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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSING WATER RIGHT PERMIT NO. 01-7011 IN THE NAME OF TWIN FALLS CANAL COMPANY AND NORTH SIDE CANAL COMPANY	**PREFILED TESTIMONY OF SHELLEY W. KEEN**

COMES NOW, the Idaho Department of Water Resources (Department), and pursuant to the Hearing Officer's pre-hearing order, submits *Prefiled Testimony of Shelley W. Keen.* Mr. Keen is the Water Rights Section Manager for the Department and has worked for the Department since December of 1990. Mr. Keen personally participated in the licensing of this water right and will be the Department's witness at the hearing set in this matter on June 2 and 3, 2010. The prefiled testimony explains the Department's basis for inclusion of the disputed elements in license no. 01-7011.

LIST OF SPONSORED EXHIBITS

EXHIBIT NO.	DESCRIPTION
IDWR 1	WORKSHEET SHOWING FINAL VOLUME CALCULATION
IDWR 2	APPELLANT'S BRIEF IN IDAHO POWER V. THE IDAHO DEPARTMENT OF WATER RESOURCES

PREFILED TESTIMONY OF SHELLEY W. KEEN

Q: WHAT IS YOUR FULL NAME?

A: Shelley Walter Keen.

Q: ARE YOU CURRENTLY EMPLOYED WITH THE IDAHO DEPARTMENT OF WATER RESOURCES?

A: Yes.

Q: HOW LONG HAVE YOU BEEN EMPLOYED WITH THE DEPARTMENT?

A: Nearly 20 years. Since December 17, 1990.

Q: WHAT IS YOUR JOB TITLE?

A: Water Rights Section Manager.

Q: ARE YOU FAMILIAR WITH LICENSED WATER RIGHT NO. 01-7011?

A: Yes, I participated in the preparation of the water right license for right no. 01-7011.

Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A: To explain the Department's basis for inclusion of the disputed elements in this license.

Q: WHEN THE DEPARTMENT ISSUED THE LICENSE FOR WATER RIGHT NO. 01-7011, THE DEPARTMENT INCLUDED AN ANNUAL DIVERSION VOLUME LIMIT OF 2,390,000.00 AF. IDAHO POWER HAS PROTESTED THE INCLUSION OF THE VOLUME ON WATER RIGHT LICENSE 01-7011. IS IT THE DEPARTMENT'S POLICY TO REQUIRE A VOLUME ON A HYDROPOWER LICENSE?

A: Yes, it is the Department's policy to require an annual diversion volume limit on all hydropower licenses. Idaho Code § 42-217 requires that an applicant submit proof of beneficial use showing "[t]he quantity of water which has been

beneficially applied for irrigation or other purposes." The Department's Beneficial Use Examination Rule 35.01.a (IDAPA 37.03.02.035.01.a) provides:

> All items of the field report must be completed and must provide sufficient information for the director to determine the extent of the water right developed in order for the report to be acceptable to the director.

Beneficial Use Examination Rule 35.01.j (IDAPA 37.03.02.035.01.j) states:

> The field examiner does not need to show total volume of water for municipal and fire protection uses on the field report unless the project works provide for storage of water.

This statute and these rules, when read together, provide that a field examiner must report an annual diversion volume for every beneficial use of water except fire protection use and municipal use. Idaho Code § 42-219 provides that when the Department issues a license, the license shall state, "the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied." I have worked in the Water Rights Section of the Water Allocation Bureau since September of 1994. During that time, it has been the policy of the Department to include an annual diversion volume limit on all water right licenses except those for fire protection use and municipal use based upon the above referenced statutes and rules. Most often the annual diversion volume is stated among the water right elements on the face of the license document, but sometimes the annual volume limit is stated in the conditions of approval.

Q: THE DEPARTMENT LICENSED THIS WATER RIGHT WITH AN ANNUAL DIVERSION VOLUME LIMIT OF 2,390,000.00 AF. HOW DID THE DEPARTMENT ARRIVE AT THIS NUMBER?

A: The Milner project has hydropower generation at two locations. The smallest of three generators is located at the dam. Two larger turbine-generator units are located in a powerhouse approximately one mile downstream from the dam. The licensed volume of water for the Milner project is the total volume put to beneficial use through all three generators. To calculate the volume for the license, the Department added the discharge measured at the Snake River gaging station at Milner (USGS Station 13087995) to the discharge from the two penstocks at the Lower Milner Power Plant (USGS Station 13087505). The USGS maintains a web page where they provide the discharge data from these two gaging stations. The underlying data used to calculate the volume was taken from the USGS web page.

