Agreement stated it was intended "to specifically implement the state's power to regulate and limit the use of water for power purposes." Swan Falls Agreement, *supra* note 3, Exhibit 7B ¶ 1.

125. Swan Falls Agreement, *supra* note 3, ¶ 13(a)(vii). The "subordination legislation" was introduced into the Legislature under Senate Bill 1008, and the trust provisions were codified at Idaho Code § 42-203B. 1985 Idaho Sess. Laws 25. The "Statement of Purpose" for Senate Bill 1008 stated: "This legislation would implement the state's authority under the 1928 amendment to Article 15, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes."

126. As explained to the Senate resources committee by the Governor's negotiator:

[Exhibit] 7B is the one that imposes this new trust concept on the portion of the hydropower right that is in excess of the minimum flow, and we wanted to keep this as

While the trust concept broke the impasse over whether water rights for flows in excess of 3900/5600 at Murphy would be “subordinated” or “subordinatable,” the nature and intent of the trust became a major source of controversy when the time came to decree the hydropower water rights in the SRBA. These matters are discussed in a subsequent section.

F. The Swan Falls Agreement

The parties’ acceptance of the “trust” concept cleared the way for finalizing and signing a document simply entitled “Agreement”—which came to be known as “the Swan Falls Agreement”—on October 25, 1984.¹²⁷ The use of the term “Agreement” was somewhat of a misnomer in that it did not resolve the lawsuits or the overall controversy. As the SRBA Court stated: “the Swan Falls Agreement was not a self-executing instrument, but rather proposed a suite of legislative and administrative action that if implemented would resolve the controversy and the legal issues to the mutual satisfaction of the parties.”¹²⁸ The proposed “legislative and administrative action” included a “legislative program” and “subordination legislation” jointly developed by the State and IPC,¹²⁹ and amendment of the State Water Plan to incorporate the minimum flows and policy “positions” to which the State and IPC had agreed.¹³⁰

These proposals were attached to the Agreement as exhibits, and the Agreement was made contingent upon their adoption.¹³¹ The State and IPC agreed to jointly and in good faith support the proposed legislation and State Water Plan amendments, including “the existence of water rights held in trust by the State.”¹³² The entire settlement package

far from being a transfer as we could. So it’s being imposed by operation of law through this rather than the power company agreeing to it by contract.

Memorandum Decision, *supra* note 3, at 13; Idaho Power Company, Statement In Support Of Senate Bill 1008 Presented to the Senate Res. & Env’t Comm., 1 (Jan. 25, 1985) (attached to *Minutes, Senate Res. & Env’t Comm.* (Idaho Jan. 25, 1985)) (stating that while IPC’s support of the Exhibit 7B legislation “could raise implications of a voluntary transfer of its water rights[,] [i]n fact, the basis for [the legislation] is the State’s power to ‘regulate and limit’ the use of water for hydropower purposes”).

127. Swan Falls Agreement, *supra* note 3, at 9–12. A separate agreement known as the “Swan Falls Contract”—i.e., the 1180 Contract—was signed the same day. Swan Falls Agreement, *supra* note 3, at ¶ 9; 1180 Contract, *supra* note 71, at 8–10.

128. Memorandum Decision, *supra* note 3, at 26; see *Miles*, 778 P.2d at 760, 116 Idaho at 638 (citing the legislation enacted to implement the proposed settlement, including the legislation that ratified the implementing amendments to the State Water Plan). The Agreement was not intended to be the legal authority for defining future development or management of the waters of the Snake River basin, but rather acknowledged that such matters are governed by state law and the State Water Plan: “This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce and administer.” Swan Falls Agreement, *supra* note 3, at ¶ 14. The Agreement also recognized the Legislature’s authority to change state law—including the legislation enacted to implement the settlement—without affecting the validity or effect of the Agreement. Swan Falls Agreement, *supra* note 3, at ¶ 17; see Memorandum Decision, *supra* note 3, at 36 (quoting statements of IPC’s attorney to the House Resources and Conservation Committee, “If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have the power to do, would be to change the contractual recognition of the company’s water rights at Murphy Gage.”); Statement of Legislative Intent, *supra* note 5, at 61 (“State water policy is not frozen by this legislation”).

129. Swan Falls Agreement, *supra* note 3, at ¶¶ 6, 13(A)(ii), (vii), Ex. 1-5, 7A-8.

130. *Id.* at ¶¶ 6, 13(A)(i), Ex. 6.

131. *Id.* at ¶ 13.

132. *Id.* at ¶ 4.

is sometimes described as the Swan Falls “Settlement,” to distinguish it from the “Agreement,” which was just one component of the overall “Settlement.”¹³³

The body of the Agreement included a conditional definition of the hydropower water rights IPC claimed for its projects between Milner and Murphy: Swan Falls, Bliss, Lower Salmon Falls, Upper Salmon Falls, Shoshone Falls, Twin Falls, Upper Malad, Lower Malad, Clear Lake, Sand Springs, and Thousand Springs.¹³⁴ These provisions defined the claimed rights cumulatively as a single “water right”¹³⁵ that was fully subordinated to existing uses of water for which water rights had been perfected, or for which claims were filed by June 30, 1985.¹³⁶ The Agreement also acknowledged the simultaneous execution of the 1180 Contract,¹³⁷ which protected from “protest or interference by the Company” all persons beneficially using water prior to November 19, 1982, or who had made “substantial investments” under a water right application prior to that date.¹³⁸

With respect to future uses, the State and IPC agreed the “water right” should be defined in two components.¹³⁹ The first component was a right to flows at the Murphy gaging station of 3,900 c.f.s. from April 1 to October 31 and 5,600 c.f.s. from November 1 to March 31; this right was “unsubordinated” to future uses.¹⁴⁰ The second component was a right for flows in excess of these levels that was “subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law.”¹⁴¹ This portion of the definition was deemed “a subordination condition.”¹⁴²

These proposed definitions were expressly conditioned on, among other things, enactment of the proposed “legislative program” and “subordination legislation” attached

133. In addition to the Agreement, the overall “Settlement” included, among other things: the new legislation, the State Water Plan amendments, “regulatory approvals” by state and federal agencies such as IPUC and FERC, dismissal of IPC’s lawsuits, and the 1180 Contract. Swan Falls Agreement, *supra* note 3, at ¶¶ 6, 9, 12, 13.

134. *Id.* at ¶ 7. The definition of the “Company’s Water Right,” did not become effective upon the signing of the Agreement, but rather was conditioned upon implementation of the “Conditions on Effectiveness.” *Id.* at ¶¶ 1, 7, 13. IPC’s C.J. Strike project was not included in the Agreement because the water right license for the project, which was issued in 1953, already included a subordination condition. *Idaho Power Co.*, 661 P.2d at 745–46, 104 Idaho at 579–80.

135. Swan Falls Agreement, *supra* note 3, at ¶ 7; see Memorandum Decision, *supra* note 3, at 10 n.8 (“Note that [Paragraph 7 of] the Agreement uses the singular term ‘right’ rather than ‘rights’ when referring to the hydropower water rights IPC claimed for its projects.”).

136. Swan Falls Agreement, *supra* note 3, ¶ 7(D). The Agreement also subordinated the hydropower water rights to the water rights of persons dismissed from “the 7500 suit.” *Id.* at ¶ 7(C).

137. *Id.* at ¶ 9.

138. 1180 Contract, *supra* note 71, at ¶ 2(a); IDAHO CODE § 61-540. As previously noted, November 19, 1982 was chosen as the operative date because it was the date of the Idaho Supreme Court issued its initial decision reversing the district court’s subordination ruling. The Court subsequently re-issued its opinion on March 31, 1983, which is the date of the reported decision. *Idaho Power Co.*, 661 P.2d at 741, 104 Idaho at 575. The SRBA’s *Final Unified Decree* provides that “[t]he scope of third-party beneficiaries and rights [under the 1180 Contract] are defined in this Court’s *Order on State of Idaho’s Motion for Partial Summary Judgment on Issue No. 2*, Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011) included as attachment 9.” *Final Unified Decree*, at 12, *In re SRBA*, No. 39576 (Aug. 25, 2014). Ultimately, October 1, 1984 was decreed as the controlling date for purposes of identifying the “existing” water rights that would be protected by subordination of the hydropower water rights. See *infra* Part IV.D.2.

139. Swan Falls Agreement, *supra* note 3, at ¶ 7.

140. *Id.* at ¶ 7(A).

141. *Id.* at ¶ 7(B).

142. *Id.*

to the Agreement in several exhibits, and amendment of the State Water Plan to incorporate the proposed minimum flows and policy “positions” in Exhibit 6.¹⁴³ Consistent with the Framework, Exhibit 6 called for increasing the Murphy minimum daily stream flow from 3,300 c.f.s. year-round to 3,900 c.f.s. from April 1 to October 31 and to 5,600 c.f.s. from November 1 to March 31.¹⁴⁴ Exhibit 6 also specifically called for confirmation that the minimum daily stream flow at Milner Dam would “remain at zero c.f.s.”¹⁴⁵

While the Murphy minimum flows are relatively junior in priority,¹⁴⁶ they are back-stopped by the senior priorities of IPC’s hydropower water rights, which the Agreement defined at the same levels. This was intentional, to ensure the State has sufficient authority to enforce the minimum flows—and therefore to protect IPC’s water rights. As IPC attorney and negotiator Thomas G. Nelson explained in a deposition:

Q. [The] minimum flow right is held by whom?

A. Idaho Power and by the state. In other words, if the state minimum flow corresponds to those flows, and the state is committed [to] recognizing those quantities as valid water rights of the Idaho Power Company. So the power company has a water right at that site with priorities going back to 1903, the state has minimum flow rights at that site with priorities going back in part to 1975 or ’76, I guess, and as recent as 1985. So there is a dual water right at that site.¹⁴⁷

Thus, as contemplated by the Framework, the proposed Settlement was structured to “allow the State to utilize Idaho Power Company’s asserted water right to augment the State’s existing and proposed legal authority”¹⁴⁸

The “legislative program” proposed by the Agreement included specific “public interest criteria” to guide the development of new uses made possible by subordination of the hydropower water rights for flows in excess of 3900/5600 at Murphy.¹⁴⁹ The proffered “legislative program” also included a proposal, to authorize commencement of the SRBA,¹⁵⁰ as previously discussed.

The “subordination legislation” proposed to implement the trust expressly relied on the State’s constitutional authority to “regulate and limit” the use of water for power purposes,¹⁵¹ and authorized agreements between the State and holders of hydropower water

143. *Id.* at ¶¶ 13(A)(i), (ii), (vii); *see id.* ¶ 10 (“no party will assert or contend that paragraphs 7, 8, and 11 have any legal effect until this Agreement is implemented by the accomplishment of the acts described in Paragraph 13”).

144. Swan Falls Agreement, *supra* note 3, at Exhibit 6(1).

145. *Id.* at Exhibit 6(2).

146. The 3,300 c.f.s. Murphy minimum flow was established in 1976 by the State Water Plan, 1976 IDAHO STATE WATER PLAN, *supra* note 47, at 116, and was decreed by the SRBA Court with a priority date of December 29, 1976. *In re SRBA*, No. 39576, *Amended Partial Decree Pursuant to I.R.C.P. 54(b) For Water Right 02-00201* (Sept. 30, 2011). The increases necessary to establish minimum flows of 3900/5600 at Murphy did not become effective until they were adopted by the IWRB and approved pursuant to law, which occurred during the 1985 legislative session. 1985 Idaho Sess. Laws 514. The priority dates for the increases to the Murphy minimum flow were therefore decreed as July 1, 1985. *In re SRBA*, No. 39576, *Partial Decree Pursuant to I.R.C.P. 54(b) For Water Right 02-00223* (Sept. 27, 2011); *In re SRBA*, No. 39576, *Partial Decree Pursuant to I.R.C.P. 54(b) For Water Right 02-00224* (Sept. 27, 2011).

147. Nelson Deposition, *supra* note 63 at 139.

148. Framework, *supra* note 43, at 5.

149. Swan Falls Agreement, *supra* note 3, at Exhibit 1. The “public interest criteria” were ultimately codified at IDAHO CODE § 42-203C.

150. Swan Falls Agreement, *supra* note 3, at Exhibit 2.

151. *See* IDAHO CONST. art. XV § 3; Swan Falls Agreement, *supra* note 3, at Exhibit 7B.

rights to define the rights as “unsubordinated to the extent of a minimum flow established by state action.”¹⁵² “Any portion of the water rights for power purposes in excess of the level so established,” however, would “be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of water for power purposes, and of the people of the State of Idaho.”¹⁵³ The water rights held in trust would be “subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.”¹⁵⁴

While this statutory structure resulted in “subordinatable” rather than “subordinated” hydropower water rights for the flows in excess of 3900/5600 at Murphy, it put the State in control of the subordination of the water rights. The State also had control, therefore, of determining whether, when, and to what extent the flows in excess of 3900/5600 at Murphy would be available in the future for uses other than hydropower. Further, the proposal to use the common threshold of 3900/5600 at Murphy to define three different but related elements of the settlement—IPC’s hydropower water rights, the water rights held in trust by the State, and the new Murphy minimum flows in the State Water Plan—made them compatible and mutually reinforcing. This effectuated the Framework’s vision of structuring the settlement to “allow the State to utilize Idaho Power Company’s asserted water right to augment the State’s existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest.”¹⁵⁵

G. Implementation Of The Swan Falls Settlement

While the signing of the Agreement on October 25, 1984 was certainly a “great moment,”¹⁵⁶ it was only the first step in settling the Controversy. Because the Agreement was “was not a self-executing instrument,” there would be no settlement until the “suite” of proposed “legislative and administrative action” was actually authorized.¹⁵⁷ In short, the Controversy would be resolved only if the Legislature, the IWRB, and the water user community understood and supported the settlement proposed by the Agreement. This

152. Swan Falls Agreement, *supra* note 3, at Exhibit 7B.

153. *Id.*

154. *Id.* While the Agreement was contingent on, among other things, enactment of the “public interest criteria” as proposed by the parties, it was not contingent on the “public interest criteria” remaining unchanged. See *id.* at ¶ 17 (“upon implementation of the conditions contained in paragraph 13, any subsequent . . . legislative act shall not affect the validity of this Agreement”). For this reason, the trust legislation proposed by the Agreement provided for subordination to water rights “acquired pursuant to state law,” as the Attorney General stated in his written testimony to the Senate Resources & Environment Committee on the trust legislation:

It is very important to note that the water held in trust by the State subject to reallocation is tied to state law not the public interest criteria. This is very important because it gives the State flexibility into the future. If the public interest criteria is not [sic], after trial and error, precisely what the legislature desires, the standards can be changed without affecting this agreement, state legal ownership of the water rights involved and the trust established.

Prepared Testimony of Jim Jones, *supra* note 111, at 5–6.

155. Framework, *supra* note 43, at 5.

156. STACY, *supra* note 27, at 201 (photograph caption).

157. Memorandum Decision, *supra* note 3, at 26.

meant the proposed settlement, including “all the various actions that were made conditions of the Swan Falls Agreement,”¹⁵⁸ had to be explained and scrutinized in public proceedings.

This occurred in a series of hearings: IWRB public information meetings on the Agreement in late 1984; hearings on the proposed legislation before the Senate and House natural resource committees in early 1985; and IWRB meetings on the proposed amendments to the State Water Plan, also in early 1985.¹⁵⁹ The background, structure and intent of the proposed settlement was thoroughly discussed, resulting in an extensive record on these matters, including minutes, tape recordings,¹⁶⁰ and a “Statement Of Legislative Intent” for the bill that enacted “the centerpiece of the legislation . . . contemplated by the agreement”: Idaho Code §§ 42-203B and 42-203C.¹⁶¹ Developing this public record was crucial to marshalling support for the proposed settlement.

The passage of time has to some extent obscured the intensity of the Swan Falls Controversy, including the fact that there were objections to and concerns with the proposed settlement: in October 1984 it was not a given that the settlement would be accepted. Among other things, there were concerns the Agreement might require the proposed legislation and State Water Plan policies to remain in place unchanged, essentially

158. *Id.*

159. *See id.* at 33 (referring to the meetings and hearings). The IWRB public information meetings, sometimes called the “road show,” were held in October and November in Idaho Falls, Pocatello, Burley, Twin Falls, Boise and Lewiston. Costello Deposition, *supra* note 52, at 9. The principal Senate Resources & Environment Committee hearings were held on January 18, 21 and 25; February 1; and March 4, 1985. The principal House Resources & Conservation Committee hearings were held on January 17 and 31; February 1, 11, 13, 19 and 25; and March 7, 1985. The IWRB public information meetings on the proposed amendments to the State Water Plan were held in January and February 1985 in Idaho Falls, Pocatello, Burley, Twin Falls, Boise, and Lewiston. Aspects of the settlement were also discussed in IDWR hearings in 1985 on administrative rules proposed to implement the settlement, and in 1987 filings made by IPC and the State in FERC proceedings on the settlement; these are discussed or referenced *infra*.

160. Although it was standard practice at the time for the tapes of the Senate Resources & Environment Committee to be re-used after the secretary had prepared the minutes, the recordings of the committee’s meetings of January 18, 21, 25 and February 1, 1985, were preserved at the instruction of Senator Laird Noh, the chairman of the committee. Recordings of the IWRB hearings, and IDWR’s hearings on administrative rules proposed to implement the settlement, were also preserved. The Idaho Attorney General’s office in 2007 had transcripts made of the recordings.

161. Statement of Legislative Intent, *supra* note 5, at 59. The primary author of this document was then-State Senator Mike Crapo. *Id.* Senator Crapo said in the January 25, 1985 meeting of the Senate committee:

It is my concern that when I first read the legislation I didn’t really understand what the intent was and we have had three very good hearings now and I think I pretty well understand the intent. I think in the future if this ever gets to court or the Department of Water Resources needs guidance on how to interpret different aspects of this, it would be very beneficial if we, as a committee, develop a statement of intent or legislative purpose to accompany this.

Minutes, Senate Res. & Env’t Comm. at 8 (Idaho Jan. 25, 1985). The Senate committee agreed and held the legislation for a week while Senator Crapo prepared a statement of intent. *Id.* at 9. The draft was reviewed and approved by the negotiators for the Governor, the Attorney General, and IPC. *Id.* at 1; *see also* Kole Deposition, *supra* note 79, at 63 (“there was a statement of legislative intent . . . that didn’t really alter any of the terms of the agreement, but explained it a just a little bit more”). Senator Crapo reviewed the final draft of the statement at the next committee meeting and the committee voted to accept it and have it distributed to all members of the Senate. *Id.* at 1–2. The Senate approved the legislation and by unanimous vote directed that the “Statement of Legislative Intent – S 1008” be reproduced in the Senate Journal. IDAHO STATE 48TH LEGISLATURE, JOURNAL OF THE STATE SENATE, 1ST SESS., at 58 (1985).

freezing state law and policy. In a House committee hearing IPC's negotiator was asked "if all these bills are passed as written . . . and then two years from now we don't like it and parts are repealed, will that affect the agreement between the power company and the state?"¹⁶² IPC's negotiator replied:

[T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have the power to do, would be to change the contractual recognition of the company's water rights at Murphy gage.¹⁶³

Following the hearings, the implementing legislation was enacted substantially as proposed by the Agreement.¹⁶⁴ Likewise, the State Water Plan amendments developed to incorporate the proposed minimum flows and policy "positions" were adopted by IWRB and approved by the Legislature.¹⁶⁵

An interpretive question arose almost immediately after the recommended legislation was enacted. The intended meaning and effect of the "zero c.f.s." minimum flow at Milner was put at issue because IDWR proposed administrative rules in 1985 that appeared to ignore the Milner Divide.¹⁶⁶

While the Agreement had called for, and been contingent upon, retaining the State Water Plan's "minimum daily flow" of "zero c.f.s." at Milner,¹⁶⁷ the trust legislation as proposed and as originally codified at Idaho Code § 42-203B did not reference this aspect of the Settlement.¹⁶⁸ The signatories to the Agreement, legislators, state officials, and water users had nonetheless understood that retention of the "zero c.f.s." minimum flow at Milner meant the hydropower water rights would be barred from calling for water from above Milner Dam to be sent to IPC's projects below Milner Dam, or for curtailment of uses above Milner Dam.¹⁶⁹ IDWR recognized this view but concluded its rulemaking authority was constrained by the absence of an express Milner Divide provision in Idaho

162. *Minutes, House Res. & Conservation Comm.* at 1 (Idaho Feb. 11, 1985).