Confirming beneficial use of water in connection with Idaho Power's permit required confirmation that power was generated with the water diverted. Just running water through a turbine is not beneficial use. Flow rates which are insufficient for generation are considered spill and not counted toward the volume of water beneficially used. Similarly, flow rates above the hydraulic capacity of the turbines is also considered spill and not counted toward the volume.

Data from the Lower Milner Power Plant station can be directly attributed to generation because it is essentially turbine discharge. The water measurements are courtesy of ultrasonic meters which are installed inside the penstocks of Unit#1 and Unit#2.

Data from the Snake River Gaging Station at Milner is courtesy of a USGS water-stage recorder. As a rated section of the river, the stage readings

taken at that location (~ 0.4 mile below the Milner dam) are converted to discharge using a stage-discharge "rating curve" relationship. The stage and related discharge represent all the water in the river at the site whether or not the water is used in power generation.

The Milner project is required to meet a FERC target flow of 200 cfs in the reach of the Snake River below Milner Dam. The Unit #3 turbine-generator, is sized to generate electricity from the water which must be released to satisfy the 200 cfs flow requirement. However, the required flow can be provided whether or not Unit #3 is online. So flow data from Snake River Gaging Station at Milner is not necessarily attributable to hydropower use. However, the Department did not have data to directly correlate flow data with power generation at Unit #3, so the Department assumed that power was generated when the flow was available.

In 1996, the USGS daily average flow data from the Snake River Gaging Station ranged between a high of 15700 cfs and a low of 223 cfs. The field examiner did not provide a capacity for Unit #3, stating only that it operated at 225.45 cfs. IDWR employee Michele Edl had personal knowledge that flows up to 230 cfs can be used to generate power at Milner Unit #3. To determine the annual volume limit for the water right license, the Department considered daily average flows between 223 cfs and 230 cfs as the beneficial use attributable to Unit #3 and added them to the daily average turbine flows from the lower power plant. As an additional check, the Department compared the total volume using 225.45 cfs as capacity for Unit #3 and the total volume using 230 cfs as the capacity. The difference between those two volumes was lost by rounding.

Idaho Power submitted proof of beneficial use for the Milner project in 1993. The preferred water year for determining the annual diversion volume limit would have been the first full calendar year immediately prior to the date when proof of beneficial use was submitted. However, the necessary measuring instrumentation was not in place until late in 1992, and outside of the calibration testing period 1993 was not a good water year. Therefore, the Department needed to evaluate the annual diversion volume for a year when data was available and flows likely approximated the best water year or years during the authorized development period for the Idaho Power's permit.

The Lower Milner Power Plant was sized with the expectation that flows greater than 4000 cfs would be available so that both Unit#1 and Unit#2 could be brought online. The Department chose to analyze data from 1996, which was the first calendar year after the field exam with flows above 4000 cfs available for more than 30 days during the year. This year better represented the expected design flow for the Lower Milner Powerhouse.

The Department created an Excel workbook to hold the series of spreadsheets demonstrating the entire data download and calculation process. Included as IDWR Exhibit 1 to my testimony is the worksheet which summarized the final volume calculation. Each daily total is a sum of the beneficial use flow rate from both generation facilities. The daily totals were summed to give a yearly total rate in cfs and that yearly total was multiplied by 1.9835 to get an annual volume in acre-feet. Consistent with Department reporting standards, the

annual volume figure was rounded to three significant figures. This results in an overall volume calculation of 2,390,000 AF.

Q: WHEN THE DEPARTMENT ISSUED THE LICENSE FOR WATER RIGHT NO. 01-7011, THE DEPARTMENT INCLUDED A TERM CONDITION ON THE WATER RIGHT. WHAT DOES THAT TERM CONDITION SAY?

A: The term condition states:

> The diversion and use of water for hydropower purposes under this water right is subject to review by the Director after the date of expiration of Milner Project License No. 2899 (11/30/2038) issued by the Federal Energy Regulatory Commission. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

Q: IN THE PROTEST, TWIN FALLS AND NORTH SIDE CANAL COMPANIES STATE THAT BECAUSE THE TERM CONDITION WAS NOT IN THE WATER RIGHT PERMIT ISSUED BY THE DEPARTMENT IN 1977, THE DEPARTMENT CANNOT INSERT THE CONDITION AT THE TIME OF LICENSING. DOES THE DEPARTMENT HAVE THE STATUTORY AUTHORITY TO INSERT A TERM CONDITION IN A HYDROPOWER RIGHT AT THE TIME OF LICENSING?