163. Memorandum Decision, *supra* note 3, at 36–37 (quoting *Minutes, House Res. & Conservation Comm.* at 1 (Idaho Feb. 11, 1985)); see also Statement of Legislative Intent, *supra* note 5, at 60–61 ("The legislation . . . provides flexibility to the state in the future to change the law . . . State water policy is not frozen by this legislation.").

164. 1985 Idaho Sess. Laws 20-32, 437; *Miles v. Idaho Power Co.*, 778 P.2d 757, 759, 116 Idaho 635, 637 (1989).

165. A Resolution, In The Matter of the Policy 32 of the State Water Plan (Idaho Water Res. Bd.) (Mar. 1, 1985) (attached to *Minutes, Senate Res. & Env't Comm.* (Idaho Mar. 4, 1985)); 1985 Idaho Sess. Laws 514.

166. The legislation proposed by the Agreement included amendments to IDAHO CODE § 42-1805 authorizing the Director of the Department of Water Resources to "promulgate, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department." Swan Falls Agreement, *supra* note 3, Exhibit 8 at 2; 1985 Idaho Sess. Laws 22.

167. Swan Falls Agreement, *supra* note 3, at ¶ 13(A)(i), Exhibit 6(2).

168. *Id.* at Exhibit 7(B); 1985 Idaho Sess. Laws 25-26.

169. For instance, in explaining the proposed settlement during the first IWRB "public information" meeting, IPC's negotiator stated, "[t]he water plan target minimum flow at Milner is zero . . . and this agreement does not contemplate any change in that minimum flow. . . . what goes on above Milner is not affected by this agreement." See Transcript of Proceedings, Public Information Meeting On the Swan Falls Agreement, Twin Falls, Idaho (Idaho Water Res. Bd.) (Oct. 25, 1984), at 27 (on file with authors); Swan Falls Agreement, *supra* note 3, at 41 ("we were trying to wrestle with how to regulate the river using streamflows at Murphy . . . and the numbers were based on zero flow at Milner.")

Code § 42-203B.¹⁷⁰ The proposed administrative rules, therefore, did not limit the hydropower water rights for IPC's projects to flows downstream from Milner Dam.¹⁷¹

A storm of protests followed, with many water users, attorneys, and officials stating they had been assured the "zero c.f.s." minimum flow at Milner would preserve the status quo and preclude calls for water to be sent past Milner Dam for downstream hydropower use.¹⁷² The parties to the Agreement also confirmed that IDWR's interpretation of Idaho Code § 42-203B was inconsistent with the intent of the settlement.¹⁷³ These views were reiterated in testimony offered during IDWR's hearings on the proposed rules,¹⁷⁴ including by then-State Senator Mike Crapo, who had been involved in the legislative hearings

170. An IDWR memorandum regarding the administrative rules stated as follows:

The adopted minimum flow of zero cfs at Milner has been construed by some as exempting any water passing Milner from the trust water provisions. This interpretation would mean that the flows of the Thousand Springs and other sources entering below Milner would have to be relied upon to supply the flow in the main stem Snake River hydropower facilities. A simple reading of S. 1008 § 42-203b(2) indicates that all waters in excess of an established minimum flow up to the amount of the established hydropower right are to be considered trust waters I propose to draft the rules recognizing all flows tributary to Snake River above Swan Falls including water passing Milner as trust waters

Memorandum from Norm Young to Ken Dunn on Legal Issues Associated with Senate Bill 1008 (June 14, 1985) (on file with the authors).

171. Idaho Dep't of Water Res., *Special Water Allocation Rules Edition*, CURRENTS, Oct. 1985, Figure 1 at 2 (on file with authors).

172. See, e.g., Letter from John A. Rosholt to Mr. Kenneth Dunn on Proposed Rules (Oct. 30, 1985) ("it's been my understanding all along that trust water flows can only exist between the Swan Falls Dam and the Milner Dam . . . for the reason that the minimum stream flow at Milner is zero."); Letter from Sherl L. Chapman, Exec. Dir., Idaho Water Users Assoc., to Mr. Ken Dunn, Dir., Idaho Dep't of Water Res. (Jan. 27, 1986). ("it is important that the Department understand that the position of the Association is that there are no trust waters above Milner Dam on the Snake River. This understanding was included in the discussions before the Legislature in 1985"); Letter from Roger D. Ling to Dir., Idaho Dep't of Water Res. (Jan. 15, 1986). ("Such a [Milner] determination was not contemplated by the Swan Falls Agreement or any legislative enactments"); Letter from John W. Keyes III, Assistant Reg'l Dir., United States Dep't of the Interior, Bureau of Reclamation, to A. Kenneth Dunn, Dir., Idaho Dep't of Water Res. (Jan. 27, 1986). ("[S]ince it is further stated that the minimum flow at Milner is zero, meaning no surface flow is required past Milner for any downstream uses, it would appear to be a misinterpretation to include surface water above Milner.") (on file with the authors).

173. In a press statement, the Attorney General said:

[T]he parties did not intend ground waters or surface waters tributary to the Snake River above Milner Dam to be included within the definition of trust water flows The reason for this conclusion is that the parties retained the minimum streamflow at Milner Dam at zero . . . one of the critical points of the negotiations was that water above Milner Dam should not be subject to the new allocation criteria. To include water above Milner as trust water is directly contrary to the intent of the negotiating parties.

Press Release, Idaho Office of the Attorney Gen. (Jan. 29, 1986) (on file with the authors); see Letter from Thomas G. Nelson to A. Kenneth Dunn, Comments of Idaho Power Co. on Proposed Water Allocation Rules (Jan. 27, 1985) (on file with the authors) ("the surface water flows above Milner should be considered not to be trust waters. The agreement is clear in its limitations on its impact above Milner.").

174. The intensity of the upper valley water users' view that IPC should have no right to call water past Milner Dam cannot be underestimated. Eldred Lee of the Great Feeder Canal Company stated as follows in an IDWR hearing on the proposed rules:

on the Settlement and was the primary author of the “Statement of Legislative Intent” for Idaho Code § 42-203B¹⁷⁵:

[Z]ero flow at Milner was very heavily discussed and was the basis upon which the legislation was passed. And certainly with regard to surface flow, there are no trust waters above Milner, as my understanding of it goes. . . .

Because it was the understanding of everyone last year that the flow at Milner was zero, and there was no trust water in the flow above Milner. And I don’t even think that Idaho Power would take the position that above Milner they are entitled to any trust water in the flow of the river.¹⁷⁶

Corrective legislation was prepared, and in 1986 Idaho Code § 42-203B was amended to include the following language:

[A]pplication of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.¹⁷⁷

IPC attorney Thomas G. Nelson, Idaho Water Users Association representative Sherl Chapman, and Senator Mike Crapo explained this amendment clarified the original intent of the Settlement, and resolved any confusion that may have arisen from the administrative rules as originally proposed.¹⁷⁸

While the 1986 amendment cleared up one point of confusion, it unfortunately contributed to the creation of another that was not fully resolved for a number of years. By amending the statute to provide it “shall not place in trust any water” upstream of Milner

I’ve been at two meetings in which I specifically asked the question of whether the Swan Falls agreement would affect the flow above Milner. And I was assured that under no circumstances would the Swan Falls agreement affect any of the diversion of water under any circumstances above Milner. . . .

The water users that I have talked to feel as if they have been deceived . . . you know, after being promised one thing and here we come and we find that all of our water rights may be in jeopardy—or some of them, at least—or that new development may be minimized because of the rules and regulations and the laws that are now made, it appears to us that it’s pure deception . . . I don’t think you realize how the farmers feel, how the people feel, about that very principle.

Transcript Of Proceeding Requested By Attorney General Lawrence Wasden Of Audiotapes Held & Maintained By The Dep’t Of Water Res.: Hearing on Water Allocation Rules & Regulation (Idaho Dep’t of Water Res.) (Jan. 14, 1986), at 16–18 (on file with the authors).

175. *Id.*

176. *Id.* at 8, 11.

177. 1986 Idaho Sess. Laws 309, ch. 117, sec. 1 (Act Relating to Trust Waters on the Snake River Established Pursuant to Agreement); *see also* IDAHO CODE §42-203B(2) (2015).

178. *Minutes, Senate Res. & Env’t Comm.*, (Idaho Feb. 19, 1986); *Minutes, House Res. & Conservation Comm.* (Idaho Mar. 13, 1986). The administrative rules were modified to conform to the 1986 amendment. IDAHO ADMIN. CODE r. 37.03.08.030.01.b (2015).

Dam,¹⁷⁹ the 1986 legislation had the unintended effect of introducing potential ambiguity as to the *res* of the trust: the 1986 amendment suggested that the trust consisted of “water” rather than “water rights.” This drafting appeared to codify a term of convenience that had been used in the original settlement negotiations: “trust water.”¹⁸⁰ As a result, “a term of dubious accuracy . . . entered Idaho’s water policy lexicon” and essentially “took on a life of its own.”¹⁸¹ As will be discussed, the SRBA Court eventually resolved the potential confusion by confirming that the trust consisted of water rights, not water.¹⁸²

The final piece of the Settlement fell into place in 1988, when FERC issued an order disposing of concerns that the federal agency might bring “a punitive action down the road [against IPC] saying you should have defended your water rights basically.”¹⁸³ Also in 1988, IDWR issued its “Policy And Implementation Plan For Processing Water Right Filings In The Swan Falls Area.”¹⁸⁴ This plan documented IDWR’s intended approach for processing the large backlog of water right filings for consumptive uses upstream of Swan Falls that had accumulated under the “de facto” moratorium imposed during the Controversy.¹⁸⁵ Processing the applications for these “trust water rights”¹⁸⁶ required IDWR to apply the new standards implemented by the new legislation and the administrative rules.¹⁸⁷

179. 1986 Idaho Sess. Laws 309, ch. 117, sec. 1 (Act Relating to Trust Waters on the Snake River Established Pursuant to Agreement), see also IDAHO CODE §42-203B(2) (2015) (emphasis added) (referring to “water . . . held in trust”).

180. See, e.g., Prepared Testimony of Jim Jones, *supra* note 112, at 5–6 (referring to “trust water” and “water held in trust”).

181. See Fereday & Creamer, *supra* note 2, at 615.

182. See *infra* Part IV.B.3.

183. See Nelson Deposition, *supra* note 63, at 150. As contemplated by the Agreement, IPC had filed a petition with FERC requesting a declaratory order approving the settlement. See *generally id.* But the petition “simply did not move once it hit FERC.” *Id.* at 67. “[T]he paralysis at FERC” finally led the parties to seek congressional assistance, and after “a major legislative effort . . . basically what Congress did was just simply take the agreement away from FERC, and say, you will approve this agreement.” *Id.* at 68; see also Act to direct the Federal Energy Regulatory Commission to issue an order with respect to Docket No. EL-85-38-000, Pub L. No. 100-216, 101 Stat. 1450 (1987) (“the Federal Energy Regulatory Commission is authorized and directed . . . to issue an order . . .”). The FERC order was issued in March 1988. Idaho Power Company, Order Pursuant To An Act of Congress, Dismissing Petition for Declaratory Order, and Granting Interventions, 42 FERC P 61375 (1988).

184. See Letter from L. Glen Saxton, Chief, IDWR Water Allocation Bureau, to Interested Parties (Nov. 10, 1988). (“On November 3, 1988, the Director of the Department of Water Resources (IDWR) issued the above referenced policy and implementation plan . . . a copy of which is enclosed with this letter.”).

185. Idaho Department of Water Resources, Policy and Implementation Plan for Processing Water Right Filings In The Swan Falls Area (Nov. 3, 1988) (on file with authors) [hereinafter Implementation Plan]. As a result of the “de facto” moratorium, IDWR had a backlog of approximately 1,400 applications on file for consumptive uses above Swan Falls. See *id.* at 1–2.

186. A “trust water right” is “[a] water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho.” Rebound Call Decision, *supra* note 6, at 12.

187. The implementation plan contemplated “continuing management” of the hydropower water rights held in trust by the State, *id.* at 6, and that permits to divert and use water made available by subordination of these hydropower water rights “may be conditioned to require review after a specific term of years.” Implementation Plan, *supra* note 185, at 8. IPC raised the question of these “term conditions” or “term permits” in subsequent SRBA proceedings on the Swan Falls Agreement.

IV. THE SRBA LITIGATION ON THE SWAN FALLS AGREEMENT LITIGATION

After implementation of the settlement, the Swan Falls Controversy and its resolution receded from the forefront of Idaho water issues for a number of years, replaced by a succession of new and significant issues in, or pertaining to, the SRBA. It was to be only a matter of time, however, until the Swan Falls Agreement itself became an SRBA issue.

The SRBA litigation regarding the Swan Falls Agreement was very complex and took place in several phases. It began with questions about the effect of the Agreement on third party ground water rights diverting from the ESPA that gave rise to a “basin-wide issue.”¹⁸⁸ The “basin-wide issue,” however, could not be resolved until the hydropower water rights that were subject to the Settlement had been decreed. Decreeing these water rights involved litigation over the “trust” and various other subordination issues that were resolved in summary judgment proceedings. Additional unresolved questions were addressed in a proposed settlement that, in turn, could be finalized only by litigating objections to the settlement proposal. These proceedings ultimately circled back to the question of the effect of the Settlement on third party water rights that were resolved through the “basin-wide issue,” and by making modifications to some third party water rights that had already been decreed. These matters are discussed in turn in below.

A. Basin-Wide Issue 13, Part 1

Most of the water rights benefitting from the subordination of IPC’s hydropower operations—both the full subordination to valid uses existing in 1984 and the partial subordination to “subsequent” or “future” uses—were ground water rights diverting from the ESPA. The SRBA claims for the ESPA ground water rights came before the SRBA Court prior to the claims for IPC’s hydropower projects on the main stem of the Snake River, however, because the SRBA addressed tributary claims before reaching claims on the main stem. Consequently, the question of how to reflect the Swan Falls Agreement in SRBA decrees first arose in the form of objections filed in 2002 to the Director’s reports for over three hundred ground water rights diverting from the ESPA.

The objections sought “to incorporate terms of the Swan Falls Agreement into the . . . *Partial Decrees*” for the ground water rights “as either remarks or as a general provision,”¹⁸⁹ so as “to preserve ‘Swan Falls’ protections for claimants in the Snake River

188. A “basin-wide issue” is a special SRBA proceeding involving “[a]n issue designated by the Presiding Judge as potentially affecting the interests of a large number of claimants to the use of water within the SRBA and the resolution of which will promote judicial economy.” See SRBA Administrative Order # 1 § 16, <http://www.srba.state.id.us/AO1NC.HTM> [hereinafter AO1]; see also SRBA Administrative Order 1, Rules of Procedure (Amended 10/10/97), *In re* SRBA, Case No. 39576 (Oct. 10, 1997) (establishing procedures for the trial of claims or issues in the SRBA).

189. Order Separating & Consolidating Common Issues From Subcases; AO1 §§ 11 & 16, I.R.C.P. 42; Order For More Definite Statement; and Notice Of Hearing on Whether to Designate As Basin-Wide Issue and Scheduling at 1, *In re* SRBA, No. 39576, Consolidated Subcase No. 37-2499, et al. (Nov. 25, 2002). A general stream adjudication conducted pursuant to Chapter 14 of Title 42 of the Idaho Code such as the SRBA adjudicates many individual water rights. A “partial decree” is a decree that determines the elements of an individual water right.

Basin Adjudication.”¹⁹⁰ The parties—which included IPC and the State—were unable to agree on language for this purpose, or even whether language was necessary at all.¹⁹¹

The SRBA Court determined “the *Swan Falls Agreement* needs to be addressed at some point in the SRBA,” and “it would make no sense to leave room for uncertainty and create an ambiguity requiring litigation in the future. . . . Uncertainty is what led to the Swan Falls controversy in the first place.”¹⁹² That said, the Court stated it was “not convinced” the issue needed to be addressed through remarks in individual water right decrees rather than a general provision, nor that the question would be ripe “until Idaho Power Co.’s hydropower rights in Basin 02 are reported and the parties have the opportunity to review how such rights are reported.”¹⁹³ The Court also stated the only issue properly before it was whether a remark or general provision was necessary, and “[i]t is not the intent of the Court to extend the scope of the proceedings . . . and in effect open the terms of the *Swan Falls Agreement* to litigation.”¹⁹⁴

The Court therefore designated Basin-Wide Issue No. 13 on the following question: “To what extent, if any, should the *Swan Falls Agreement* be addressed in the SRBA or memorialized in a decree?”¹⁹⁵ The Court stayed the matter “pending the reporting of Idaho Power Co.’s water rights” for the main stem of the Snake River.¹⁹⁶

B. Consolidated Subcase No. 00-92023 (92-23)

The Director filed reports for IPC’s hydropower water rights on the Snake River in late 2006, a little more than two years after the SRBA Court stayed Basin-Wide Issue 13.¹⁹⁷ While IPC’s response to the Director’s reports led to litigation that required the SRBA Court to interpret the terms of the Agreement and other elements of the Settlement, a brief discussion of certain events that preceded the Director’s reports for IPC’s hydropower water rights is necessary to understand why the SRBA litigation unfolded as it did.

1. The 2006 Recharge Dispute

The question of whether IPC’s hydropower water rights could be subordinated to the use of water for purposes of recharging the ESPA was raised in the Idaho Legislature during the 2006 legislative session under House Bill 800.¹⁹⁸ This bill proposed deleting language from two 1994 statutes that provided recharge water rights were “secondary” to

190. More Definite Statement at 1, *In re* SRBA, No. 39576, Consolidated Subcase No. 37-2499, et al. (Jan. 10, 2003).

191. Order Designating Basin-Wide Issue Re: To What Extent, If Any, Should The *Swan Falls Agreement* Be Addressed In The SRBA Or Memorialized In A Decree?, *In re* SRBA, Basin-Wide Issue 91-13 (Aug. 23, 2004) [hereinafter BWI 13 Order].

192. *Id.* at 5, n.5.

193. *Id.* at 5. The SRBA is a statutory general stream adjudication proceeding. IDAHO CODE § 42-1406A [uncodified]. In such proceedings, the Director examines the water system and files reports with the court that among other things make recommendations on “remarks” for individual water right claims and also “general provisions” that apply to many water rights. IDAHO CODE §§ 42-1410–1411; AO1 § 2(t), *supra* note 190. These are known as “Director’s Reports.”

194. BWI 13 Order, *supra* note 191, at 6.

195. *Id.* at 8–9. AO1 § 2(c), *supra* note 190.

196. BWI 13 Order, *supra* note 191, at 8–9. Administrative Basin 02 is the main stem of the Snake River between Milner Dam and the Murphy gaging station.

197. Memorandum Decision, *supra* note 3, at 3.

198. H.R. 800, 58th Leg., 2d Reg. Sess. (Idaho 2006), <http://legislature.idaho.gov/legislation/2006/H0800.html>.

hydropower water rights “that may otherwise be subordinated” by the Swan Falls Agreement.¹⁹⁹ The sponsors of House Bill 800 had obtained an opinion from Attorney General Lawrence G. Wasden concluding that in the Agreement IPC had agreed to subordinate its hydropower water rights to aquifer recharge, that the State held legal title to the water rights for flows in excess of 3900/5600 at Murphy, and that the 1994 legislation had not created any vested rights or priorities in IPC.²⁰⁰ These conclusions became the subject of disagreement in a lengthy hearing on the bill before the Senate Resources and Environment Committee.

IPC disagreed with the Attorney General’s opinion and opposed House Bill 800 on the ground that “[w]hat we are talking about here is Idaho power’s water rights.”²⁰¹ IPC stated the proposed legislation raised “issues that really have ramifications for claimed water rights that Idaho Power has,”²⁰² and “the place to resolve a contract dispute . . . is for the court to tell us what it means, not the Legislature to interpret the contract and perhaps impact vested water rights that Idaho Power Company has.”²⁰³ Others, including former Governor John V. Evans (who had signed the Agreement) and former legislators who had participated in implementing the Settlement and/or in the 1994 recharge legislation, stated that House Bill 800 was consistent with the Settlement and did not threaten IPC’s water rights.²⁰⁴

The Senate did not approve House Bill 800, and the 1994 statutes remained in place. The debate over the proposed legislation had brought into the open, however, disagreements regarding several aspects of the Settlement, including: the nature of the trust; legal ownership of the hydropower water rights for flows in excess of 3900/5600 at Murphy; subordination of the hydropower water rights to aquifer recharge; and the effect of the Milner Divide. These questions had to be resolved if the SRBA Court was to issue decrees for the hydropower water rights at IPC’s projects on the main stem of the Snake River; and the Director’s recommendations for decreeing those water rights were due in the SRBA at the end of 2006.

Concerned that IPC’s hydropower water right claims in the SRBA failed to acknowledge that water rights for flows in excess of 3900/5600 at Murphy were held in trust by the State of Idaho, Attorney General Lawrence Wasden filed “Notices of Change In Water Right Ownership” with the Department in December 2006.²⁰⁵ The notices set forth the State’s claim that it held in trust legal title to the hydropower water rights for

199. *Id.*

200. Lawrence G. Wasden, Attorney General Opinion 06-2 (Mar. 9, 2006), <http://www.ag.idaho.gov/publications/op-guide-cert/2006/Opinion06-2.pdf>; see also Lawrence, G. Wasden, Attorney General Opinion 06-2A (Feb. 13, 2007), <http://www.ag.idaho.gov/publications/op-guide-cert/2006/Opinion06-2A.pdf>.

201. *Minutes, Senate Res. & Env’t Comm.* at 19 (Idaho Mar. 27, 2006) (statements of James Tucker, attorney, Idaho Power Co.).

202. *Id.* at 22.

203. *Id.*

204. *Id.* at 26–28 (former Gov. Evans); *id.* at 29–34 (former Senators Noh and Peavey). Questions were also raised about the origin and intent of the language enacted in 1994. *Id.* at 23 (Senator Cameron); *id.* at 66 (former Senator Tominaga).

205. Letter from Idaho Attorney Gen. Lawrence Wasden to Idaho Dep’t of Water Res. (Dec. 22, 2006) (covering “Notices of Change in Water Right Ownership” for water rights nos. 02-2001A, 02-2001B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-10135, 36-2013, 36-2018, 36-2026, 37-20709, 37-20710, 02-4000, 02-4001, and 02-2032. The filings included attachments documenting the Swan Falls Settlement and the State’s claims.).

flows in excess of 3900/5600 at Murphy.²⁰⁶ The notices also provided voluminous supporting documentation of the Settlement.²⁰⁷

2. The Basin 02 Director's Reports And IPC's *Complaint*

The Director recommended to the SRBA Court that the main stem Snake River water right claims implicated by the Swan Falls Agreement be decreed as seventeen separate water rights: four held solely by IPC, and the rest with legal title held in trust by the State of Idaho.²⁰⁸ The Director also recommended the partial decrees include remarks addressing the average daily flows at the Murphy gaging station, the trust, and subordination.²⁰⁹

IPC responded by filing a *Complaint and Petition for Declaratory and Injunctive Relief* (“*Complaint*”)²¹⁰ in the “main” SRBA case.²¹¹ The *Complaint* sought to alter or nullify several key elements of the Swan Falls Settlement, and also sought various forms of declaratory and injunctive relief.²¹²

The *Complaint* expressly requested that the SRBA Court “reform” the Swan Falls Agreement on grounds of “mutual mistake,” alleging that no “trust water” had been available at the time the Agreement was executed, so there had been no trust *res* and “no valid trust” had been created.²¹³ The *Complaint* further asked for declaratory rulings: quieting title to the hydropower water rights solely in IPC’s name; barring the State’s claim of

206. *Id.*

207. *Id.*

208. Memorandum Decision, *supra* note 3, at 3 n.3; *Idaho Department Of Water Resources Recommended Water Rights Acquired Under State Law* for water rights nos. 02-100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2059, 02-2060, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, and 02-10135 [hereinafter *Basin 02 Reports*]. Note that while Paragraph 7 of the Swan Falls Agreement identified thirteen hydropower water rights in Basin 02, the Director recommended that seventeen Basin 02 water rights be decreed. The four “new” water rights resulted from the Director’s recommendation that three of the Basin 02 water rights (02-2032, 02-4000 and 02-4001) each be split and decreed as two separate rights; and from an additional “constitutional method” claim IPC filed for the Bliss project (02-10135) after the Swan Falls Agreement was signed.

209. *Basin 02 Reports*, *supra* note 208. While most of the hydropower water rights covered by the Swan Falls Agreement were for IPC facilities in Basin 02, the Agreement also covered IPC claims for projects in Basins 36 and Basin 37. See Swan Falls Agreement, *supra* note 3, ¶ 7 (listing water rights nos. 36-2013 (Thousand Springs), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 37-2128, 37-2472 (Lower Malad), and 37-2471 (Upper Malad)). The Basin 36 water rights had been reported in the SRBA in 1992 in IPC’s name, without any references to the Swan Falls Agreement or subordination, and were decreed without objection in 1997. Memorandum Decision, *supra* note 3, at 2. The Basin 37 water rights were initially recommended in 2005 in IPC’s name, and included remarks addressing the Swan Falls Agreement to which IPC had objected. *Id.* at 2–3. In February 2007, while IPC’s objections were pending, the Director issued amended reports for the Basin 37 water rights recommending they be decreed consistent with the Director’s recommendations for the Basin 02 water rights. *Id.* at 3. The Basin 37 reports also included two “constitutional method” claims IPC filed for its Malad River projects after the Swan Falls Agreement had been signed (water right nos. 37-20709 and 37-20710).

210. *Complaint and Petition for Declaratory and Injunctive Relief*, Idaho Power Co. v. State (2007), *In re* SRBA Case No. 39576, 2, <http://www.idwr.idaho.gov/News/Issues/SwanFalls/Archive.htm> [hereinafter *Complaint*].

211. Filings made in the “main case” are directed to the Presiding Judge and generally concern matters other than objections to a Director’s report in a subcase pending before a Special Master. Subcases are the standard SRBA proceeding for resolving objections to the Director’s water right reports (IDAHO CODE § 42-1412(1) (2015)); AO1 § 4, *supra* note 190. IPC’s *Complaint* sought to resolve IPC’s objections to the Director’s reports through a separate lawsuit rather than in SRBA subcases.

212. *Complaint*, *supra* note 210, at 21–27.

213. *Id.* at 21–22.

legal title to the water rights under estoppel, waiver and laches; declaring the hydropower water rights were not subordinated to the use of water for ground water recharge, through the Swan Falls Agreement or otherwise;²¹⁴ and declaring the State had failed to account for the multiple-year impacts of ground water pumping in administering water rights in the Snake River basin.²¹⁵

The *Complaint* also sought several injunctions: enjoining the State from taking any action on the basis of claims of legal title to the hydropower water rights; ordering the Department of Water Resources to re-evaluate water availability and take appropriate action in connection with “trust water” permits having 20-year term conditions;²¹⁶ ordering the Attorney General to withdraw his opinion regarding House Bill 800 as erroneous and a breach of the Swan Falls Settlement;²¹⁷ and ordering the Department to take reasonable steps “to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows,” including “taking into account the multiple year impacts of ground water pumping in the [Eastern Snake Plain Aquifer.]”²¹⁸

IPC’s filings resulted in some initial skirmishing over whether the IPC could avoid normal SRBA procedure by filing a “complaint” rather than “objections,” and whether IPC had asserted claims that were beyond the scope and/or jurisdiction of the SRBA.²¹⁹ While the SRBA Court declined to dismiss the *Complaint*, it ruled that “a special proceeding” was unnecessary because IPC’s claims could be “resolved in conjunction with the objection and response resolution process set forth in [Administrative Order 1].”²²⁰ The Court determined it would “parse out the issues over which it has jurisdiction and consolidate and hear them in conjunction with the issues raised in Idaho Power’s objections.”²²¹ “Following resolution of the scope of Idaho Power’s water rights,” the Court ruled, “any remaining issues over which the Court concludes it does not have jurisdiction can be dealt with accordingly.”²²² The Court did, however, stay IPC’s claims against the Director and the Department because they were not parties to the SRBA.²²³ The Court

214. *Id.* at 22–23.

215. *Id.* at 23.

216. *Id.* at 24–25. As previously noted, the 1988 “Policy and Implementation Plan For Processing Water Right Filings In The Swan Falls Area” had contemplated adding conditions to some water rights establishing “a specific term of years.” See Implementation Plan, *supra* note 185.

217. The opinion at issue was Attorney General Opinion 06–2, which addressed questions of whether the Swan Falls Agreement subordinated IPC’s hydropower water rights to the use of water for aquifer recharge, and whether recharge statutes enacted subsequent to the Agreement created vested rights or priorities in IPC (Regarding Swan Falls Agreement and IDAHO CODE §§ 42-234(2) and 42-4201A(2)); Opinion of Idaho Attorney Gen. 06–2 (2006), <http://www.ag.idaho.gov/publications/op-guide-cert/2006/2006index.html>.

218. *Complaint*, *supra* note 210, at 25. IPC included the same allegations and claims asserted in the *Complaint* in *Responses* filed in the subcases for IPC’s Malad project claims in Basin 37, although IPC “styled them as a *Counterclaim*.” Memorandum Decision, *supra* note 3, at 3.

219. Order Granting In Part, Denying in Part Motion To Dismiss; Consolidating Common Issues Into Consolidated Subcase; And Permitting Discovery Pending Objection Period In Basin 02; Notice Of Scheduling Conference, Consolidated Subcase No. 92-23 at 6–7, *In re SRBA Case No. 39576* (Jul. 24, 2007) [hereinafter Consolidation Order].

220. *Id.* at 15.

221. *Id.* at 9.

222. *Id.* at 9; see also *id.* at 13 (“Following the determination of the preliminary issues regarding the scope of Idaho Power’s water rights, this Court will transfer the issues of compliance and enforcement to an administrative body or a court of appropriate jurisdiction.”).

223. *Id.* at 13–14 (citing IDAHO CODE § 42-1401A(3); *In re SRBA Case No. 39576*, Twin Falls Canal Co. v. IDWR, 905 P.2d 89, 127 Idaho 688 (1995)).

also dismissed IPC's claim for an order directing the Attorney General to "repeal" Attorney General Opinion 06-2,²²⁴ stating it could find "no authority standing for the proposition that it or any other court can order the Attorney General to repeal Attorney General's Opinion No. 06-2 nor is the Court persuaded there is any reason to do so as a matter of law."²²⁵

The SRBA Court held "the issues raised by Idaho Power are common to all of its hydropower claims covered under the *Swan Falls Agreement* and share common issues of law and fact"²²⁶ and therefore ordered consolidation of "issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement*" into Consolidated Subcase 92-23 (later re-numbered 00-92023).²²⁷ With the issues narrowed and the procedural path defined, the State and IPC filed cross motions for summary judgment in January 2008.²²⁸

3. Summary Judgment, Round 1: Water Right Ownership & The Res Of The Trust

The first round of summary judgment motions focused on the trust and legal ownership of the hydropower water rights for flows in excess of 3900/5600 at Murphy.²²⁹ The State and IPC both claimed ownership based on very different theories of the Swan Falls Settlement.²³⁰ The SRBA Court granted the State's motion and denied IPC's motion.²³¹ The Court's analysis also rejected IPC's argument that the "trust" consisted of "water" rather than "water rights," and disposed of IPC's bid for "reformation" of the Agreement because of an alleged "mutual mistake" regarding water supply conditions in 1984.²³²

The State relied mainly on Idaho Code § 42-203B,²³³ which had been enacted in 1985 to codify the trust and subordination legislation proposed in Exhibit 7B to the Agreement.²³⁴ The State argued the enactment of the statute gave the State "legal title to any portion of the hydropower water rights subject to the Swan Falls settlement in excess of the minimum flows established at the Murphy gauge, and that the rights held in trust are subordinated to junior water rights approved pursuant to State law."²³⁵

224. *Id.* at 15.

225. *Id.*

226. *Id.*

227. *Id.* at 15–16; Memorandum Decision, *supra* note 3, at 2 n.1.

228. Memorandum Decision, *supra* note 3, at 4.

229. *Id.* at 5–18.

230. *Id.*

231. *Id.* at 1.

232. *Id.* at 47.

233. *Id.* at 17, 20–21.

234. Swan Falls Agreement, *supra* note 3, at ¶ 13.A.vii, Exhibit 7B; Memorandum Decision, *supra* note 3, at 11–16; 1985 Idaho Sess. Laws 25–26. *See also* Idaho Power Co. v. Idaho Dept. of Water Resources, 255 P.3d 1152, 1155, 151 Idaho 266, 269 (2011) ("One key piece of legislation that was drafted and passed pursuant to the Swan Falls Agreement was IDAHO CODE § 42-203B, which went into effect on July 1, 1985."); *id.* at 1163, 151 Idaho at 276 ("After the agreement, both Idaho Power and the Department were engaged in efforts to pass legislation, including IDAHO CODE § 42-203B, pursuant to the Swan Falls Agreement.").

235. Memorandum Decision, *supra* note 3, at 17–18, 20–21. The Governor of Idaho, the Speaker of the Idaho House of Representatives, the President Pro Tempore of the Idaho State Senate, and the City of Pocatello filed statements concurring with the State's summary judgment motion. *Id.* at 4.

IPC, in contrast, relied principally on the “Consent Judgments” in the lawsuits it filed in the 1980s that triggered the Swan Falls Controversy.²³⁶ The Consent Judgments recited verbatim the Agreement’s contractual definition of the hydropower water rights (Paragraph 7), which did not reference the “trust” or the “subordination legislation” of Exhibit 7B.²³⁷ IPC argued that under the Consent Judgments it was “the sole and lawful owner of the water rights,”²³⁸ and the State’s claim of legal title was barred by *res judicata*, collateral estoppel, and judicial estoppel.²³⁹ IPC also argued that Idaho Code § 42-203B was “ambiguous as to whether the legislature intended that the corpus or *res* of the statutorily created trust consists of water . . . or of Idaho Power’s water rights.”²⁴⁰

Both parties filed affidavits with voluminous documentation of the Swan Falls Controversy and Settlement.²⁴¹ The SRBA Court granted the State’s motion and denied IPC’s motion,²⁴² but based its decision on “interpretation of the Swan Falls Agreement, including the agreement between the parties to enact I.C. § 42-203B, as opposed to deciding the matter based solely on the State’s regulatory authority” under Idaho Code § 42-203B.²⁴³

The SRBA Court found that the only explicit reference to the trust in the body of the Agreement was the phrase “water rights held in trust” in Paragraph 4, which did not define the water rights.²⁴⁴ The Court further found that Paragraph 7 did not explicitly reference the trust but rather “defined Idaho Power’s various hydropower rights as a single cumulative right and then apportions the right between the unsubordinated and subordinated portion.”²⁴⁵ The Court concluded this definition “is not inconsistent with a split in ownership as established by other sections of the Agreement,” specifically the “subordination legislation” of Exhibit 7B.²⁴⁶ The Court determined that “Exhibit 7B is unambiguous regarding the trust arrangement”²⁴⁷ and quoted its language in full, emphasizing its multiple references to “rights” that would be “held in trust.”²⁴⁸

Exhibit 7B clearly and unambiguously provides that any portion of Idaho Power’s water rights in excess of the minimum flows are held in trust by the State, by and through the Governor, for the use and benefit of Idaho Power for power purposes and of the people of the State of Idaho. It is also unambiguous that the *res* of the trust consists of “water rights” as opposed to “water.”²⁴⁹

236. *Id.* at 43; *see also* Nelson Deposition, *supra* note 63, at 73 (“The other thing the parties had agreed to do as part of the agreement was upon full implementation, to enter parallel judgments in each of the two pending Idaho Power Company lawsuits.”)

237. Memorandum Decision, *supra* note 3, at 16.

238. *Id.* at 18.

239. *Id.* at 16, 21, 43.

240. *Id.* at 21.

241. *Id.* at 4.

242. *Id.* at 1.

243. Memorandum Decision, *supra* note 3, at 26.

244. *Id.* at 27.

245. *Id.* at 28.

246. *Id.* at 29. The District Court’s decision effectively held that the Exhibits were integral parts of the overall Agreement, i.e., that the contractual text of the Agreement and the Exhibits had to be read together as a whole. Prior to this ruling, the legal significance of the Exhibits had at times been questioned or dismissed by some. Exhibits 7A and 7B to the Swan Falls Agreement were combined in 1985 Senate Bill 1008, and enacted as IDAHO CODE § 42-203B. 1985 Idaho Sess. Laws 23-27.

247. Memorandum Decision, *supra* note 3, at 29.

248. *Id.* at 29–31.

249. *Id.* at 31 (footnote omitted).

The Court held that “[a]lthough Paragraph 7 of the Agreement (which defines Idaho Power’s rights) does not mention a trust arrangement, the rights are defined so as to reconcile with the application of the terms set forth in Exhibit 7[B].”²⁵⁰

In response to IPC’s argument “that it would have never entered into an agreement where it assigned or transferred its water rights to the State,” the SRBA Court found that “the Agreement was carefully drafted so that Idaho Power would not be directly assigning or transferring its water rights to the State[,]” which could have exposed the company to ratepayer liability for failing to protect its water rights.²⁵¹ “Rather than transferring or assigning the 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.”²⁵² The Court also found it “inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State [would] pass legislation entirely inconsistent with the body of the contract or the intent of the parties. . . . Exhibit 7B clearly and unambiguously reflects the intent of the parties.”²⁵³

While the SRBA Court held it “need not go beyond the four corners of the [Agreement] to ascertain the [] intent of the parties” with respect to the trust and water right ownership,²⁵⁴ “[e]ven if it considered matters outside the four corners of the Agreement, the result is unchanged.”²⁵⁵ The Court reviewed minutes and transcripts of the public meetings and hearings on the Agreement held in 1984 and 1985, the “Statement of Legislative Intent” for the Settlement legislation, and a 1990 deposition of the attorney who represented IPC in the Swan Falls negotiations.²⁵⁶ The Court determined all of these were consistent with the conclusion that the State as trustee held legal title to the hydropower water rights at IPC’s projects for flows in excess of 3900/5600 at Murphy.²⁵⁷

Turning to the contention that the trust *res* was a “block of water” rather than water rights, the SRBA Court determined “[t]he argument that the trust contains a ‘block of water’ instead of a water right does not make sense. First, the way in which water flows are encumbered in Idaho is through a water right, not a ‘block of water.’”²⁵⁸ The Court also explained that putting the hydropower water rights for flows in excess of 3,900/5,600

250. *Id.* at 31. As previously discussed, the “consistency” between Paragraph 7 and Exhibit 7B was intentional, and necessary to “allow the State to utilize Idaho Power Company’s asserted water right to augment the State’s existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public interest.” Framework, *supra* note 43, at 5.