A: Yes, Idaho Code § 42-203B(6) provides the Department with the statutory authority to include a term condition in a hydropower water right at the time of licensing. This code section states in part, "The director shall also have the authority to limit a permit or license for power purposes to a specific term." The issue of the Department's legal authority to insert a term condition in a water right at the time of licensing is currently on appeal before the Idaho Supreme Court in the case Idaho Power v. IDWR, Supreme Court Docket No. 37348-2010. The parties are still in the briefing stage of the appeal. Attached to my testimony as IDWR Exhibit 2 is the State of Idaho's appellant brief, which was recently filed in the proceeding. While the facts are not identical, the underlying issues of

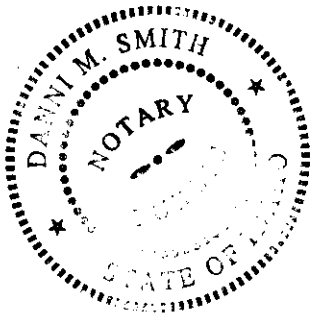
law are similar. In that proceeding, Idaho Power makes a similar allegation that the Department lacks the authority to include a term condition in water right at the time of licensing. I would turn the Hearing Officer's attention to pages 10 through 19 of the brief. These sections explain the Department understanding of Idaho Code § 42-203B(6) and the legislative history behind the statute.

DATED this 25th day of May, 2010.

Shelley W. Keen

Shelley W. Keen

SUBSCRIBED AND SWORN TO before me this 25th day of May, 2010.



Danni M Smith

Notary Public for _____
Residing at Boise ID
My commission expires Dec 12, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May, 2010, I caused a true and correct copy of the foregoing PREFILED TESTIMONY OF SHELLEY W. KEEN to be filed with the Court and served on the following parties by the indicated methods:

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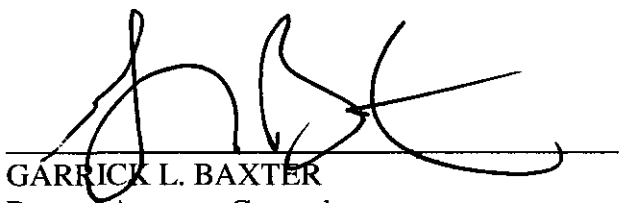
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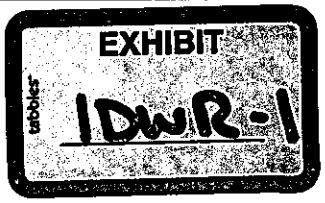
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Deputy Attorney General

---------- WARNING ----------
The data you have obtained from this automated U.S. Geological Survey database
have not received Director's approval and as such are provisional and subject to
revision. The data are released on the condition that neither the USGS nor the
United States Government may be held liable for any damages resulting from its use.
Additional info: http://waterdata.usgs.gov/id/nwis/help/?provisional
#
File-format description: http://waterdata.usgs.gov/nwis/?tab_delimited_format_info
Automated-retrieval info: http://waterdata.usgs.gov/nwis/?automated_retrieval_info
#
Contact: gs-w_support_nwisweb@usgs.gov
retrieved: 2008-09-24 14:01:51 EDT
#
Data for the following site(s) are contained in this file
USGS 13088000 SNAKE RIVER AT MILNER ID (TOTAL FLOW)

#
Data provided for site 13088000
DD parameter statistic Description
01 00060 00003 Discharge, cubic feet per second (Mean)
#
Data-value qualification codes included in this output:
A Approved for publication -- Processing and review completed.
e Value has been estimated.
#

agency_cd	site_no	datetime	01_00060_00003	01_00060_00003_cd	5s 15s 16d 14n 10s
Reference station 13088000 is a calculated total of stations 13087505 and 13087995					Flow above each powerplant capacity is spill; not a contribution to volume
		Date	USGS Q(cfs)		Combined Q for units 1-3 (cfs)
USGS	13088000	1/1/1996	3680	A	3680
USGS	13088000	1/2/1996	3680	A	3680
USGS	13088000	1/3/1996	3680	A	3680
USGS	13088000	1/4/1996	3630	A	3630
USGS	13088000	1/5/1996	3570	A	3570
USGS	13088000	1/6/1996	3580	A	3580
USGS	13088000	1/7/1996	3760	A	3760
USGS	13088000	1/8/1996	4300	A	4300
USGS	13088000	1/9/1996	5060	A	5060
USGS	13088000	1/10/1996	2710	A	2710
USGS	13088000	1/11/1996	4350	A	4350
USGS	13088000	1/12/1996	4710	A	4710
USGS	13088000	1/13/1996	4840	A	4840
USGS	13088000	1/14/1996	4730	A	4730
USGS	13088000	1/15/1996	4650	A	4650
USGS	13088000	1/16/1996	4580	A	4580
USGS	13088000	1/17/1996	4540	A	4540
USGS	13088000	1/18/1996	4490	A	4490
USGS	13088000	1/19/1996	4530	A	4530
USGS	13088000	1/20/1996	4570	A	4570