251. Memorandum Decision, *supra* note 3, at 31.

252. *Id.* The court explained:

The operative language of Exhibit 7B and the resulting SB 1008 do not require that Idaho Power “assign or transfer” its rights to the State. Rather, the rights are held in trust *by operation of law*. The implementation of such law was not only a condition of the Agreement, but apparently a law which Idaho Power helped to draft.

Id. at 38.

253. Memorandum Decision, *supra* note 3, at 32.

254. *Id.*

255. *Id.* at 33.

256. *Id.* at 33–39; see Statement of Legislative Intent *supra* note 5, at 59–60 (“[T]his trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows”).

257. *Id.* at 33–41.

258. Memorandum Decision, *supra* note 3, at 40; see Fereday & Creamer, *supra* note 2, at 623 (describing “[t]he idea of ‘reserving a block of water’” as “a novel departure from Idaho water law”).

at Murphy into the trust allowed the State to impose the “public interest criteria” on new permit applications that could not otherwise have been applied had the rights been left in Idaho Power’s name and simply subordinated outright:

[I]n order for the State to impose the public interest criteria restrictions on the appropriation of future water rights and avoid the risk of Article 15 § 3 challenges, the river had to be considered fully appropriated. . . . By placing the portions of Idaho Power’s water rights exceeding the minimum flows in trust, and making the rights “subordinatable” to future uses, the river would still maintain the status of being fully appropriated. This enabled the State to impose the public interest criteria in conjunction with issuing new rights. A straight subordination of Idaho Power’s right would not accomplish the same result as the river would not have been fully appropriated.²⁵⁹

The SRBA Court also addressed the term “trust water” and determined it did not create any legal ambiguity regarding the nature of trust:

The somewhat confusing part is that new appropriators were not receiving a transfer of an actual portion of Idaho Power’s water rights held in trust, but rather a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to “trust water” comes from and support for the argument that the *res* of the trust is water, not water rights. Nonetheless, the Court does not find the use of the term “trust water” to create an ambiguity regarding the *res* of the trust. Again the only way the use of the water could be encumbered is via a water right. This becomes particularly apparent when taking into account the underlying purposes for which the Agreement was carefully structured to achieve.²⁶⁰

The Court also held that the State’s conduct and representations since the execution of the Agreement had been consistent with the State holding legal title to the hydropower water rights in question.²⁶¹

Turning to IPC’s summary judgment motion, the SRBA Court held that the Consent Judgments entered in the two original district court actions did not support IPC’s claim of sole ownership. The Consent Judgments were “part and parcel of the Swan Falls Agreement[.]”²⁶² and “[t]he better reasoning is the Consent Judgments define Idaho Power’s right(s) consistently with Paragraphs 7A through E to the Agreement.”²⁶³

The Consent Judgments were entered after the enactment of I.C. § 42-203B and thus were subject to its provisions. Idaho Code § 42-203B also specifically refers to the October 25, 1984, Agreement. The parties cannot stipulate around the application of the statute. Therefore, just because the Consent Judgments do

259. Memorandum Decision, *supra* note 3, at 40–41 (footnote omitted).

260. *Id.* at 41.

261. *Id.* at 42. The Court also determined that decreeing the three Basin 36 hydropower water rights solely in IPC’s name and without any references to the Swan Falls Agreement “was an oversight in uncontested subcases The claims should have been withheld from decree until the rest of Idaho Power’s claims covered by the Swan Falls Agreement were reported.” *Id.* “The Agreement did not provide for a minimum rate of flow at Idaho Power’s individual upstream facilities. . . . all claims should have been addressed at the same time so partial decrees could be issued in a manner which recognized the modifications to the original licenses pursuant to the Swan Falls Agreement.” *Id.* at 43.

262. *Id.* at 19.

263. Memorandum Decision, *supra* note 3, at 43.

not refer to I.C. § 42-203B does not mean Idaho Power's water rights are insulated from its application. Idaho Power did not challenge the application of I.C. § 42-203B in the [previous district court] proceedings. In fact, just the opposite is true. The Consent Judgments were entered based in part on the enactment of I.C. § 42-203B. . . .

. . . .

In this case, the Consent Judgments are wholly consistent with the Agreement. The Consent Judgments define Idaho Power's water rights and the statute places the "subordinatable" portions of the rights in trust. There is no inconsistency between the two. Under the Agreement, the rights were to be put in trust pursuant to the State's regulatory authority, not a transfer by Idaho Power. Idaho Power simply agreed to the State's regulatory authority as applied to its rights.²⁶⁴

The SRBA Court also addressed IPC's claim for reformation of the Agreement due to "the alleged erroneous assumption that there was water available for future appropriation."²⁶⁵ The Court stated that while mutual mistake is normally an issue of fact, "in this case the Court holds that as a matter of law . . . it does not matter whether erroneous assumptions . . . regarding the availability of water for future appropriations. . . . The *res* of the trust consists of water rights, not water."²⁶⁶ "Further," the Court held, "the Agreement was structured to specifically account for uncertainty in the availability of the excess flows. No guarantees or promises were made to Idaho Power with respect to the availability of the excess flows."²⁶⁷ Thus, "Idaho Power did not have an expectation that water above the minimum flows would be available for its use for an indefinite period."²⁶⁸

The SRBA Court also held that if flows drop below 3900/5600 at Murphy, then "Idaho Power's water right(s) held in trust are not subordinate to subsequent appropriations. As a result, these subsequent appropriations may be subject to curtailment in order to meet the minimum flows."²⁶⁹ The Court held this question, however, was "an issue pertaining to the administration of Idaho Power's water rights, as well as the rights of the subsequent appropriators, and needs to be brought before IDWR in the context of an administrative proceeding."²⁷⁰

The SRBA Court then addressed the causes of action in IPC's *Complaint* that were not resolved by the summary judgment decision.²⁷¹ The Court held IPC's assertion that the hydropower water rights were not subordinate to aquifer or ground water recharge uses was properly before the court, and instructed the parties to be prepared to discuss whether this contention could be addressed via summary judgment.²⁷² The Court deemed

264. *Id.* at 43–45; see Nelson Deposition, *supra* note 63, at 73 (describing the Consent Judgments as "paralleling the agreement as to the description of the company's water rights").

265. Memorandum Decision, *supra* note 3, at 46.

266. *Id.* at 47.

267. *Id.*

268. *Id.*

269. *Id.* at 47–48. The Agreement and IPC's water rights did not guarantee Murphy flows 3900/5600, however. Rather, IPC agreed to fully subordinate its hydropower water rights to uses under water rights or valid claims existing at the time the Agreement was signed, even if these uses resulted in flows at Murphy less than 3900/5600. See *infra* Part IV.C.2.i.

270. *Id.* at 48.

271. Memorandum Decision, *supra* note 3, at 48–49.

272. *Id.* at 48

essentially all of the remaining claims as raising water rights administration questions that should be addressed in administrative proceedings before the Department of Water Resources pursuant to *American Falls Reservoir District No. 2 v. IDWR*.²⁷³ IPC subsequently represented to the Court that it did not intend to pursue these claims, and they were dismissed.²⁷⁴

4. Summary Judgment, Round 2: Aquifer Recharge & The Milner Divide

The second round of summary judgment motions addressed IPC's claim that the hydropower water rights were not subject to subordination to uses of water for aquifer or ground water recharge purposes, i.e., "recharge subordination."²⁷⁵ As in the first round of summary judgment, each party submitted extensive documentation and relied on differing interpretations of the Swan Falls Settlement.²⁷⁶

The State argued that because the Swan Falls Settlement limited the hydropower water rights to flows downstream from Milner Dam, the hydropower water rights were effectively subordinated to any use of water upstream from Milner Dam, including recharge uses.²⁷⁷ The State also argued that because the hydropower water rights held in trust by the State were subordinate to any use of water authorized under state law, they were as a matter of law subordinated to recharge water rights issued pursuant to state law.²⁷⁸ The State relied principally on the subordination provisions of the Agreement and the implementing legislation, which did not exempt recharge; IPC's dismissal from "the 7500 suit" of two recharge water rights existing in 1984²⁷⁹; the Agreement's provision for retaining the "zero c.f.s." minimum daily flow at Milner Dam²⁸⁰; and the 1986 amendment to Idaho Code § 42-203B(2)²⁸¹ that "sought to separate water administration above and below [Milner] dam."²⁸²

IPC argued that the Swan Falls Agreement had not contemplated subordination of the hydropower water rights to recharge because in 1984 recharge was seen as a non-

273. *Id.* at 48–49. In *American Falls Reservoir District Number 2*, the Idaho Supreme Court confirmed that the requirement of exhausting administrative remedies prior to seeking judicial review of an agency action applies to the administration of water rights. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 154 P.3d 433, 441–43, 143 Idaho 862, 870–72 (2007).

274. See Order Dismissing Claims Pertaining to Water Availability Without Prejudice And Denying Motion To Dismiss Claim For Injunctive Relief, *In re SRBA*, Consolidated Subcase No. 00-92023 (Aug. 4, 2008).

275. State Of Idaho's Amended Motion For Summary Judgment On Issue Of Recharge Subordination, *In re SRBA*, Consolidated Subcase No. 00-92023 (Oct. 17, 2008); Idaho Power Company's Motion For Partial Summary Judgment on Recharge Subordination, *In re SRBA*, Consolidated Subcase No. 00-92023 (Oct. 17, 2008).

276. *Id.*

277. See, e.g., Memorandum in Support Of State Of Idaho's Amended Motion For Summary Judgment On Issue Of Recharge Subordination at 1–2, *In re SRBA*, Consolidated Subcase No. 00-92023, (Oct. 17, 2008).

278. *Id.* at 2.

279. *Id.* at 54–56. In 2006, IPC and the State of Idaho entered into a stipulation in which "[t]he Company agree[d] that its water rights are subordinated to water rights nos. 01-7054 and 37-7842 pursuant to the terms of the Swan Falls Agreement" Stipulation at 1 (April 11, 2006) (on file with the authors).

280. Swan Falls Agreement, *supra* note 3, at Exhibit 6.

281. *Id.* at 47–54; 1986 Idaho Sess. Laws 309; IDAHO CODE § 42-203B(2) (2015).

282. Clear Springs Foods, Inc. v. Spackman, 252 P.3d 71, 80, 150 Idaho 790, 799 (2011).

depletionary “management tool” rather than a “beneficial use” of water.²⁸³ IPC argued this intent was legislatively confirmed in statutory provisions enacted subsequent to the Agreement that authorized water rights for recharge purposes, but made them “secondary to . . . 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.”²⁸⁴ IPC also relied on other statutory language in effect at the time of Agreement that recharge uses were “secondary to all prior perfected water rights, including those held by a privately-owned electrical generating company to appropriate waters in the reaches of the Snake River downstream from the Milner diversion for purposes of hydroelectric power generation.”²⁸⁵

While the summary judgment motions on recharge were pending, the State and IPC entered into negotiations and in February 2009 the State and IPC jointly requested that the SRBA Court delay issuing a decision.²⁸⁶ By the end of the following month, the State and IPC had agreed to a proposed settlement, which was provided to the Court and the other parties.²⁸⁷ Like the Swan Falls Agreement, the proposal was to resolve the dispute through executive, legislative, and judicial actions jointly proposed and supported by the State and IPC.

C. The 2009 “Reaffirmation Framework”

The settlement proposal was entitled “Framework Reaffirming The Swan Falls Agreement” (“Reaffirmation Framework”).²⁸⁸ The Reaffirmation Framework stated that “[t]hrough this Framework, and the attached Exhibits, the Parties reconfirm the continuing validity of the Swan Falls Settlement and commit to resolving the questions raised in the litigation in accordance with the terms set forth herein.”²⁸⁹ The Reaffirmation Framework endorsed the State’s views as to all of the disputed issues in the litigation. It also recognized, however, that more work remains to realize comprehensive water resource management under the legal standards and policy principles implemented as a result of

283. Idaho Power Company’s Opening Brief In Support Of Motion For Partial Summary Judgment On Recharge Subordination at 1, 18–19, *In re* SRBA, Consolidated Subcase No. 00-92023 (Oct. 17, 2008).

284. *Id.* at 29 (quoting IDAHO CODE § 42-4201A(2) (2008)) (emphasis omitted). In 1994 this language was codified in two statutes: IDAHO CODE §§ 42-4201A(2), 42-234(2). 1994 Idaho Sess. Laws 851-52, 1397-98. In 2009 this language was stricken as part of the Legislature’s implementation of the “Framework Reaffirming The Swan Falls Agreement.” 2009 Idaho Sess. Laws 743.

285. IDAHO CODE § 42-4201(2) (2015). In a subsequent judicial review proceeding regarding subordination of the water right license for the Milner hydropower project, the court noted that this statute is limited to “a small isolated group of groundwater recharge rights held by aquifer recharge districts [] in Jerome, Lincoln, Gooding and Twin Falls counties.” Memorandum Decision And Order On Petition For Judicial Review, *Twin Falls Canal Co. & North Side Canal Co. v. Spackman*, Case No. CV-2010-5377 at 13 n.6 (Idaho 5th Dist., Aug. 30, 2011), http://www.idwr.idaho.gov/News/Issues/M3/PDFs/11Nov/20110830_Memorandum%20Decision%20and%20Order%20on%20Petition%20for%20Judicial%20Review%202010-5377.pdf.

286. State Of Idaho And Idaho Power Company’s Motion To Delay Issuance Of Court’s Decision on Pending Motions For Summary Judgment, *In re* SRBA, Consolidated Subcase No. 00-92023 (Feb. 17, 2009).

287. See State Of Idaho And Idaho Power Company’s Joint Motion To Enter Order Temporarily Withholding Rulings On Pending Summary Judgment Motions, *In re* SRBA, Consolidated Subcase No. 00-92023 (Mar. 26, 2009).

288. Framework Reaffirming the Swan Falls Settlement, Idaho-Idaho Power Company, March 25, 2009, <https://www.idwr.idaho.gov/files/legal/swan-falls-agreement/20090325-Framework-Swan-Falls-Settlement.pdf> [hereinafter Reaffirmation Framework].

289. *Id.* at 2.

the Settlement, and laid the foundation for cooperative efforts to move forward on these fronts.²⁹⁰

1. The “Summary Of Swan Falls Reaffirmation Settlement”

As had been the case with the Swan Falls Agreement, the Reaffirmation Framework generated concerns and opposition from some legislators and other interested parties. Also as in 1984-85, these concerns were addressed verbally by representatives of the State and IPC in hearings before legislative committees and the IWRB,²⁹¹ and in an explanatory statement jointly prepared by the State and IPC entitled the “Summary Of Swan Falls Reaffirmation Settlement” (“Summary”). The Summary was presented to the House Resources And Conservation Committee, discussed in the committee’s meeting of April 13, 2009, and is attached to the minutes of that meeting.²⁹² Like the “Statement of Legislative Intent” prepared in 1985 to explain the settlement proposed by the 1984 Swan Falls Agreement,²⁹³ the Summary explained the intent of the 2009 Reaffirmation Framework.

The Summary stated that the terms “Framework” and “Reaffirming” had been chosen “to connote two key points. First, the 2009 Framework is a road map for reaching settlement rather than a final settlement document. . . . Second, the parties intend the proposed 2009 Reaffirmation Settlement to reconfirm rather than change any [] terms and conditions of the 1984 Swan Falls Settlement.”²⁹⁴

The settlement proposed by the Reaffirmation Framework also was intended to “resolve three issues regarding the interpretation of the 1984 Swan Falls Settlement.”²⁹⁵ “First,” the proposed settlement reaffirmed the Milner Divide as recognized in Idaho Code § 42-203B, and that:

[T]he hydropower water rights for Idaho Power Company facilities located on the reach of the Snake River between Milner Dam and the Murphy Gage carry no entitlement to demand the release of natural flow past Milner Dam or to seek administration of water rights diverting . . . surface or ground water tributary to the Snake River upstream from Milner Dam.²⁹⁶

“Second,” the settlement proposed to decree the hydropower water rights for the IPC facilities “consistent with the SRBA Court’s Memorandum Decision and Order on Cross-

290. The Reaffirmation Framework was executed on March 25, 2009 by Idaho Governor C. L. “Butch” Otter, Idaho Attorney General Lawrence G. Wasden, and IPC President and C.E.O. J. LaMont Keen. *Id.* at 10–14.

291. The Reaffirmation Framework was reviewed and discussed in a joint meeting of the Senate and House resources committees on April 1, 2009, a meeting of the House resources committee on April 13, 2009, and an IWRB meeting on April 30, 2009. *Minutes, Senate Res. & Env’t Comm., House Res. & Conservation Comm.* (Idaho Apr. 1, 2009); *Minutes, House Res. & Conservation Comm.* (Idaho Apr. 13, 2009); Transcript of Proceedings, Meeting No. 7-09 Before the Idaho Water Res. Bd. (Apr. 30, 2009).

292. See *Minutes, House Res. & Conservation Comm.*, 3 (Idaho Apr. 13, 2009) (referring to “attached summary”).

293. See Statement of Legislative Intent, *supra* note 5.

294. *Minutes, House Res. & Conservation Comm.*, 1 (Idaho Apr. 13, 2009) (Summary of Swan Falls Reaffirmation Settlement attached to committee minutes) [hereinafter Summary].

295. *Id.*

296. *Id.*

Motions for Summary Judgment” regarding water right ownership and the trust.²⁹⁷ “Finally,” the settlement proposed to “reaffirm that the 1984 Swan Falls Settlement does not preclude use of water for aquifer recharge.”²⁹⁸ . Article II of the Reaffirmation Framework, and the attached exhibits, were the proposed means for achieving these objectives.²⁹⁹

Article III of the Reaffirmation Framework recognized that other important matters arising under the 1984 Swan Falls Settlement had yet to be fully implemented, such as “an acceptable program to monitor and measure flows at the Murphy Gage” and “procedures for re-evaluating term permits” approved under the 1985 “public interest” legislation, Idaho Code § 42-203C.³⁰⁰ Through Article III of the Reaffirmation Framework the State and IPC re-committed to make good faith efforts to resolving concerns and potential disagreements over such matters through discussion and cooperation.³⁰¹ In doing so the parties implicitly acknowledged what had been made explicit in 1984: “Achieving a proper balance among competing demands for a limited resource such as water in the Snake River system is a fundamental public policy question,” and “adversary proceedings may not necessarily yield solutions which reflect the broad public interest.”³⁰²

2. The Partial Decrees For The Hydropower Water Rights

Exhibit 6 to the Reaffirmation Framework consisted of proposed partial decrees for the hydropower water rights that the State and IPC had developed during negotiations.³⁰³ The proposed partial decrees implemented the SRBA Court’s summary judgment decision and interpretation of the Swan Falls Agreement,³⁰⁴ and addressed disputed issues in the SRBA litigation, including subordination, water right ownership, the trust, and the Milner Divide.³⁰⁵

i. Subordination To Uses Existing At The Time Of The Settlement

An element of the Settlement that had not been litigated in the SRBA proceedings was its full subordination of the hydropower water rights to all other water rights and uses existing in 1984. This agreement was set forth in Paragraphs 7C and 7D of the Agreement and the 1180 Contract.³⁰⁶ These provisions did not make subordination contingent on Murphy flows of 3900/5600; rather IPC accepted the risk that the “existing” uses might

297. *Id.*

298. *Id.*

299. See Summary, *supra* note 294, at 2. Article I of the Reaffirmation Framework recited background principles from the original Settlement that were relevant to the proposed resolution of the three issues of the interpretation of the original Settlement. Article III identified issues for future discussions. Article IV set forth general provisions relating to the intent and effect of the proposed settlement, such that the Reaffirmation Framework was not intended to modify, amend or alter the Swan Falls Settlement, and was not intended to create any vested, compensable or enforceable private rights in the proposed legislative enactments. *Id.* at 23.