1996 Q data for 01-7011 Milner .xls
created by Michele Edl, Associate Engineer



		Date	USGS Q(cfs)		Combined Q for units 1-3 (cfs)			
USGS	13088000	1/21/1996	4680	A	4680			
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USGS	13088000	1/24/1996	5290	A	5290			
USGS	13088000	1/25/1996	3260	A	3260			
USGS	13088000	1/26/1996	5320	A	5320			
USGS	13088000	1/27/1996	5270	A	5270			
USGS	13088000	1/28/1996	5260	A	5260			
USGS	13088000	1/29/1996	5130	A	5128			
USGS	13088000	1/30/1996	5240	A	5238			
USGS	13088000	1/31/1996	4470	Ae	1900			
USGS	13088000	2/1/1996	4900	Ae	829			
USGS	13088000	2/2/1996	5150	A	5070			
USGS	13088000	2/3/1996	5150	A	5090			
USGS	13088000	2/4/1996	5150	Ae	5090			
USGS	13088000	2/5/1996	5250	Ae	5210			
USGS	13088000	2/6/1996	5620	A	5470			
USGS	13088000	2/7/1996	5770	A	5540			
USGS	13088000	2/8/1996	5760	A	5540			
USGS	13088000	2/9/1996	5840	A	5550			
USGS	13088000	2/10/1996	5880	A	5550			
USGS	13088000	2/11/1996	6040	A	5570			
USGS	13088000	2/12/1996	6120	A	5560			
USGS	13088000	2/13/1996	6320	A	5560			
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USGS	13088000	2/25/1996	11700	A	5590			
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USGS	13088000	2/27/1996	11600	A	5590			
USGS	13088000	2/28/1996	11600	A	5590			
USGS	13088000	2/29/1996	11600	A	5590			
USGS	13088000	3/1/1996	11600	A	5590			
USGS	13088000	3/2/1996	11600	A	5590			
USGS	13088000	3/3/1996	11600	A	5580			
USGS	13088000	3/4/1996	11800	A	5570			
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USGS	13088000	3/12/1996	17000	A	5550			
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USGS	13088000	5/5/1996	4830	A	4800			
USGS	13088000	5/6/1996	4790	A	4760			
USGS	13088000	5/7/1996	4660	A	4630			
USGS	13088000	5/8/1996	4200	A	4170			
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USGS	13088000	5/12/1996	3000	A	2970			
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USGS	13088000	5/15/1996	3060	A	3030			
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USGS	13088000	6/16/1996	5060	A	5050			
USGS	13088000	6/17/1996	4780	A	4750			
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1996 Q data for 01-7011 Milner .xls
created by Michele Edl, Associate Engineer

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USGS	13088000	6/26/1996	3870	A	3840			
USGS	13088000	6/27/1996	4360	A	4330			
USGS	13088000	6/28/1996	4470	A	4420			
USGS	13088000	6/29/1996	5010	A	4990			
USGS	13088000	6/30/1996	5560	A	5550			
USGS	13088000	7/1/1996	5250	A	5220			
USGS	13088000	7/2/1996	4630	A	4430			
USGS	13088000	7/3/1996	2600	A	2560			
USGS	13088000	7/4/1996	1570	A	1560			
USGS	13088000	7/5/1996	1720	A	1710			
USGS	13088000	7/6/1996	2150	A	2140			
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USGS	13088000	8/19/1996	1540	A	1540			
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USGS	13088000	8/21/1996	1520	A	1520			
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1996 Q data for 01-7011 Milner .xls
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1996 Q data for 01-7011 Milner .xls
created by Michele Edl, Associate Engineer

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USGS	13088000	12/5/1996	2020	A	2020			
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USGS	13088000	12/16/1996	4030	Ae	4028			
USGS	13088000	12/17/1996	3730	Ae	3730			
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round to 3 sigfig					**2,390,000**	**AFA**		

1996 Q data for 01-7011 Milner .xls
created by Michele Edl, Associate Engineer

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF LICENSED WATER RIGHT NO. 03-7018 IN THE NAME OF IDAHO POWER COMPANY,	)	
IDAHO POWER COMPANY, Petitioner-Respondent, -vs- THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondent-Appellant.	)	Supreme Court Docket No. 37348-2010

APPELLANT'S BRIEF

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Washington, The Honorable Susan E. Wiebe, District Judge, presiding

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A. THE DISTRICT COURT'S HOLDING THAT IDAHO CODE § 42-203B DOES NOT AUTHORIZE THE DIRECTOR TO ADD A TERM CONDITION TO A HYDROPOWER WATER RIGHT AT THE TIME OF LICENSING IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE, FAILS TO TAKE INTO CONSIDERATION THE IMPORTANT PUBLIC POLICIES OF LIMITING HYDROPOWER WATER RIGHTS AND IS CONTRARY TO THE LEGISLATIVE HISTORY OF THE STATUTE. 11

1. The plain language of Idaho Code § 42-203B explicitly authorizes the inclusion of a term condition at the time of licensing. 11

2. The public policy behind term conditions argues in support of their broad application. 13

3. The history of the Swan Falls Agreement and the legislative history leading up to the enactment of Idaho Code § 42-203B shows that the Legislature intended to exercise its full authority and authorize the Director to include term conditions at the time of licensing. 14

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE LEGISLATURE DID NOT INTEND BY ITS ENACTMENT OF IDAHO CODE § 42-203B TO AUTHORIZE THE DIRECTOR TO ADD A TERM CONDITION TO A WATER RIGHT AT THE TIME OF LICENSING. 20

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2. The district court erred by undertaking an analysis of whether a permit is a quasi-vested property right. 22

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STATEMENT OF CASE

A. NATURE OF THE CASE

This is a water rights case arising out of an appeal from a decision of the Idaho Department of Water Resources (Department). The case presents an issue of first impression concerning the State of Idaho's authority to regulate hydropower water rights. License no. 03-7018 is a water right license held by Idaho Power Company (Idaho Power) for power purposes at Brownlee Dam. When the Department issued water right license no. 03-7018 to Idaho Power in 2008, the Department included a condition limiting the term of the license pursuant to Idaho Code § 42-203B(6).[1] Idaho Code § 42-203B(6) provides, in relevant part:

> The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. ... The director shall also have the authority to limit a permit or license for power purposes to a specific term. Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

Idaho Code § 42-203B(6) (emphasis added)

Idaho Power appealed the inclusion of the term condition to the Washington County district court, arguing the Director should not be allowed to insert the term condition in the license when it was not included in the permit to develop the water right. The district court, acting as an appellate court, held that the Director lacked the statutory authority to insert a term condition at the time of licensing and remanded the matter to the Department with instructions to

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[1] A condition limiting the term of the license is commonly referred to as a "term condition."

issue the license pursuant to the terms of the permit. The Department respectfully requests that this Court reverse the judgment of the district court.

Hydropower water rights have a unique status under the Idaho Constitution and under Idaho code. The reason for this unique status is because of the significant negative impact hydropower water rights can have on future upstream development. The authorization to "regulate and limit the use [of water] for power purposes", as stated in Section 3 of Article XV of the Idaho Constitution, is both consistent with and reflected in Idaho Code § 42-203B. The plain language of Idaho Code § 42-203B(6) provides the Director with the express statutory authority to add a condition limiting a hydropower water right to a specific term at the time of licensing. Moreover, even if this Court looks past the plain language of Idaho Code § 42-203B(6), the history of the Swan Falls Agreement and the legislative history of Idaho Code § 42-203B confirms the Legislature's intent to authorize the Director to add a term condition to any water right licensed for power purposes after Idaho Code § 42-203B(6) became law.

B. COURSE OF PROCEEDINGS

On December 24, 1975, Idaho Power submitted an Application for Permit to the Department for an additional water right for hydropower at Brownlee Dam. (Agency R. pp. 72-75.)[2] The Director approved the application for permit on January 29, 1976. (Agency R. p. 75.)

On November 16, 2007, Gary Spackman, then Administrator of the Department's Water Management Division, approved the license for Water Right No. 03-7018. (Agency R. p. 130.)

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[2] References to the administrative record before the Department are shown as "Agency R." References to the record before the district court are show as "R."

On November 23, 2007, the Department issued a letter to Idaho Power informing them that the license was issued as a preliminary order and that it would become final upon 14 days after service unless the order is appealed. (Agency R. pp. 131-134.) The Director, pursuant to its authority under Idaho Code § 42-203B(6), included a term condition in the license. The condition provides:

> The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

(Agency R. p. 130.)

Idaho Power filed its Protest and Petition for Hearing on December 3, 2007 requesting a hearing before the Department and objecting to the inclusion of the term condition. (Agency R. pp. 137-139.) A prehearing conference was held on March 10, 2008. Idaho Power served upon the Department a first set of discovery questions on July 25, 2008. (Agency R. pp. 162-166.) The Department's rules of procedure in administrative hearings do not provide for service of interrogatories and requests for production upon the Department. However, to expedite resolution of the matter, the Department provided a Statement of Position regarding the term condition. (Agency R. pp. 174-197.)

Idaho Power subsequently decided to withdraw its request for hearing. The Department granted the request on March 30, 2009. (Agency R. pp. 209-213.)