300. *Id.* at 2.

301. *Id.*

302. Framework, *supra* note 43, at 1.

303. Reaffirmation Framework, *supra* note 288, at Exhibit 6.

304. Framework, *supra* note 43, at 1, 4.

305. Reaffirmation Framework, *supra* note 288, at Exhibit 6.

306. Swan Falls Agreement, *supra* note 3, ¶¶ 7(C)–(D), at 4.

reduce flows at Murphy below 3900/5600.³⁰⁷ In other words, the Agreement did not “guarantee” a flow of 3900/5600 at Murphy,³⁰⁸ and subordination to the “existing” uses was “unqualified.”³⁰⁹ The partial decrees proposed by the Reaffirmation Framework included provisions subordinating the hydropower water rights to the “existing” uses that closely tracked the language of Paragraphs 7C and 7D of the Agreement.³¹⁰

Ultimately, certain terms in these contract-based provisions were found to be potentially ambiguous, and ill-suited to the practical task of distributing water and regulating diversions in accordance with water right decrees. Consequently, these provisions were modified to clarify their intent and to facilitate water rights administration. The proceedings on these matters became quite involved and are discussed in a subsequent section.

ii. Ownership And Subordination To Future Uses

While the SRBA Court’s summary judgment decision confirmed the State holds legal title in trust to the hydropower water rights for flows in excess of 3900/5600 at Murphy, it was undisputed that IPC owns the water rights for flows up to those levels. The Reaffirmation Settlement therefore proposed two sets of partial decrees: four (4) solely in the name of IPC for water rights to “average daily flows” of 3900/5600 at Murphy; and twenty one (21) partial decrees for the remaining water rights, to be decreed in

307. In a 1985 Senate committee hearing on the Settlement, then-state Senator Mike Crapo asked Tom Nelson, IPC’s negotiator: “Would it be fair to say then that Idaho Power assumes the risk of actual stream flow below 3,900 as far as priorities of that water?” Mr. Nelson replied: “That is correct as to existing users.” Transcript of Proceedings, S. Res. & Env’t Comm. Meeting on SB 1006 & SB 1008, 16 (Idaho Feb. 1, 1985) (on file with authors). As previously discussed, essentially all of the existing uses had been established without protest or objection by IPC, and in 1984 the parties had agreed that even under the best litigation outcome IPC could reasonably hope for it would be deemed to have waived its rights as against existing users.

308. The Swan Falls Settlement is sometimes incorrectly characterized as having given IPC a “guarantee” that flows at Murphy will never drop below 3900/5600. IPC by unconditionally subordinating the hydropower water rights to the “existing” uses had accepted the risk that the “existing” uses might result in flows below 3900/5600 at Murphy.

309. In subsequent proceedings, the parties and the Court adopted the convention of referring to subordination to uses existing at the time of the Agreement as “unqualified” because it was independent of flow levels at the Murphy Gage (“Murphy”). On the other hand, subordination to uses established subsequent to the Agreement was “qualified” because it was dependent upon flows of 3900/5600 at Murphy. This terminology is discussed *infra* Part IV.E.

310. Reaffirmation Framework, *supra* note 288, at Exhibit 6; Swan Falls Agreement, *supra* note 3, at 4 ¶¶ 7(C)–(D).

the name of the State of Idaho as trustee³¹¹ for two beneficiaries: IPC and the people of the State of Idaho.³¹²

The two sets of partial decrees contained different, but complementary, provisions regarding subordination of the hydropower water rights to “subsequent” or “future” or uses, that is, uses of water initiated after the date the Agreement was executed. IPC’s partial decrees for water rights to 3900/5600 at Murphy provided the rights were “unsubordinated” and “not subject to depletion” by such uses.³¹³ The hydropower water rights held in trust by the State, in contrast, were “subject to subordination to and depletion by future beneficial uses of water under water rights acquired pursuant to applicable state law unless . . . such use depletes or will deplete the average daily flow of the Snake River below” 3900/5600 at Murphy.³¹⁴

Taken together, the two sets of partial decrees provided that IPC’s hydropower operations would be subordinated to water rights acquired after execution of the Agreement until flows dropped to 3900/5600 at Murphy; below those levels, the post-Agreement water rights would be subject to administration (including curtailment) in favor of hydropower generation. This approach was consistent with the SRBA Court’s holding regarding administration of the hydropower water rights held in trust.³¹⁵ It also effectuated the Settlement’s intent of striking a balance between two competing interests in a limited resource: IPC’s interest in having enforceable rights to continued use of the excess flows until the rights were subordinated to new uses approved pursuant to state law, and the public interest in having water available for such uses.³¹⁶

iii. The Milner Divide

All of the proposed partial decrees included a provision confirming that consistent with Idaho Code § 42-203B, “the hydropower water rights for Idaho Power Company

311. While the trust and subordination legislation as proposed by Exhibit 7B to the Agreement and as enacted by the Legislature referred to hydropower water rights held in trust by the State “by and through the Governor,” Swan Falls Agreement, *supra* note 3, at Exhibit 7B; IDAHO CODE § 42-203B(2) (2015), the partial decrees identify the owner as “State of Idaho—Trustee” without referencing the Governor; the phrase “by and through the Governor” is recited in textual provisions of the partial decrees. This is consistent with the original intent that “[t]his is strictly a passive trust over which the Governor will not exert any active discretions. . . . The Governor is named as the trustee just because you need an individual to sue in the event of some scramble over the trust assets. . . . It is a passive trust.” Transcript of Proceedings, Sen. Res. & Env’t Comm. Meeting on SB 1006 & SB 1008, 13–14 (Idaho Feb. 1, 1985) (on file with authors) (statement of Governor’s attorney). “The Governor of course is a passive trustee. The intent here was that the Director would be the individual who would make the reallocation determination.” *Id.* at 14 (statement of Attorney General’s attorney).

312. The twenty-five (25) proposed partial decrees represented the original nineteen (19) permitted, licensed, and decreed water rights identified in the Swan Falls Agreement, *supra* note 3, at 4 ¶ 7, plus three (3) “constitutional method” water rights for which claims were not filed until after the Agreement was executed. See *Idaho Power Co. v. Idaho Dep’t of Water Res.*, 255 P.3d 1152, 1160, 151 Idaho 266, 274 (2011) (“Prior to 1971, water users could appropriate water in the state of Idaho through the constitutional method of diversion and application to a beneficial use.”). The reason the total number of proposed partial decrees (25) was greater than the total number of water rights claimed by IPC (22) was that three of the claimed rights had to be split to provide IPC with water rights that collectively provided for flows up to, but not exceeding, 3900/5600 at Murphy.

313. Reaffirmation Framework, *supra* note 288, at Exhibit 6.

314. *Id.* The provision also stated the water rights held in trust by the State would not be subject to subordination to “unlawfully exercised” water rights.

315. Memorandum Decision, *supra* note 3, at 47–48.

316. Statement of Legislative Intent, *supra* note 5, at 59.

facilities located on the reach of the Snake River between Milner Dam and the Murphy Gage carry no entitlement to demand the release of natural flow past Milner Dam,” or to seek administration of water rights diverting “surface or ground water tributary to the Snake River upstream from Milner Dam”³¹⁷:

For the purposes of the determination and administration of this water right, 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.³¹⁸ This water right may not be administered or enforced against any diversions or uses of the waters identified in this paragraph.³¹⁹

The first sentence of this provision was taken from the 1986 amendment to Idaho Code § 42-203B(2). The second sentence confirmed the provision affirmatively limits the extent to which the water rights may be “administered or enforced.”³²⁰ By including these provisions in the partial decrees, the Reaffirmation Settlement ensured that the prohibition against calling water past Milner Dam became an element of the hydropower water rights. This addressed concerns that had lingered since 1986 that changes in the Idaho Code, the State Water Plan, or administrative rules might provide a basis for IPC to seek regulation of water use above Milner Dam.

3. The Proposed Recharge Legislation

The Reaffirmation Framework proposed three pieces of legislation, two of which pertained to aquifer recharge.³²¹ The first recharge bill addressed the parties’ dispute over “recharge subordination” by “clarify[ng] that the Swan Falls Agreement does not preclude use of water for recharge.”³²² The legislation did this “by removing the reference to the Agreement in Idaho Code § 42-234 and repealing Idaho Code § 42-4201A.”³²³ The

317. Summary, *supra* note 294, at 1.

318. 1986 Idaho Sess. Laws 309; *see also* IDAHO CODE § 42-203B(2) (2015).

319. Reaffirmation Framework, *supra* note 288, at Exhibit 6.

320. The Milner Divide was also decreed in an SRBA “General Provision,” as follows:

The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. For the purposes of the determination and administration of rights to the use of the waters of the Snake River or its tributaries downstream from Milner dam, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered.

Order of Partial Decree For Gen. Provisions In Basin 02 at 1, *In re* SRBA, Case No. 39576, Subcase No. 00-92002GP (Nov. 20, 2012).

321. Reaffirmation Framework, *supra* note 288, at Exhibits 3–5; Summary, *supra* note 294, at 4. The third piece of proposed legislation was an un-codified statute providing the Reaffirmation Framework was in the public interest and the IPUC had no jurisdiction to consider whether IPC should have or could have “preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with” the Reaffirmation Framework. Reaffirmation Framework, *supra* note 288, at Exhibit 4. This legislation was essentially identical to a statute enacted in 1985 as part of the original “legislative program” implementing the Swan Falls Agreement. Swan Falls Agreement, *supra* note 3, at ¶¶ 6(f), 13(a)(ii), Exhibit 5; 1985 Idaho Sess. Laws 20–21. Both the 1985 legislation and its 2009 counterpart were intended largely to protect IPC from ratepayer claims that IPC could have or should have continued litigating, or gotten better settlement terms. Ratepayer claims were what triggered the original Swan Falls controversy.

322. Summary, *supra* note 294, at 4; “Statement Of Purpose—RS18934” (2009 Senate Bill 1185).

323. *Id.*

stricken language had provided that recharge water rights were “secondary” to hydro-power water rights “that may otherwise be subordinated” by the Swan Falls Agreement.³²⁴ The proposed legislation also “consolidate[d] recharge policy in Idaho Code § 42-234,”³²⁵ and authorized the Director to issue and condition permits and licenses for recharge purposes “pursuant to the provisions of this chapter and in compliance with other applicable Idaho law and the state water plan.”³²⁶

The second piece of recharge legislation amended Idaho Code § 42-1737 so “that managed recharge projects [would] be subject to the same review process applicable to storage reservoirs . . . because managed recharge may have effects on surface flows similar to those of a storage reservoir.”³²⁷ The legislation extended the IWRB’s statutory authority to review and approve or disapprove proposals for large storage reservoirs (more than 10,000 acre-feet of active capacity) to also cover proposals for large recharge projects (more than 10,000 acre-feet on an average annual basis).³²⁸

Enactment of the recharge legislation³²⁹ confirmed that the Swan Falls Settlement was not intended to preclude managed recharge activities or to prevent subordination of the hydropower water rights to recharge water rights.³³⁰ Further, the legislation clarified that the implementation of managed recharge is a matter of public policy governed by state law and the State Water Plan rather than private agreements between the State and IPC.³³¹ This was consistent with the principles confirmed in the proposed “Memorandum of Agreement” between IPC and IWRB.

4. The Memorandum Of Agreement

One implication of the Milner zero minimum flow and the Milner Divide policy is that management of the ESPA, which discharges to the Snake River via springs downstream from Milner, is key to providing flows of 3900/5600 at Murphy.³³² While managed ESPA recharge activities can indirectly support the Murphy minimum flows, recharge can also have adverse effects on flow levels at Murphy by diverting water out of the river

324. Reaffirmation Framework, *supra* note 288, at Exhibit 3; 2009 Idaho Sess. Laws 743.

325. Summary, *supra* note 294, at 4.

326. Reaffirmation Framework, *supra* note 288, at Exhibit 3; 2009 Idaho Sess. Laws 743. The amendments to Idaho Code § 42-234 also authorized the Director to regulate the exercise of recharge water rights to prevent injury to senior water rights, and to approve, disapprove, or require alterations in the methods employed to implement ground water recharge “in order to achieve optimum development of water resources in the public interest.” The phrase “optimum development of water resources in the public interest” is constitutional language. This phrase appears in Article XV § 7 of the Idaho Constitution, which was adopted in 1964 and provides for a “State Water Agency” that “shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest.” The Idaho Supreme Court has characterized this provision as a “constitutionally enunciated policy.” *Baker v. Ore-Ida Foods, Inc.*, 513 P.2d 627, 636, 95 Idaho 575, 584 (1973). The IWRB is the “State Water Agency” referenced in the constitutional provision. IDAHO CODE § 42-1732 (2015).

327. Summary, *supra* note 294, at 4; *see also* “Statement Of Purpose—RS18886” (2009 Senate Bill 1167)..

328. Reaffirmation Framework, *supra* note 288, at Exhibit 5; 2009 Idaho Sess. Laws 740.

329. 2009 Idaho Sess. Laws 743, 740.

330. The recharge legislation also confirmed that the recharge statute amendments proposed in 2006 under House Bill 800 would not have adversely “impact[ed] vested water rights that Idaho Power Company has.” *Minutes, Sen. Res. & Env’t Comm. 2* (Idaho Mar. 27, 2006).

331. *See id.*

332. *Id.*; 1976 IDAHO STATE WATER PLAN, *supra* note 47, at 35 *see* 2012 IDAHO STATE WATER PLAN, *supra* note 14, at 44 (quoting IDAHO WATER RES. BD., IDAHO STATE WATER PLAN, (Dec. 12, 1986)).

that would otherwise flow on to Murphy.³³³ Further, the nature, magnitude, and timing of the effects of a given recharge proposal on the flow at Murphy can be difficult to predict given the complex hydrology of the ESPA.³³⁴

The Reaffirmation Framework therefore proposed a “Memorandum of Agreement” (“MOA”) to be executed by IPC and the IWRB to “set forth an understanding between the parties regarding certain protocols for implementation of managed recharge.”³³⁵ While the State and IPC agreed that the Swan Falls Agreement did not preclude managed recharge or prohibit subordination of the hydropower water rights to recharge water rights, the MOA recognized they had a “shared interest in ensuring the Swan Falls minimum flows are maintained,” and in working “cooperatively to explore and develop a managed recharge program that achieves to the extent possible benefits for all users.”³³⁶ In this context, the MOA memorialized IPC’s “right to participate in the public process before the [IWRB] for evaluating and approving managed recharge as provided by state law,” and to “present information relative to any issues associated with a managed recharged proposal.”³³⁷

The MOA did not establish recharge objectives or limits but rather acknowledged that the long-term hydrologic target for managed recharge was established and governed by the “Comprehensive Aquifer Management Plan” (“CAMP”) for the ESPA as adopted by the IWRB,³³⁸ and that the question of “whether to proceed with the implementation of managed recharge is fundamentally a public policy decision of the State of Idaho.”³³⁹ While the MOA recognized that IWRB has discretion in implementing the CAMP,³⁴⁰ it also provided that, consistent with Section 7 of Article XV of the Idaho Constitution and Idaho Code § 42-1734B, the IWRB would seek legislative approval if IWRB sought to increase the CAMP Phase I recharge objective of 100,000 acre-feet by more than 75,000 acre-feet prior to January 1, 2019.³⁴¹ The MOA further provided that “nothing in this memorandum of agreement shall be construed to limit or interfere with the authority of the State of Idaho to authorize managed recharge in accordance with applicable state law,” and that IPC “shall not have a right to assert that implementation of managed recharge is precluded by the Swan Falls Settlement.”³⁴²

In sum, the MOA confirmed that managed recharge is governed by state law and the State Water Plan rather than the Swan Falls Settlement, but also that in the Swan Falls Settlement IPC had not waived or forfeited its rights under state law to participate in the public processes pertaining to the development and implementation of managed recharge

333. See *Minutes, Sen. Res. & Env’t Comm.* (Idaho Mar. 4, 1985).

334. *Id.*

335. Summary, *supra* note 294, at 3.

336. *Id.*; A Resolution, In The Matter of Agreement Regarding Implementation Of Managed Recharge Under The Eastern Snake Plain Aquifer Management Plan And State Law 1 (Idaho Water Res. Bd.) (Apr. 30, 2009) (on file with the authors) [hereinafter MOA Resolution].

337. Summary, *supra* note 294, at 3; MOA Resolution, *supra* note 336, at 1–2.

338. Summary, *supra* note 294, at 3; MOA Resolution, *supra* note 336, at 1; Reaffirmation Framework, *supra* note 288, at Exhibit 2. The long-term hydrologic target for managed recharge established by the ESPA CAMP is 150,000 to 250,000 acre-feet on an average annual basis. *Id.*

339. Reaffirmation Framework, *supra* note 288, at Exhibit 2.

340. Summary, *supra* note 294, at 3; MOA Resolution, *supra* note 338, at 1.

341. Summary, *supra* note 294, at 3–4; MOA Resolution, *supra* note 336, at 1; Reaffirmation Framework, *supra* note 288, at Exhibit 2.

342. Reaffirmation Framework, *supra* note 288, at Exhibit 2; Summary, *supra* note 294, at 4.

proposals. The MOA thus reaffirmed “the principles established by the Swan Falls Settlement.”³⁴³

5. The Dismissal Order

The Reaffirmation Framework also included a stipulation and proposed dismissal order addressing each count in IPC’s *Complaint*.³⁴⁴ With a few exceptions, the stipulation and order provided for dismissal with prejudice of IPC’s claims, including: the claim for “reformation” of the Swan Falls Agreement; the claims that there had never been a valid trust, that IPC has sole ownership of the hydropower water rights, and the State does not hold legal title to any of the rights; the claim that the hydropower water rights in the Agreement cannot be subordinated to aquifer recharge; and the claim for repeal of Attorney General Opinion 06-2.³⁴⁵ The dismissal stipulation and order recognized that under the SRBA Court’s summary judgment decision, IPC’s claims had explicitly or implicitly been rejected, or determined to be administrative matters outside the scope of the SRBA.³⁴⁶

6. Implementation Of The Reaffirmation Framework

The settlement proposed by the Reaffirmation Framework was examined and explained in hearings before legislative committees and IWRB during April and May 2009, as previously discussed.³⁴⁷ The legislation was enacted substantially as proposed during the 2009 legislative session.³⁴⁸ The IWRB approved the MOA on April 30, 2009,³⁴⁹ and it was executed on May 6.³⁵⁰ The SRBA Court entered the agreed-upon order to dismiss IPC’s *Complaint* on March 30, 2010.³⁵¹

D. Resolving Objections To The Proposed Partial Decrees

During and after approval of the Reaffirmation Framework, the SRBA Court heard objections to the proposed partial decrees for the hydropower water rights. Resolving these objections was the most procedurally complex and time-consuming aspect of the settlement. Ultimately, it required re-activating Basin-Wide Issue No. 13, making

343. Reaffirmation Framework, *supra* note 288, at Exhibit 2.

344. *Id.* at Exhibit 7.

345. *Id.*

346. The *Dismissal Order* also disposed of IPC’s contract-based claims alleging “breach” or “violation” of the Swan Falls Agreement. *Complaint*, *supra* note 210, at 16, 19, 20, 21, 25, 26. The Agreement was fully performed years ago and no obligations remain under it; it cannot be “breached” and did not establish any enforceable standards capable of “violation.” As the SRBA Court held, questions of subordination and/or whether flows have dropped below 3900/5600 at Murphy are not matters of contract but rather issues “pertaining to the administration of Idaho Power’s water rights, as well as the rights of subsequent appropriators,” and should be “brought before IDWR in the context of an administrative hearing.” Memorandum Decision, *supra* note 3, at 47–48.

347. See discussion *infra* at IV.C.1.

348. 2009 Idaho Sess. Laws 740–45.

349. MOA Resolution, *supra* note 336, at 2.

350. *Memorandum Of Agreement* (May 6, 2009) (on file with authors). The *Memorandum Of Agreement* was executed by C.L. “Butch” Otter, Governor of the State of Idaho, Terry T. Uhling, chairman of the IWRB, and J. LaMont Keen, President and C.E.O. of Idaho Power Company.

351. Order Dismissing Complaint And Petition For Declaratory And Injunctive Relief, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Mar. 30, 2010).

changes to the proposed partial decrees for the hydropower water rights, and making changes to the partial decrees for some of the water rights benefitting from subordination of the hydropower water rights. The need for these actions arose largely from potential ambiguities in the subordination language of the Agreement (which had been carried over into the proposed partial decrees), and from the need to decree subordination provisions that not only reflected the intent of the Agreement but also were administrable by the watermaster.

Certain provisions in the proposed partial decrees for the hydropower water rights incorporated, essentially verbatim, language from the Agreement regarding calculation of the “average daily flows” of 3900/5600 at Murphy, subordination of the hydropower water rights to “future beneficial uses,” and subordination to uses existing when the Agreement was signed. While the language of these provisions of the proposed partial decrees was consistent with the Swan Falls Agreement, other parties to the proceedings objected to potential ambiguities in the language. In some cases, resolving these objections required making changes or additions to the proposed partial decrees, and/or to the partial decrees for water rights benefitting from hydropower subordination.

1. The “Average Daily Flows” At Murphy

While the partial decrees, like the Agreement, unconditionally subordinated the hydropower water rights to uses existing in 1984 regardless of the flows at Murphy,³⁵² subordination to uses established afterwards depended upon whether flows were above or below 3900/5600 at Murphy.³⁵³ For purposes of distributing water and regulating diversions in accordance with the partial decrees, therefore, the methodology for determining the flow at Murphy is crucial.³⁵⁴

Like the Agreement, the proposed partial decrees referenced “average daily flows” of 3900/5600 at Murphy based on “actual flow conditions,” and stated that “fluctuations resulting from the operation of IPC facilities shall not be considered in the calculation of such flows.”³⁵⁵ Also consistent with the Agreement, the proposed partial decrees provided that flows purchased, leased, owned or otherwise acquired by IPC “shall be considered

352. The proposed partial decrees included the Agreement’s filing deadline of June 30, 1985 for water right applications or claims for any “existing” uses of water. Reaffirmation Framework, *supra* note 288, at Exhibit 6; Swan Falls Agreement, *supra* note 3, at ¶ 7(D). This requirement raised questions of a potential “latent ambiguity” in the Agreement and “unintended consequences.” See discussion *infra* Part IV.D.4.

353. Memorandum Decision, *supra* note 3, at 47.

354. Measuring the flow at Murphy and determining the action(s) to be taken if the flow drops below 3900/5600 at Murphy are not questions of complying with the Swan Falls Agreement but rather issues “pertaining to the administration of Idaho Power’s water rights, as well as the water rights of the subsequent appropriators.” Memorandum Decision, *supra* note 3, at 47–48. The Director and the watermasters as supervised by the Director are statutorily required to distribute water and regulate diversions in accordance with the prior appropriation doctrine as established by Idaho law, IDAHO CODE §§ 42-602, 42-607 (2012), and for this purpose rely on water right decrees rather than private contracts. See *Almo Water Co. v. Darrington*, 501 P.2d 700, 705, 95 Idaho 16, 21 (1972) (“Because the watermaster is a ministerial officer, he is authorized to distribute water only in compliance with applicable decrees.”). Further, and as will be discussed, the Swan Falls Agreement did not, and as a matter of law could not, establish enforceable minimum flows or water rights. See *infra* Part V. In any event, the partial decrees as proposed by the State and IPC (and as decreed) included a provision stating they are “consistent with the Swan Falls Agreement” and the 1180 Contract. Reaffirmation Framework, *supra* note 288, at Exhibit 6.

355. Reaffirmation Framework, *supra* note 288, at Exhibit 6.

fluctuations resulting from the operation of IPC facilities.”³⁵⁶ Several concerns were raised regarding these provisions.³⁵⁷

The principal concern was that the “fluctuations” provision could be interpreted to mean that flows purchased, leased, owned or acquired by entities other than IPC (such as water released from federal reservoirs for flow augmentation purposes pursuant to the Endangered Species Act) would be subtracted from the flow actually measured at Murphy in determining the “average daily flow.”³⁵⁸ The SRBA Court agreed there was potential ambiguity on this point and therefore ordered language added to the partial decrees stating that “fluctuations” caused by IPC’s operations are the “‘sole exclusion’ to the rule that all flows actually present at the Murphy Gaging Station constitute actual flow conditions,” and that “flows purchased, leased, owned or otherwise acquired by other entities . . . are not considered fluctuations.”³⁵⁹

In other words, the “average daily flow” at Murphy is determined using measurements of “all flows actually present,” and the only adjustments thereto are those necessary to account for increases or decreases in flow caused by IPC operations. An upward adjustment would be appropriate, for instance, when the volume of water released from IPC’s C.J. Strike project is less than the volume of inflow to it,³⁶⁰ because this reduces the flow at Murphy. A downward adjustment would be appropriate when C.J. Strike releases exceed inflow, or when IPC storage released from a reservoir above Milner Dam has reached Murphy, because these increase the flow at Murphy.³⁶¹

Concerns were also expressed that the Agreement and the proposed partial decrees did not provide “sufficient data to calculate daily flows at the Murphy Gauge,”³⁶² and that “the procedure currently in place is rudimentary and does not account for a number of . .

356. *Id.* These provisions incorporated the terminology of the Agreement. Swan Falls Agreement, *supra* note 3, at ¶¶ 7A-7B, 7E.

357. Order On Motions For Approval Of Settlement at 5, 5-6, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (92-23) (Jan. 4, 2010).

358. *Id.* at 12.

359. *Id.* at 12. Subsequent to the Swan Falls Settlement, the State of Idaho approved the 2004 Snake River Water Rights Agreement, which created a Snake River flow augmentation program. The flow augmentation consisted of two tiers. Tier 1 required that water rights be decreed to the IWRB for the minimum flows established at Murphy pursuant to the Swan Falls Settlement, and required IWRB to protect the Murphy minimum flows. Tier 2 provides for the delivery of leased water from above Milner Dam and for the rental of a portion of the water accruing to the Bell Rapids natural flow water rights held by the IWRB. *Mediator’s Term Sheet* at 19 (Apr. 20, 2004) (on file with authors); see Snake River Water Rights Act of 2004, § 3(1), 118 Stat. 3432 (“The term ‘Agreement’ means the document entitled ‘Mediator’s Term Sheet’ dated April 20, 2004”). While these additional flows are intended to augment the Murphy minimum flows, they are not IPC-caused “fluctuations.” Accordingly, no adjustment for flow augmentation is made to the measured Murphy flow for purposes of distributing water and regulating diversions in accordance with the partial decrees for the hydropower water rights and the minimum flow water rights. The terms of the Bell Rapid rental water agreement call for the delivery of a cumulative acre-foot volume at Murphy each year between April 10 and August 31 (48,320 acre-feet), rather than an “average daily flow” measured in cubic feet per second. Water Right Lease Agreement, Idaho Dep’t of Water Resources – U.S., at 3, Reclamation Contract No. 1425-05-WL-10-0006 (June 19, 2003) (on file with the authors).

360. The C.J. Strike project includes a large reservoir, upstream of and relatively close to Swan Falls. The “rule of thumb,” based on observations of IPC personnel, is that at a flow of approximately 5,000 c.f.s., water will travel from C.J. Strike to Swan Falls in about ten (10) hours. IPC operations at C.J. Strike can therefore have significant impacts on the flows at Murphy. See *generally* Idaho Power Co. v. State, 661 P.2d 741, 104 Idaho 575 (1983).

361. These examples are not an exhaustive list of the possible “fluctuations.”

362. Order On Motions For Approval Of Settlement at 5, 12, Consolidated Subcase No. 00-92023 (92-23) (Jan. 4, 2010).

. variables.”³⁶³ The SRBA Court determined, however, that these considerations were “administrative in nature and beyond the scope of these proceedings,” and “should be addressed if and when an issue arises over the administration” of the water rights.³⁶⁴ The parties subsequently cooperatively developed a proposed methodology for monitoring and reporting the “average daily flows” at the Murphy gaging station for purposes of distributing water and regulating diversions in accordance with the partial decrees.³⁶⁵ The Director adopted the parties’ flow measurement and reporting methodology recommendations in the *Final Order Regarding Measuring And Reporting The “Average Daily Flow” As Measured At The Murphy Gaging Station*.³⁶⁶

2. Definition of Subordination To “Future Beneficial Uses”

The proposed partial decrees, Idaho Code § 42-203B, and the Agreement provided the hydropower water rights held in trust by the State (i.e., the hydropower water rights for flows in excess of “average daily flows” of 3900/5600 at Murphy) would be subordinated to “future beneficial uses” under water rights acquired pursuant to state law.³⁶⁷ Objections were raised that the phrase “future beneficial uses” as used in the proposed partial decrees was ambiguous because the term “future” could be interpreted to refer to water rights issued after entry of the partial decrees, rather than to water rights issued after the execution of the Swan Falls Agreement.³⁶⁸ The SRBA Court agreed and determined that a “date certain” should be used because this would be “more consistent with the original language of the Swan Falls Agreement.”³⁶⁹ The Court initially ordered that the phrase “future beneficial uses” be replaced with the phrase “beneficial uses made after October 25, 1984.”³⁷⁰

The State and IPC requested reconsideration of this ruling because “the basic architecture” of the original Settlement provided for “two types of subordination,” with all water rights protected by one of the two: “‘contractual’ or ‘full’ subordination” would protect uses of water existing at the time the Agreement was signed (as identified in Paragraphs 7C and 7D of the Agreement), and “‘statutory’ or ‘partial’ subordination” would protect water rights established after the Agreement was signed, pursuant to Idaho Code § 42-203B.³⁷¹ Replacing the term “future beneficial uses” with “October 25, 1984” was

363. *Id.* at 15.

364. *Id.*

365. *See generally* Final Order, In The Matter Of Distributing Water To Water Rights Nos. 02-100, 02-201, 02-223, 02-224, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-4001B, 02-10135, 36-2013, 36-2018, 36-2026, 37-2128, 37-2471, 37-2472, 37-20709, and 37-20710 (Idaho Dep’t of Water Resources Oct. 27, 2014).

366. *Id.* at 8–12.

367. IDAHO CODE § 42-203B(2) (2015); Reaffirmation Framework, *supra* note 288, Exhibit 6; Swan Falls Agreement, *supra* note 3, Exhibit 7B ¶ 2.

368. Order on Motion For Approval Of Settlement at 18, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan. 4, 2010).

369. *Id.* at 19. The court’s holding on this point is instructive because it demonstrates that simply incorporating language from a contract into a water right decree may not effectuate the intent of the contract. I.e., contracts and water right decrees have different purposes, and language appropriate for a contract may not be appropriate for a water right decree—even when the water right is the subject of the contract.

370. *Id.* at 20.

371. Memorandum In Support Of State Of Idaho’s And Idaho Power Company’s Joint Motion For Reconsideration, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023, 4 (Jan. 29, 2010). The

contrary to this architecture because it raised the possibility of a “subordination ‘gap’”³⁷²: Water rights for which beneficial use was established after October 1, 1984 but before October 25, 1984 would not be protected,³⁷³ because the last “operative beneficial use date” for “full” subordination under the Agreement and the proposed partial decrees was October 1, 1984,³⁷⁴ and “partial” subordination protected only water rights established after October 25, 1984.³⁷⁵ There would be no subordination protection for beneficial use-based water rights established during the “gap”: the period between October 1 and October 25, 1984.³⁷⁶

The State and IPC sought to avoid the “subordination gap” by replacing the term “future beneficial uses” with the term “any other water right.”³⁷⁷ The other parties stipulated to this proposal,³⁷⁸ and the Court ordered that the subordination provision of the hydropower water rights held in trust by the State would use the term “any other water right.”³⁷⁹

3. Subordination To Rights Dismissed From The “7500 Suit”

While the proposed partial decrees included a provision unconditionally subordinating all of the hydropower water rights to uses of water by persons dismissed from “the 7500 suit,”³⁸⁰ it was argued the provision was deficient because it did not identify the individual water rights that benefitted from the dismissals.³⁸¹ It was therefore proposed to “include in the record a list of the water right holders dismissed from the 7500 case and to which the subordination provision applies.”³⁸² The State and IPC agreed to this proposal provided “it is made clear that the list is not static and includes subsequent changes to the original rights resulting from transfers, splits, and water right renumbering.”³⁸³ The SRBA Court therefore made the original Notices of Dismissal from “the

two different types of subordination were ultimately decreed as “unqualified” and “qualified” subordination. Rebound Call Decision, *supra* note 6, at 5–8, 12–13.

372. *Id.*

373. *Id.* at 5.

374. The most probable reason that the pertinent provision of the Swan Falls Agreement referenced October 1 rather than the signing date of October 25, Swan Falls Agreement ¶ 7(D), was that the Framework had been signed on October 1.

375. Memorandum In Support Of State Of Idaho’s And Idaho Power Company’s Joint Motion For Reconsideration at 4, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023, 4–5 (Jan. 29, 2010).

376. *Id.* at 5.

377. *Id.* at 2.

378. Order On Motions For Reconsideration; Order Consolidating Issue With Basin-Wide Issue 13; Order Partially Decreeing Elements Of Water Rights; Order Dismissing Complaint And Petition For Declaratory And Injunctive Relief at 5, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Mar. 25, 2010) [hereinafter Consolidation Order].

379. *Id.* at 8.

380. Reaffirmation Framework, *supra* note 288, Exhibit 6. This provision implemented Paragraph 7C of the Swan Falls Agreement. Swan Falls Agreement, *supra* note 3, ¶ 7C. The “7500 suit” dismissals were made were pursuant to the 1180 Contract. Swan Falls Agreement *supra* note 3 at ¶ 7(D), 9. The 1180 Contract “has been performed according to its terms” and is “null and void” except for certain provisions that were incorporated into the partial decrees issued in the SRBA. 1180 Contract *supra* note 71, at ¶ 7(b).

381. Order on Motion For Approval Of Settlement at 19, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023 (Jan. 4, 2010).

382. *Id.*

383. *Id.*

7500 suit” part of the record,³⁸⁴ and ordered that the subordination provision of the partial decrees addressing “the 7500 Suit” dismissals include a notification that the dismissed rights were listed in the SRBA record.³⁸⁵

4. Subordination To “Constitutional Method” Claims

The proposed partial decrees also fully subordinated the hydropower water rights to “water rights of those persons who beneficially used water prior to October 1, 1984” if an application or claim for such use had been filed “by June 30, 1985.”³⁸⁶ This provision presented a problem because while June 30, 1985 had been the statutory deadline for filing water right claims based on the “constitutional method”³⁸⁷ when the Agreement was executed, the Legislature subsequently extended and then eliminated the statutory deadline for filing such claims in the SRBA.³⁸⁸ The filing deadline in the Agreement, however, was not amended or updated to conform to these changes in the statutory filing requirements.

Consequently, while the Agreement originally intended the hydropower water rights to be subordinated to all “constitutional method” water rights provided they were claimed under the statutory deadline,³⁸⁹ decreeing the subordination language of the Agreement would result in such water rights not being protected if they had been claimed in the SRBA after June 30, 1985. Rather, such water rights would be subject to curtailment in favor of the hydropower water rights. As a result, a senior but late-filing “constitutional method” appropriator could respond to a delivery call from IPC by seeking curtailment of a junior “constitutional appropriator” who had filed by June 30, 1985 and thus was protected from a direct call by IPC. It was argued that this was tantamount to allowing IPC to indirectly curtail water users to whom it had expressly subordinated: “In effect, Idaho Power’s rights would not be subordinated to the rights of those juniors who had timely met the June 30, 1985 deadline.”³⁹⁰

384. *Id.* The original Notices of Dismissal in “the 7500 case” listed the defendants and their water rights.

385. *Id.* at 20.

386. Reaffirmation Framework, *supra* note 288, Exhibit 6. This provision implemented Paragraph 7(D) of the Swan Falls Agreement. Swan Falls Agreement, *supra* note 3, ¶ 7(D).

387. That is, establishing an appropriation through actual diversion and beneficial use of water rather than through statutory permitting and licensing procedures. *Idaho Power Co. v. Idaho Dept. of Water Resources*, 255 P.3d 1152, 1160, 151 Idaho 266, 274 (2011).

388. At the time of the Agreement, the Idaho Code required that claims for water rights based on actual diversion and beneficial use of water (“Constitutional method” claims) be filed with the Department of Water Resources “not later than June 30, 1983,” except that “late claims” (for which higher filing fees were required) could be filed up until “June 30, 1985.” 1983 Idaho Sess. Laws 141–43. The Legislature in 1985 extended the “late claim” filing deadline to “June 30, 1988,” 1985 Idaho Sess. Laws 543, and in 1988 the Legislature extended the filing deadline in the SRBA to June 30, 1990. 1988 Idaho Sess. Laws 272. The SRBA filing deadline for “constitutional method” claims was eliminated altogether in 1994. 1994 Idaho Sess. Laws 121.

389. The State and IPC represented to the SRBA Court that the Agreement’s filing deadline was likely chosen to be consistent with the statute’s filing deadline. *State Of Idaho And Idaho Power Company’s Joint Motion For Summary Judgment* at 6, *In re SRBA*, Case No. 39576, Subcase No. 00-91013 (Dec. 22, 2010).

390. Order on Motion For Approval Of Settlement at 19, *In re SRBA*, Case No. 39576, Consolidated Subcase No. 00-92023, 16 (Jan. 4, 2010).

The SRBA Court determined this question of “unintended consequences” and “a latent ambiguity” in the subordination provision could require a “full summary judgment hearing or evidentiary hearing.”³⁹¹ At the parties’ request, therefore, the Court decreed all proposed elements of the hydropower water rights as modified by the Court, with the exception of the provision subordinating the hydropower water rights to valid “constitutional method” claims filed by June 30, 1985.³⁹² The question raised by this provision was consolidated with Basin-Wide Issue No. 13 for resolution.³⁹³

E. Basin-Wide Issue 13, Part 2

Basin-Wide Issue No. 13 had been designated in 2004 as: “To what extent, if any, should the *Swan Falls Agreement* be addressed in the SRBA or memorialized in a decree?”³⁹⁴ The proceedings were then stayed “pending the reporting of Idaho Power Co.’s water rights” for the main stem of the Snake River.³⁹⁵ In re-activating the Basin-Wide Issue 13 proceedings, the SRBA Court initially identified five questions raised by the parties, but ultimately these boiled down to two issues: preventing “rebound calls”; and specifically identifying the water rights that were the intended third-party beneficiaries of the contract-based subordination provisions, and preserving these benefits in SRBA decrees.³⁹⁶

The key to resolving these issues was that the State and IPC agreed “the basic architecture” of the *Swan Falls* settlement contemplated “two types” of hydropower subordination, and that all water rights were protected by one of these two forms of subordination.³⁹⁷ The demarcation between the two types of subordination was based on whether the beneficiary water rights were already existing at the time of the Agreement, or were “future” water rights, that is, water rights established after the Agreement.

391. *Id.* at 18.