On April 27, 2009, Idaho Power filed a petition for judicial review with the Washington County district court, appealing the Department's final decision. (R. Vol. I, p. 5.) The district court heard appellate argument in the case on December 1, 2009. (R. Vol. I, p. 3.) On January 13, 2010, the district court issued its decision holding that the Department lacked the statutory authority to insert a term condition at the time of licensing. (R. Vol. II, p. 252.) The Department filed its notice of appeal on January 26, 2010. (R. Vol. II, p. 268.)

C. STATEMENT OF FACTS

Idaho Power filed application for permit no. 03-7018 to appropriate the public waters of the state of Idaho on December 24, 1975. (Agency R. pp. 72-75.) The permit provided for the diversion of water at Brownlee Dam for hydropower purposes. On January 29, 1976, the Director approved the application for permit. (Agency R. p. 75.) The Director did not include a term condition as a condition of approval.

On December 12, 1979, Idaho Power applied for and was granted an extension of time to submit proof of beneficial use to the Department, granting an extension to February 1, 1985. (Agency R. p. 82.)

On August 9, 1980, Idaho Power submitted a letter and postcard stating that it had completed the diversion works and put water to beneficial use. (Agency R. pp. 83-85.)

On March 31, 1983, the Idaho Supreme court issued its decision in *Idaho Power Co. v. State,* 104 Idaho 575, 661 P.2d 741 (1983). In *Idaho Power*, this Court held that the subordination clause included in the Federal Power Commission license granted to Idaho Power for the Hells Canyon project was valid and enforceable under Idaho law, and binding on Idaho

Power for purposes of the Hells Canyon project. *Idaho Power*, 104 Idaho at 586, 661 P.2d at 752. However, the Court also held that the subordination clause did not apply to Idaho Power's water rights at Swan Falls dam. *Id.* This Court remanded the case to the trial court for further proceedings to resolve the affirmative defenses. *Idaho Power*, 104 Idaho at 590, 661 P.2d at 756. The remand of the matter spawned additional litigation when Idaho Power responded by filing a second lawsuit naming as defendants the State of Idaho and approximately 7500 persons claiming water rights in the Snake River basin. *In re Snake River Basin Water System*, 115 Idaho 1, 3, 764 P.2d 78, 80 (1988).

On October 25, 1984, in an effort to resolve the litigation related to Swan Falls dam, an agreement was entered into by Idaho Power and the State of Idaho. *In re Snake River Basin Water System,* 115 Idaho at 3, 764 P.2d at 80. A copy of the agreement is attached as Addendum A. The October 25, 1984 agreement, commonly referred to as 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 to the mutual satisfaction of the parties." *Memorandum Decision And Order on Cross-Motions For Summary Judgment, In re SRBA, Consolidated Subcase 00-92023*, at 26 (Apr. 18, 2008), a copy of which is attached as Addendum B.[3]

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[3] This summary judgment order was entered in SRBA Consolidated Subcase No. 00-92023, which addresses "issues pertaining to ownership and interpretation and/or application of the Swan Falls Agreement" for purposes of adjudicating the hydropower water rights that gave rise to the Swan Falls controversy. *Order Granting In Part, Denying In Part Motion To Dismiss; Consolidating Common Issues Into Consolidated Subcase; And Permitting Discovery Pending*

One of the legislative actions necessary to implement the Swan Falls Agreement and resolve the controversy was enactment of the proposed "subordination legislation" set forth in Exhibits 7A and 7B to the Agreement. Swan Falls Agreement at 7-8 ¶ 13(a)(vii). The legislation proposed under Exhibit 7A authorized the Director to subordinate and/or to insert a term condition, in a hydropower "permit or license":

> The Director shall have the authority to subordinate the rights granted in a permit or license for power purposes . . . . The director shall also have the authority to limit a permit or license for power purposes to a specific term.

Swan Falls Agreement, Exhibit 7A at 27. As presented to the Legislature under 1985 Senate Bill 1008, Exhibits 7A and 7B were combined into a single new code section, Idaho Code § 42-203B. *Compare* 1985 Idaho Sess. Laws 25-26 (Idaho Code § 42-203B as enacted under 1985 Senate Bill 1008) *with* Swan Falls Agreement, Exhibits 7A-7B. The term condition provision of Exhibit 7A as proposed in Senate Bill 1008 was Idaho Code § 42-203B(6). *Id.*

In the Senate Resource and Environment Committee's hearings on Senate Bill 1008, John Runft, an attorney representing small hydropower interests, sought a change in the term condition provision. He noted that the provision expressly grandfathered existing licenses, and argued that existing permits represented property rights and "should be so grandfathered as well as licenses." Attachment to Senate Resources and Environment Committee Minutes (Jan. 21,

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Objection Period In Basin 02, In re SRBA, Consolidated Subcase 92-23, at 16 (July 24, 2007), a copy of which is attached as Addendum C. In settling that SRBA litigation, Idaho Power and the State of Idaho stipulated that the summary judgment order is final and binding between them. *State Of Idaho's And Idaho Power Company's Stipulation and Joint Motion To Dismiss Complaint And Petition For Declaratory And Injunctive Relief, In re SRBA, Consolidated Subcase No. 00-92023*, at 8 (June 25, 2009), a copy of which is attached as Addendum D.

1985), entitled "*Revised and Supplemented Testimony By John L. Runft Before the Idaho Senate Committee on Resources and Environment January, 21, 1985*," p. 5 (attached hereto as Addendum E). Attorney General Jim Jones opposed this proposed change on the basis that such permits did not carry property interests and the State had authority to insert term conditions in them. Attachment to Senate Resources and Environment Committee Minutes (Jan. 25, 1985) entitled "Supplemental Testimony of Attorney General Jim Jones before the Idaho Senate Committee of Resources and Environment," pp. 1, 3 (attached hereto as Addendum E). The committee did not modify the proposed legislation to grandfather existing hydropower permits.

In a subsequent hearing of the same committee, Senator William Ringert observed that because the proposed legislation authorized the Director to subordinate a hydropower "permit or license," the Director would have the authority to insert at licensing a new condition that had not been present in the hydropower permit. Transcript of Senate Resources and Environment Committee Meeting (Feb. 1, 1985), at pp. 33-34, attached as Addendum F.[4] Idaho Power's attorney and Swan Falls negotiator, Tom Nelson, responded that this interpretation was "obviously possible under the language," and that the statute had been so drafted because the

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[4] The transcripts attached hereto were submitted as affidavit exhibits in the SRBA in Consolidated Subcase 00-92023. The Attorney General's Office arranged for a court reporter to make the transcripts from cassette tape recordings of the 1985 meetings of the Senate Resource and Environment Committee on the legislation enacted to implement the Swan Falls Agreement, the acknowledged centerpiece of which was Idaho Code § 42-203B. The recordings were permanently preserved by the Legislative Services Office at the request of the committee chairman at the time, Senator Laird Noh. *See Affidavit of Michael C. Orr In Support Of State Of Idaho's Motion For Partial Summary Judgment* (Jan. 11, 2008); *Affidavit of Laird Noh* (Jan. 11, 2008). These affidavits are available for viewing at the SRBA website, http://www.srba.state.id.us/SREPT.HTM, under Subcase no. 00-92023.

State "wanted the power to go back and subordinate those [unsubordinated hydropower] permits at the time that they issue the license." *Id.* at 34.

The "subordination legislation" of Exhibits 7A and 7B was enacted as proposed in Senate Bill 1008, and authorizes the Director to subordinate and/or insert term conditions in a hydropower "permit or license." 1985 Idaho Sess. Laws 25-26; Idaho Code § 42-203B(6). The legislation expressly implements the State's constitutional authority to regulate and limit hydropower water rights. Idaho Code § 42-203B(1).

Idaho Code § 42-203B(6) was approved on February 28, 1985 and went into effect on July 1, 1985. 1985 Idaho Sess. Laws 27.

Subsequent to the statutory addition of Idaho Code § 42-203B, a beneficial use exam was conducted for water right no. 03-7018. The Beneficial Use Field Report was submitted to the Department on September 8, 1985. (Agency R. pp. 88-98.)

The Department approved the license for Water Right No. 03-7018 on November 16, 2007. (Agency R. p. 130.) The Department, pursuant to its authority under Idaho Code § 42-203B(6), included a term condition in the license. The condition provides:

> The diversion and use of water for hydropower purposes under this license is subject to review by the Director after the date of expiration of the Federal Energy Regulatory Commission license for Brownlee Dam. Upon appropriate findings relative to the interest of the public, the Director may cancel all or any part of the use authorized herein and may revise, delete or add conditions under which the right may be exercised.

(Agency R. p. 130.)

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in holding that Idaho Code § 42-203B does not authorize the Director to add a condition limiting a hydropower water right to a specific term at the time of licensing.

2. Whether the district court erred in concluding that the legislature did not intend by its enactment of Idaho Code § 42-203B to authorize the Director to add a condition limiting a hydropower water right to a specific term at the time of licensing.

STANDARD OF REVIEW

"In an appeal from a district court, where the court was acting in its appellate capacity under IDAPA, the Supreme Court reviews the agency record independently of the district court's decision." *Spencer v. Kootenai County,* 145 Idaho 448, 452, 180 P.3d 487, 491 (2008) (citing *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 508, 148 P.3d 1247, 1254 (2006)).