392. Consolidation Order, *supra* note 378, at 9–10.

393. *Id.* at 9–10. This question was described at the time as “the ‘rebound call’ issue.” *Id.* But during subsequent proceedings in Basin-Wide Issue 13, the term “the rebound call issue” was used to reference a distinctly different question, as will be discussed.

394. BWI 13 Order, *supra* note 191, at 8–9.

395. *Id.* Administrative Basin 02 is the main stem of the Snake River between Milner Dam and the Murphy gaging station.

396. The five issues the SRBA Court identified were: (1) the “rebound call” issue; (2) identifying and preserving protections for third-party beneficiaries of the Agreement; (3) identifying the water rights that benefitted from subordination of the hydropower water rights under Paragraphs 7C and 7D of the Agreement; (4) subordination consistency between the IWRB’s Murphy minimum flow water rights and IPC’s hydropower water rights; and (5) SRBA General Provision for Basin 2 regarding the comprehensive management plan for administration of water rights above the Murphy Gaging Station and below Milner Dam as reflected in the State Water Plan. Second Amended Scheduling Order, *In re* SRBA, Case No. 39576, Subcase No. 00-91013 (Basin-Wide Issue 13) (Nov. 9, 2010). The fourth and fifth issues ultimately were withdrawn, Order Withdrawing Issue No. 4, *In re* SRBA, Case No. 39576, Subcase No. 00-91013 (Basin-Wide Issue 13) (Nov. 1, 2011); Order Granting Motion To Withdraw Objection, *In re* SRBA, Case No. 39576, Subcase No. 00-91013 (Basin-Wide Issue 13) (Sep. 28, 2011), and as the proceedings progressed the third issue was largely subsumed by the second. The proceedings in Basin-Wide Issue 13 to resolve objections to the proposed partial decrees for the hydropower water rights were lengthy and complex. The following discussion is intended as a summary of the main issues.

397. Memorandum In Support Of State Of Idaho’s And Idaho Power Company’s Joint Motion For Reconsideration, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023, 4 (Jan. 29, 2010).

The first type of subordination—contract-based subordination of all of the water rights for IPC’s hydropower operations between Milner Dam and Murphy to uses of water existing when the Agreement was signed³⁹⁸—came to be known as “unqualified” subordination because it is effective even if the flow at Murphy drops below 3900/5600.³⁹⁹ The second type—statutory subordination of the hydropower water rights held in trust by the State pursuant to Idaho Code § 42-203B to uses of water established after the Agreement was signed⁴⁰⁰—came to be known as “qualified” subordination, because it is effective only when the flow at Murphy equals or exceeds 3900/5600.⁴⁰¹

The water rights intended to benefit from “unqualified” subordination were the classes of water rights identified in Paragraphs 7(C) and 7(D) of the Swan Falls Agreement and Paragraphs 2(a), 2(d) and 2(e) of the 1180 Contract.⁴⁰² The intended beneficiaries of “qualified” subordination, however were all “future” water rights, that is, water rights established after the execution of the Agreement and in accordance with state law.⁴⁰³ These are known as “trust water rights,” because pursuant to Idaho Code § 42-203B they divert and use “water first appropriated under hydropower rights held in trust by the State of Idaho.”⁴⁰⁴

1. The “Rebound Call” Issue

Defining and resolving “the rebound call issue” hinged upon recognition of the distinction between “unqualified” and “qualified” subordination, and of the nature of “trust water rights.” As the SRBA Court stated in framing “the rebound call issue”:

The “rebound call issue” describes the concern that the holder of a “trust water right” could, in response to administration of the hydropower right, make a call on certain junior water rights that benefit from unqualified subordination under the Swan Falls Agreement and the 1180 Contract. This would be conceptually possible because water users who applied for a water right before the date of the Agreement, but who neither developed that right nor substantially invested in its development before October 25, 1984, hold “trust water rights” despite

398. *Id.*

399. Joint Motion For Partial Summary Judgment On The “Rebound Call” Issue, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, 5 (March 25, 2011); Order Granting State Of Idaho’s Second Amended Motion To Include Subordination Language On Water Rights Affected By The Swan Falls Settlement, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, 2 (Jan. 12, 2012).

400. Memorandum In Support Of State Of Idaho’s And Idaho Power Company’s Joint Motion For Reconsideration, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023, 4 (Jan. 29, 2010).

401. *In re* SRBA, Case No. 39576, Subcase No. 00-91013 at 2 (Jan. 12, 2012) (Order Granting State Of Idaho’s Second Amended Motion To Include Subordination Language On Water Rights Affected By The Swan Falls Settlement) [hereinafter Grant of Second Amended Motion].

402. *In re* SRBA, Case No. 39576, Subcase No. 00-91013 at 2, 7 (Jul. 12, 2011) (Order On State Of Idaho’s Motion For Partial Summary Judgment On Issue No. 2) [hereinafter Order On State Of Idaho’s Motion For Partial Summary Judgment on Issue No. 2].

403. See Statement of Legislative Intent, *supra* note 5, at 59 (“The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is available for appropriation by future upstream users who satisfy the criteria of Idaho law.”).

404. Rebound Call Decision, *supra* note 6, at 13; See also Joint Motion For Partial Summary Judgment On The “Rebound Call” Issue, *supra* note 399, at 3 (“These water rights are often referred to as ‘trust water rights’ because they are deemed to divert the water first appropriated under the hydropower water rights held in trust”). “Trust water rights” must be “acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.” IDAHO CODE § 42-203B (2015).

[holding] a priority earlier than some rights that receive the benefit of unqualified subordination.⁴⁰⁵

Such a “rebound call” would effectively render the protection of “unqualified” subordination “meaningless” for some of the intended beneficiaries.⁴⁰⁶ This would have been contrary to the original intent of protecting uses existing at the time of the Agreement from curtailment by IPC hydropower operations.

While this unintended result initially appeared to be possible under the language of the partial decrees as incorporated from the Agreement, the SRBA Court concluded that such a “rebound call” is precluded as a matter of trust law. The Court found that when the hydropower water rights for flows in excess of 3900/5600 at Murphy were placed in trust by operation of law under Idaho Code § 42-203B, they had already “been subordinated via the plain language of the Swan Falls Agreement and 1180 Contract to junior-priority water rights that met the criteria for unqualified subordination.”⁴⁰⁷ Thus, holders of “trust water rights”

could receive no greater right or interest in that water than that held by the State as trustee. . . . trust law precludes a rebound call situation such as the one described above . . . those individuals that acquired a trust water right . . . cannot make a call against water rights benefitting from unqualified subordination.⁴⁰⁸

This elegant analysis disposed of what had been a thorny question latent in the language and structure of the Settlement, and had initially seemed incapable of resolution without adding language to the decrees that superficially if not substantively departed from the language of the Agreement. It was therefore important to memorialize this conclusion in the SRBA decree to prevent future confusion over the issue. The Court ordered that a definition of “Trust Water Right” be included in the SRBA Final Decree language stating, in part, that “[t]rust water rights are subordinate to all water rights that enjoy the benefit of unqualified subordination” of the hydropower water rights.⁴⁰⁹

405. Rebound Call Decision, *supra* note 6, at 9 (quoting Joint Motion For Partial Summary Judgment On The “Rebound Call” Issue, *supra* note 399, at 7).

406. Rebound Call Decision, *supra* note 6, at 10. Note that this formulation of the “rebound call issue” differed from the “rebound call” issue that arose in the previous proceedings in Consolidated Subcase No. 00-92023.

407. *Id.* at 11.

408. *Id.*

409. Rebound Call Decision, *supra* note 6, at 12. The full definition of “trust water right” as ordered by the Court is as follows:

Trust Water Right: A water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho. Trust water rights are subordinate to all water rights that enjoy the benefit of unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-0202026 pursuant to the Swan Falls Settlement.

Rebound Call, *supra* note 6, at 12. The water right numbers listed in the remark are the hydropower water rights decreed in the name of IPC and in the name of the State as trustee pursuant to the Swan Falls Settlement. The Court also ordered language added to the partial decree for any “trust water right” with a priority date senior to July 1, 1985, stating that the right “cannot make a delivery call on any water rights with a priority date senior to October 25, 1984, or any water rights identified on its [sic] face as receiving the benefit of unqualified subordination” of the hydropower water rights. Rebound Call Decision, *supra* note 6, at 12–13.

2. The Intended Third-Party Beneficiaries

The other issue resolved in the re-activated proceedings on Basin-Wide Issue 13 was the question of specifically identifying water rights held by intended third-party beneficiaries of the contract-based subordination provisions, and preserving this protection in SRBA decrees. This question actually consisted of three sub-issues, each of which is discussed below.

The first problem arose from the fact that the filing deadline in the Agreement's subordination provision addressing "constitutional method" water rights—June 30, 1985—had never been amended to reflect subsequent legislative changes in the statutory deadline. As previously discussed, this inconsistency made it theoretically possible that a "constitutional method" water right decreed in the SRBA for a use existing at the time the Agreement was signed would not be protected by "unqualified" subordination simply because it had not been formally claimed in the SRBA until after June 30, 1985. Further, such a water right could theoretically respond to a call by IPC by demanding curtailment of any junior "constitutional method" water rights for which claims had been filed by June 30, 1985—thus circumventing their "unqualified" subordination protection and the intent of the Agreement.⁴¹⁰

These potential anomalies were resolved by the 1180 Contract, which provided that persons using water under a valid "constitutional method" claim "prior to November 19, 1982 . . . may continue the perfection of such water right in compliance with Idaho law without protest or interference by the Company."⁴¹¹ In other words, as the State and IPC argued in a joint motion, the June 30, 1985 deadline of the Agreement was "rendered moot" by "the language of the 1180 Contract," because it effectively granted the protection of "unqualified subordination to all [constitutional method] beneficial use claims decreed in the SRBA, regardless of the date upon which they were filed."⁴¹² The SRBA Court therefore held "as a matter of law that the meaning and effect of Paragraph 7D of the Swan Falls Agreement is to grant the benefit of unqualified subordination . . . to all beneficial use claims decreed in the SRBA, regardless of the date upon which they were filed."⁴¹³

On June 25, 2015, the SRBA Court directed that the definition of "Trust Water Right" be included in the Final Unified Decree. *In re* SRBA, Case No. 39576, Order Amending Final Unified Decree at 1 ("Due to clerical error resulting from oversight and omission . . . the definition of 'Trust Water Right' was omitted from the *Final Unified Decree*.").

410. This issue had been described in previous proceedings in Consolidated Subcase No. 00-92023 as "the 'rebound call' issue." See *supra* note 397.

411. 1180 Contract, *supra* note 71, at ¶ 2(a). The 1180 Contract referenced November 19, 1982 because that was the date Idaho Supreme Court issued its initial decision reversing the district court's subordination ruling. The Court subsequently re-issued its opinion on March 31, 1983, which is the date of the reported decision. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983).

412. State Of Idaho And Idaho Power Company's Joint Motion For Summary Judgment, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, at 3 (Dec. 22, 2010).

413. *In re* SRBA, Case No. 39576, Subcase No. 00-91013 at 4 (Feb. 24, 2011) (Order Granting Joint Motion For Summary Judgment; Order Lifting Stay). The court further held that the Paragraph 7(D) subordination provision language grants the benefit of unqualified subordination "to all water rights for uses existing prior to October 25, 1984 for which an application was filed with IDWR on or before June 30, 1985." *Id.*

The second issue was the question of whether the “public at large” was an intended third party beneficiary of the Agreement.⁴¹⁴ This argument had been based on the contention that “‘separate and apart from the subordination of IPC water rights,’” the Swan Falls Agreement was also “‘an allocation of the State’s water resources, a more general and pervasive action affecting all persons,’” and “‘an apportionment of water in an arid state.’”⁴¹⁵ The SRBA Court declined to accept these arguments,⁴¹⁶ holding there was no supporting language in the Agreement or the 1180 Contract: “While the public at large may arguably be considered incidental beneficiaries of the Swan Falls settlement, that alone is insufficient to confer a third-party beneficiary right to the public at large to enforce the provisions of the contracts.”⁴¹⁷ The Court determined, rather, that “the classes of water users” identified in Paragraphs 7(C) and 7(D) of the Swan Falls Agreement and Paragraphs 2(a), 2(d) and 2(e) of the 1180 Contract were the intended third party beneficiaries of “unqualified” subordination of the hydropower water rights.⁴¹⁸

The third, and most difficult, question for purposes of preserving the third-party protections of the Swan Falls Settlement was specifically identifying, in administrable provisions in SRBA decrees, the individual water rights benefitting from the “unqualified” subordination provisions of the Agreement and the 1180 Contract.⁴¹⁹ The Agreement and the 1180 Contract identified “classes” of beneficiary water rights⁴²⁰ using terms and descriptors such as the date of first beneficial use or the fact of having been dismissed from Ada County district court case No. 81375.⁴²¹ Such terms and descriptors do not appear on the face of an SRBA water right decree, however.⁴²² Thus, a watermaster would not be able to determine whether a given water right fell within one of the beneficiary “classes” and is protected from an IPC delivery call simply by reviewing the partial decree. Such a determination would require, rather, a review of voluminous court records and/or water right files at IDWR’s main office in Boise.⁴²³

A watermaster in routinely distributing water and regulating diversions, however, generally must rely on the information on the face of a water right decree.⁴²⁴ Further, with an estimated 27,000+ beneficiary water rights entitled to the protection of “unqualified”

414. Order On State Of Idaho’s Motion For Partial Summary Judgment On Issue No. 2, *supra* note 402, at 10–11.

415. *Id.* at 10.

416. *Id.* at 10–11.

417. *Id.* at 10.

418. *Id.* at 7; Rebound Call Decision, *supra* note 6, at 7.

419. Second Scheduling Order, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, at 1.

420. Order on State of Idaho’s Motion for Partial Summary Judgment on Issue No. 2, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, at 2, 7 (July 12, 2011).

421. Swan Falls Agreement, *supra* note 3, at ¶¶ 7(C)–(D); Reaffirmation Framework, *supra* note 288, at Exhibit 6.

422. Order on State of Idaho’s Motion for Partial Summary Judgment on Issue No. 2, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, at 7 (July 12, 2011); see IDAHO CODE §§ 42-1411, 42-1412 (2015) (listing the elements of a decreed water right).

423. See generally State Of Idaho’s Second Amended Motion To Include Subordination Language On Water Rights Affected By The Swan Falls Agreement, *In re* SRBA, Case No. 39576, Subcase No. 00-91013 (Mar. 21, 2011) [hereinafter Idaho’s Second Amended Motion] (discussing the need for SRBA decrees to include “a clear and straightforward indication of which rights enjoy the benefit of unqualified subordination” for purposes of efficiently administering the subordination provisions).

424. See *Almo Water Co. v. Darrington*, 501 P.2d 700, 705, 95 Idaho 16, 21, (1972) (“Because the watermaster is a ministerial officer, he is authorized to distribute water only in compliance with applicable decrees.”).

subordination of the hydropower water rights,⁴²⁵ as a practical matter it was simply not possible for a watermaster to perform timely reviews of court records or IDWR water right files. In short, the “unqualified” subordination provisions in the proposed partial decrees (and in the Agreement) were essentially un-administrable.⁴²⁶

It was not immediately obvious how to handle the problem. At the outset, the only alternatives appeared to be: (1) re-open the partial decrees for the 27,000+ beneficiary water rights and insert provisions identifying them as benefitting from “unqualified” subordination of the hydropower water rights; or (2) compile and maintain lists of the individual water rights benefitting from “unqualified” subordination. While the prospect of re-opening 27,000+ water right decrees was obviously daunting and legally problematic, the proposal to maintain water right lists also had problems: the lists would have to be regularly reviewed and updated in perpetuity to reflect changes such as transfers, splits, re-numbering, etc.⁴²⁷ Moreover, such lists would not be decreed elements or conditions of the beneficiary water rights, but simply administrative aids.

The State therefore proposed a “hybrid” solution, based on the fact that the vast majority of the water rights protected by “unqualified” subordination had priority dates senior to the October 25, 1984 signing date of the Agreement and the 1180 Contract.⁴²⁸ The “hybrid” solution proposed three new subordination provisions: one for the partial decrees for the hydropower water rights that would protect most of the beneficiary water rights simply by operation of priority; and two alternative provisions for any remaining beneficiary water rights that would not be protected by operation of priority, but nonetheless were entitled to either “unqualified” or “qualified” protection.⁴²⁹

The first “hybrid” provision replaced a provision in the partial decrees for the hydropower water rights that limited subordination to “constitutional method” water rights to those for which claims had been filed by June 30, 1985. The “hybrid” replacement provision stated the hydropower water rights were subordinate to any water right “with a priority date senior to October 25, 1984, unless otherwise indicated on the face of individual water rights.”⁴³⁰ Because priority date is a decreed element set forth on the face of a water right decree,⁴³¹ the “hybrid” provision is easily and efficiently administered. It

425. Idaho’s Second Amended Motion, *supra* note 423, at 7.

426. This fact underscores the general need for caution when attempting to memorialize or reflect contractual language in a water right decree. Language that suffices for describing or defining a water right in a contract may nonetheless be inadequate or problematic from an administrative standpoint if simply incorporated verbatim into a water right decree. *See supra* note 373.

427. This was also the reason the State and IPC had requested it be made clear that the list of dismissals from “the 7500 suit” was not “static.” Order on Motion for Approval of Settlement, *In re* SRBA, Case No. 39576, Consolidated Subcase No. 00-92023, at 19 (Jan. 4, 2010). Because the water rights dismissed from “the 7500 Suit” were also senior in priority to October 25, 1984, the “hybrid” solution discussed below preserved the subordination benefits to which these rights were entitled without reference to the original list of dismissals.

428. Idaho’s Second Amended Motion, *supra* note 423, at 8. The 1180 Contract has terminated because it “has been performed according to its terms.” 1180 Contract, *supra* note 71, at ¶ 7(b).

429. *Id.*

430. The State’s motion proposed the substance but not the specific language of the replacement subordination provision. Swan Falls Agreement, *supra* note 3, at 8–9. The replacement subordination provision for the hydropower water rights as subsequently decreed by the SRBA Court is as follows: “This water right is subordinate to all water rights diverting water from the Snake River and surface and groundwater sources tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on the face of the individual water rights.” Grant of Second Amended Motion, *supra* note 401, at 7.

431. IDAHO CODE §§ 42-1411(2)(d), 1412(6) (2015).

also provides a means of ensuring the benefits of “unqualified” subordination for the vast majority of the thousands of beneficiary water rights by simply replacing one of the provisions in the twenty-four (24) partial decrees for the hydropower water rights with a new provision.⁴³²

This proposal did not ensure subordination protection for all beneficiary rights, however.⁴³³ Based on a review of IDWR water right files, the State had identified approximately 57 water rights with priority dates junior to October 25, 1984 that nonetheless appeared to be entitled to the benefits of “unqualified” subordination of the hydropower water rights pursuant to the 1180 Contract’s protections of uses in which “substantial investment” had been made.⁴³⁴ This group became known as the “Appendix A” water rights.⁴³⁵ The State proposed that the partial decrees for the Appendix A water rights be amended to include the second of the three provisions of the “hybrid” solution: a provision stating that the Appendix A water rights enjoyed “the benefit of unqualified subordination” of the hydropower water rights.⁴³⁶

The third provision of the “hybrid” solution applied to a group of approximately 154 water rights that, based on a review of IDWR files, had priority dates senior to October 25, 1984 but nonetheless appeared to be “trust water rights” and thus not entitled to “unqualified” subordination protection.⁴³⁷ This group became known as the “Appendix B” water rights.⁴³⁸ The State proposed that the partial decrees for the Appendix B water rights be amended to include the third of the three provisions of the “hybrid” solution: a provision stating the rights enjoyed “the benefit of subordination . . . only so long as the average daily flows as measured at the Murphy Gaging Station meet or exceed the minimum flow [3900/5600] established by state action.”⁴³⁹

432. Grant of Second Amended Motion, *supra* note 401, at 7–8.

433. *See id.*

434. Idaho’s Second Amended Motion, *supra* note 423, at 9; 1180 Contract, *supra* note 71 at ¶ 2(a).

435. Swan Falls Agreement, *supra* note 3, at 9; 1180 Contract, *supra* note 71, at ¶ 2(a).

436. Swan Falls Agreement, *supra* note 3, at 9; 1180 Contract, *supra* note 71, at ¶ 2(a). The full text of the provision that State proposed for the Appendix A water rights is as follows: “This water right enjoys the benefit of unqualified subordination of hydropower water rights nos. 02-100, 02-4000A, 02-4001A, 02-2032A, 02-4000B, 02-4001B, 02-2032B, 02-2036, 02-2056, 02-2065, 02-2064, 02-10135, 02-2060, 02-2059, 02-2001B, 02-2001A, 02-2057, 37-2128, 37-2472, 37-2471, 37-20710, 37-20709, 36-2013, 36-2018, and 36-2026.” This is also the language that was eventually decreed. Grant of Second Amended Motion, *supra* note 401, at 7.

437. “Trust water rights” are rights perfected after the Agreement was signed and therefore generally have priority dates junior to the signing date of October 25, 1984.

438. State of Idaho’s Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Agreement, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, at 10 (Mar. 21, 2011).

439. *Id.* The full text of the provision that State proposed for the Appendix B water rights was as follows:

This water right enjoys the benefit of subordination of hydropower water rights nos. 02-100, 02-4000A, 02-4001A, 02-2032A, 02-4000B, 02-4001B, 02-2032B, 02-2036, 02-2056, 02-2065, 02-2064, 02-10135, 02-2060, 02-2059, 02-2001B, 02-2001A, 02-2057, 37-2128, 37-2472, 37-2471, 37-20710, 37-20709, 36-2013, 36-2018, and 36-2026 only so long as the average daily flows at Murphy Gaging Station meet or exceed the minimum stream flows established by state action.

This is also the language that was eventually decreed. Grant of Second Amended Motion, *supra* note 401, at 8.

The SRBA Court issued an order establishing notice and hearing procedures for resolving any objections to these proposals, including claims of subordination protection for water rights that were not covered by any of the three proposed subordination provisions of the “hybrid” proposal.⁴⁴⁰ Under these procedures, the Appendix A and Appendix B lists were finalized, and the Court adopted the “hybrid” solution.⁴⁴¹

The subordination provision of the hydropower water rights referencing the June 30, 1985 filing deadline was replaced with a provision subordinating the hydropower water rights to “all water rights . . . with a priority date senior to October 25, 1984, unless otherwise indicated” on the face of the individual water rights,⁴⁴² and the Court ordered the hydropower water rights to be decreed as amended.⁴⁴³ The partial decrees for the Appendix A and Appendix B water rights were also amended to include either the “A” or “B” subordination provision, as appropriate.⁴⁴⁴ The Court subsequently ordered that the “qualified” subordination language be included in the partial decrees for eight additional water rights.⁴⁴⁵

Finally, there were nine (9) beneficiary water rights that needed subordination provisions but which had been administratively split from other water rights. These water rights had to be administratively brought back within the purview of the SRBA to ensure they had the amendments necessary to preserve their subordination benefits. The Court requested IDWR to issue “Notices of Completed Administrative Proceedings” (“NCAPs”) for these water rights so the court could enter partial decrees that included the appropriate subordination provisions.⁴⁴⁶ The NCAPs were issued, and amended partial decrees entered, for these water rights.⁴⁴⁷ This completed the SRBA proceedings on the Swan Falls Agreement.

V. THE SWAN FALLS SETTLEMENT TODAY

In a sense, the SRBA proceedings on the Swan Falls Agreement constituted the final chapter on the formal resolution of the Swan Falls Controversy. The SRBA proceedings were necessary to resolve lingering questions of the ownership and subordination of the hydropower water rights that are the subject of the Agreement, and to ensure that these matters were correctly reflected in SRBA decrees.

440. Procedural Order Governing State of Idaho’s Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Agreement, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, 1–3 (Apr. 12, 2011).

441. *Id.*

442. Grant of Second Amended Motion, *supra* note 401, at 7. The full text of the subordination provision decreed for the hydropower water rights is as follows: “This water right is subordinate to all water rights diverting water from the Snake River and surface and groundwater sources tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on the face of the individual water rights.”

443. *Id.* The hydropower water rights so decreed were water rights nos.: 02-100, 02-4000A, 02-4001A, 02-2032A, 02-4000B, 02-4001B, 02-2032B, 02-2036, 02-2056, 02-2065, 02-2064, 02-10135, 02-2060, 02-2059, 02-2001B, 02-2001A, 02-2057, 37-2128, 37-2472, 37-2471, 37-20710, 37-20709, 36-2013, 36-2018, and 36-2026.

444. *Id.* at 7–8.

445. Order Granting State of Idaho’s Motion to Alter or Amend, *In re* SRBA, Case No. 39576, Subcase No. 00-91013, at 3 (Nov. 30, 2012).

446. *Id.* at 2–3.

447. *Id.*

The SRBA proceedings also disposed of a number of ancillary misconceptions about the intent and effect of the Settlement that had taken root over the years, such as views that the Agreement “guaranteed” minimum flows of 3900/5600 at Murphy and is “breached” or “violated” if flows drop below those levels; that the trust consisted of a 600 c.f.s. “block of water”; and that the Swan Falls Agreement was itself a “comprehensive plan” for development of the Snake River basin rather than simply a vehicle to propose a settlement. That said, the basic issue that drove the Swan Falls Controversy—the need to balance competing demands for a limited resource—is alive and well today.

While the Swan Falls Controversy was framed in terms of hydropower subordination, the Settlement sought to address the larger and more fundamental question of how to achieve “a proper balance among competing demands for a limited resource . . . water in the Snake River system.”⁴⁴⁸ The Settlement’s numeric expression of the “proper balance” among various demands on the waters of the Snake River basin is the Milner Zero Flow Policy and Murphy minimum stream flows. Now that issues related to the intent and effect of the Milner Zero Flow Policy and hydropower and minimum stream flow water rights have been resolved, the questions going forward will not hinge on the intent or effect of the Swan Falls Settlement, but rather will focus on water resource management and administration.

While the Settlement contemplated that the Snake River should be managed to sustain the Murphy minimum stream flow, it did not address the underlying tension between the Murphy minimum stream flow and the Milner Zero Flow Policy. Day-to-day administration of the ESPA to protect the Murphy minimum stream flow and promote optimum beneficial use and development of the ESPA were left to state law and the State Water Plan.⁴⁴⁹

Management of the ESPA is the key issue because it is the primary source of the flows measured at Murphy. As stated in the 1985 State Water Plan amendments adopted to implement the Settlement:

The zero flow established at Milner means that river flows downstream from that point to Swan Falls Dam may consist almost entirely of ground-water discharge during portions of low-water years. The Snake Plain aquifer which provides this water must therefore be managed as an integral part of the river system.⁴⁵⁰

During the Settlement implementation proceedings, it was recognized that the watermaster’s traditional regulation tool—curtailment of junior appropriators—is poorly suited to administering the ESPA and protecting the Murphy minimum stream flow: “cutting off a junior appropriator on the Snake Plain doesn’t do any good in terms of days or months, even, perhaps for the flow at Murphy” because of the flow-attenuating nature of

448. Framework, *supra* note 43, at 1.

449. See Swan Falls Agreement, *supra* note 3, at 8. (stating the Agreement “shall not be construed to limit or interfere with the authority and duty” of the Department or the IWRB “to enforce and administer the laws of the state which it is authorized to enforce and administer.”).

450. Minutes, Senate Res. & Env’t Comm. (Idaho, Mar. 4, 1985); IDAHO WATER RES. BD., IDAHO STATE WATER PLAN 35 (1986), available at http://www.idwr.idaho.gov/waterboard/WaterPlanning/State-WaterPlanning/State_Planning.htm [hereinafter 1986 IDAHO STATE WATER PLAN]; see 2012 Idaho State Water Plan 44 (2012) (quoting 1986 IDAHO STATE WATER PLAN).

the ESPA.⁴⁵¹ This problem was also discussed in the Department's 1988 "Policy And Implementation Plan For Processing Water Right Filings In The Swan Falls Area"⁴⁵²:

The traditional method of stopping or cutting back the use of junior rights during times of scarcity is not adequate to guarantee that senior flow rights or minimum stream flows in the Snake River will be met. Curtailment of junior ground water pumping rights is inadequate to protect senior Snake River flow rights because of the time delay between reduced ground water pumping and the effect reaching the Snake River.⁴⁵³

Curtailing junior ground water diversions from the ESPA to protect the Murphy minimum stream flow is also inefficient in that only a small fraction of the water made available by curtailment may actually reach the Snake River at Murphy. The volume of ground water use that must be curtailed, therefore, is likely to be much larger than the volume of water actually needed to support flows of 3900/5600 at Murphy during a period of shortage. Further, while in most years there are only two relatively brief periods during which the Murphy minimum stream flow is at risk,⁴⁵⁴ ground water curtailment must take place over longer timeframes to eliminate or minimize this risk. Thus, one of the most significant challenges in short-term ESPA administration is developing alternatives to curtailment.

One alternative to curtailing the "trust water rights" is to temporarily increase the volume of surface water passing Milner Dam when flows are (or will be) below 3900/5600 at Murphy. This approach would provide more timely, efficient, and flexible protection for the Murphy minimum stream flows than curtailment of ground water users, and with less economic disruption.⁴⁵⁵

The acquisition of storage water for this purpose was authorized in the 1985 State Water Plan amendments adopted to implement the Settlement.⁴⁵⁶ The 1985 amendments included a policy regarding "Stored Water for Management Purposes,"⁴⁵⁷ which stated "[i]t is the policy of Idaho that reservoir storage be acquired in the name of the Idaho Water Resource Board to provide management flexibility in assuring the minimum flows designated for the Snake River," and that "at some time stored surface water may be necessary to maintain the designated minimum flows."⁴⁵⁸ The IWRB has since acquired

451. Transcript of State Water Plan Hearing On Policy 32, Twin Falls, Idaho (Idaho Water Res. Bd.), Jan. 31, 1985, 2:00 p.m. and 7:00 p.m), at 79 [hereinafter *Idaho Water Resource Board*] (discussing "Policy 32J, stored water for management purposes") (on file with authors).

452. Implementation Plan, *supra* note 187.

453. *Id.* at 6–7.

454. The first period is late March, when "winter" flows are diminishing but the minimum stream flow is still at the "winter" level of 5,600 c.f.s. The second is late June to early July, when the minimum stream flow is 3,900 c.f.s., but irrigation diversion demand is high and agricultural returns flows to the river are still relatively low. Outside of these two critical periods, flows at Murphy generally are well above the minimum stream flow levels.

455. As previously discussed, the Milner "zero c.f.s." minimum stream flow does not require "zero" flow past Milner Dam. Rather, it authorizes uses above Milner Dam to reduce to flows at the dam to zero, and precludes delivery calls to send water past Milner Dam to support downstream uses.

456. Senate Res. & Env't Comm., *supra* note 450.

457. *Id.* attachment at 7–8.

458. *Id.* at 7. This concept was also explained during the 1985 IWRB hearings on the State Water Plan amendment implementing the Settlement. *See, e.g., Idaho Water Resource Board, supra* note 451, at 79; Transcript of Proceedings, Public Information Meeting Regarding Changes to State Water Plan—Policy, at 31–33 (Idaho Water Res. Bd.) (Feb. 6, 1985, 2 PM and 7 PM) (Lewiston, Idaho) (on file with authors).

5,000 acre-feet of storage in Palisades Reservoir that can be, and has been, used to protect the Murphy minimum stream flows.

Long-term, however, the IWRB's storage may not be sufficient to avoid curtailments in a very low water year, or in a series of moderately low water years. It is not difficult to imagine water supply scenarios in future years that would exhaust IWRB's storage without preventing or remedying flow shortfalls at Murphy.

A proposal to avoid such an outcome was included in the Department's 1988 "Policy and Implementation Plan." The Policy and Implementation Plan proposed purchases of "replacement water" to be funded by fees assessed on the water users who would be protected from curtailment—users of "trust water":

Because curtailment of ground water pumping during a given year will not be effective, a source of water is needed in the upper Snake River Basin to supply water to the river during periods of low flow at the Murphy gauging station. Those using trust water for consumptive uses must be responsible for insuring that the replacement water source is available when needed. A fee based upon the volume of trust water depleted is needed to provide funding to purchase or contract for a source of water to maintain the required minimum instream flows.⁴⁵⁹

While the 1988 fee proposal was not implemented and no "replacement water source" was purchased, the rationale for acquiring such "replacement water" is as compelling today as it was in 1988, if not more so.⁴⁶⁰ Assessing fees to finance the purchase of replacement water could, in combination with IWRB's storage, prevent curtailment of the "trust water rights" in all but the most extreme circumstances. It also would provide more timely and reliable protection for the Murphy minimum stream flows.

Additional ESPA administration alternatives have been developed in connection with efforts to resolve delivery calls against ESPA ground water users by senior water right holders other than IPC. While the Settlement provided for subordination of IPC's hydropower water rights, it did not subordinate the water rights of other surface water users or of spring water users.⁴⁶¹ Some of these water users have sought administration of junior ESPA ground water rights under the IDWR's Conjunctive Management Rules ("CM Rules").⁴⁶² The Settlement and delivery calls under the CM Rules ("CM Delivery Calls") thus converge at the question of management and administration of the ESPA. ESPA management is key to protecting the Settlement's Murphy minimum stream flow and also to protecting senior surface water rights in CM Delivery Calls; and both implicate the question of promoting optimum beneficial use and development of the ESPA.

459. Implementation Plan, *supra* note 187, at 7.

460. As previously discussed, flows at Murphy now regularly approach the minimum stream flow levels twice each year. This is consistent with expectations at the time of the Settlement. IPC in its 1987 responses to FERC inquiries regarding the Swan Falls Settlement predicted that under the Settlement depletions and development would continue for approximately thirty (30) years and that by 2015 flows at Murphy would approach the minimum stream flow levels of 3900/5600 on a regular basis. Response To Questions 5 and 6 Completing Response to Request for Information Dated January 30, 1987 at 5–6, *In re* Petition for Declaratory Order by Idaho Power Company (Fed. Energy Reg. Comm'n) (May 19, 1987) (Docket No. EI-85-38-000). That prediction has proven remarkably accurate.

461. Memorandum Decision, *supra* note 3; Clear Springs Food, Inc. v. Spackman, 252 P.3d 71, 75, 150 Idaho 790, 794 (2011) ("Chasing" water discussion).

462. "CM Rules" refers to the "Rules for Conjunctive Management of Surface and Ground Water Resources." IDAHO ADMIN CODE r. 37.03.11.000–.050 (2015).

Efforts to resolve the CM Delivery Calls are likely to produce curtailment alternatives that also will help to sustain the Murphy minimum stream flow.

The above-described actions, however, are not a substitute for developing a long-term ESPA management plan to protect the Murphy minimum stream flow that reduces or precludes the need for short-term administration by re-balancing water demands and supplies. The Idaho Legislature formally recognized the need for long-term ESPA management in 2007, requesting that the IWRB develop a “comprehensive” management plan for the ESPA.⁴⁶³ The IWRB in 2009 issued its “Comprehensive Management Plan” for the ESPA—also known as “ESPA CAMP.”⁴⁶⁴

The goal of the ESPA CAMP is to “sustain the economic viability and social and environmental health of the Eastern Snake Plain by adaptively managing a balance between water use and supplies.”⁴⁶⁵ The plan’s specific objectives are to: increase predictability by managing for a reliable supply; create alternative to curtailment; manage overall demand for water on the Eastern Snake Plain; increase recharge to the ESPA; and reduce withdrawals from the ESPA.⁴⁶⁶ ESPA CAMP establishes a long-term program for managing ESPA water supply and demand “through a phased approach to implementation, together with an adaptive management process to allow for adjustment or changes in management techniques as implementation proceeds.”⁴⁶⁷ The specific mechanisms to be used to adjust the ESPA water balance include:

- Ground water to surface water conversions;
- Managed aquifer recharge;
- Demand reduction, including: surface water conservation, buyouts, buydowns, and/or subordination agreements; rotating fallowing, dry-year lease agreements, and Conservation Reserve Enhancement Program (CREP) enhancements; and crop mix modification in the Aberdeen-Bingham Groundwater District;
- Pilot weather modification program; and
- Minimizing loss of incidental recharge.⁴⁶⁸

While ESPA CAMP was requested primarily for purposes of assisting in resolution of delivery call conflicts between senior surface and spring water right holders and junior ground water holders,⁴⁶⁹ its implementation will also help protect the Murphy minimum stream flow. Ultimately both matters raise the question of “[a]chieving a proper balance among competing demands for a limited resource . . . water in the Snake River system.”⁴⁷⁰ Further, while the specific water rights and legal standards applicable to the Settlement

463. 2007 Idaho Sess. Laws 1160–61 (House Concurrent Resolution No. 28).

464. IDAHO ADMIN. CODE r. 37.02.01.030 (2009); IDAHO WATER RES. BD., EASTERN SNAKE PLAIN AQUIFER COMPREHENSIVE MANAGEMENT PLAN (Jan. 2009), available at http://www.idwr.idaho.gov/waterboard/WaterPlanning/CAMP/ESPA/PDFs/ESPA_CAMP_lowres.pdf.

465. *Id.* at 4.

466. *Id.*

467. *Id.*

468. *Id.*

469. See 2007 Idaho Sess. Laws, *supra* note 466, at 1160 (“the Idaho Legislature is determined to facilitate and encourage a resolution of the surface/ground water rights conflict.”).

470. Framework, *supra* note 43, at 43.

and the CM Delivery Calls may differ, they must be resolved together because ultimately the solution for both is ESPA management and administration that protects vested rights, promotes optimum beneficial use and development of the resource, and “reflect[s] the broad public interest.”⁴⁷¹

VI. CONCLUSION

The Swan Falls Settlement resolved a dispute over subordination of hydropower water rights claimed by IPC that had raised significant public policy issues and thrown into question the State’s authority to manage and guide development of the water resources of the Snake River basin. The Settlement resolved the Controversy through a suite of legislative, executive, and judicial actions that were well documented and understood at the time, but with the passage of time became the subject of disputes focusing on hydropower water right ownership, hydropower subordination, aquifer recharge, and the Milner Divide-“two rivers” concept. These disputes were resolved via SRBA litigation and a formal reaffirmation of the intent and effect of the Settlement. As a result, the SRBA Court issued water right decrees that are consistent with the terms of the Agreement, the intent of the Settlement, and the extensive Settlement record.

Resolution of the SRBA litigation also re-emphasized the need for integrated management of the ESPA and the Snake River. The Milner Divide policy as reflected in SRBA decrees and codified at Idaho Code § 42-203B(2) means the ESPA is often the primary source of flows to provide 3900/5600 at Murphy, and thus must be managed together with and as a part of the Snake River. This presents significant water management and administration challenges similar to those that have arisen in the context of CM Delivery Calls by senior surface and spring water rights holders against junior ground water right holders. These challenges must be resolved together under a long-term, comprehensive management plan to achieve a balance among the various competing demands for the use of a limited resource.

471. *Id.*; see 2007 Idaho Sess. Laws 1160 (House Concurrent Resolution No. 28) (“the welfare of the people of the state of Idaho is dependent upon the management of the Eastern Snake Plain Aquifer.”).