Judicial review of a final decision of IDWR is governed by the Idaho Administrative Procedures Act (IDAPA), chapter 52, title 67, Idaho Code. Idaho Code § 42-1701A(4). Under the IDAPA, the Court reviews an appeal from an agency decision based upon the record created before the agency. Idaho Code § 67-5277; *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992). As to the weight of evidence on questions of fact, the Court does not substitute its judgment for that of the agency. *Spencer*, 145 Idaho at 452, 180 P.3d at 491. The Court shall affirm the agency decision unless the Court finds that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not

supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. IDWR*, 135 Idaho 414, 417, 18 P.3d 219, 222 (2001). The party challenging the agency decision must show that the agency erred in a manner specified in Idaho Code § 67-5279(3), and that a substantial right of the petitioner has been prejudiced. Idaho Code § 67-5279(4); *Barron*, 135 Idaho at 417, 18 P.3d at 222.

ARGUMENT

The controlling question in this proceeding is whether Idaho Code § 42-203B authorizes the Director to condition a hydropower water right at the time of licensing to a term of years, even when a term condition was not included in the approved application for permit. The Third Judicial District Court held that the legislature did not intend to authorize the Director to include a term condition in a license when it was not in the approved application for permit. *Memorandum Decision and Order on Appeal* (Jan. 13, 2010), at 14 (hereafter referred to as *Memorandum Decision*). The Department respectfully requests that this Court reverse the decision of the district court because the relevant statutory provisions, the important public policies embodied therein, and the clearly expressed intention of the Legislature all show the Legislature exercised its constitutional authority to limit the impact of hydropower water rights on development in Idaho by authorizing the Director to include a term condition in <u>any</u> hydropower license issued after Idaho Code § 42-203B was signed into law.

A. THE DISTRICT COURT'S HOLDING THAT IDAHO CODE § 42-203B DOES NOT AUTHORIZE THE DIRECTOR TO ADD A TERM CONDITION TO A HYDROPOWER WATER RIGHT AT THE TIME OF LICENSING IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE, FAILS TO TAKE INTO CONSIDERATION THE IMPORTANT PUBLIC POLICIES OF LIMITING HYDROPOWER WATER RIGHTS AND IS CONTRARY TO THE LEGISLATIVE HISTORY OF THE STATUTE.

When interpreting a statute, the Court looks first to the plain reading of the statute. *Pocatello v. State*, 145 Idaho 497, 501, 180 P.3d 1048, 1052 (2008). If the statute is ambiguous, the Court looks to the intention of the legislature in drafting a statute, examining not only the literal words of the statute, but also the reasonableness of the proposed constructions, the public policy behind the statute, and its legislative history. *Hayden Lake First Prot. Dist. v. Alcorn*, 141 Idaho 388, 398-399, 111 P.3d 73, 83-84 (2005). The district court failed to properly apply this standard in its decision.

1. The plain language of Idaho Code § 42-203B explicitly authorizes the inclusion of a term condition at the time of licensing.

The Legislature codified the language agreed upon by the State of Idaho and Idaho Power in the Swan Falls Agreement by enacting Idaho Code § 42-203B(6), which provides in relevant part:

> [T]he director shall also have the authority to limit a permit or license for power purposes to a specific term. Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

The Court, when interpreting a statute, looks first to the plain reading of the statute. *Pocatello,* 145 Idaho at 501, 180 P.3d at 1052. The plain reading of this language expressly authorizes the Director to limit a license to a specific term. Idaho Code § 42-203B(6) provides

for inclusion of a term condition in a "permit or license." The word "or" is a disjunctive particle used to express an alternative. *Doe I v. Doe II*, --- Idaho ---, ---, 228 P.3d 980, 982, 2010 WL 918943, at 3 (2010) (citing *Frasier v. Frasier,* 87 Idaho 510, 514, 394 P.2d 294, 296-97 (1964)). The use of the disjunctive "or" means that the term condition can be included at either stage in the licensing process: the term condition can be included at the time the permit is issued or can be included at the time the license is issued. Looking to the literal words of the statue as directed in *Pocatello*, the plain reading of Idaho Code § 42-203B(6) confirms that a term condition can be added to a license when the license is issued.

This point is underscored by the one limitation the Legislature included in the statute. The Legislature provided that "[s]ubsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act." Idaho Code § 42-203B(6) (emphasis added). Thus, the Legislature specifically authorized the inclusion of a term condition in a permit or license, but in the very next sentence, said that the Director of the Department could not apply term conditions to licenses issued prior to the act. If the Legislature had intended that the Director not include term conditions in licenses issued after the act, the Legislature would have said so here. The lack of such a restriction supports the argument that the intent of the Legislature was to allow the Director to include term conditions at the time of licensing.

2. The public policy behind term conditions argues in support of their broad application.

It has long been the policy of the State of Idaho to regulate hydropower water rights. In 1928, in light of the development of hydropower projects on the Snake River and its tributaries, Article XV, section 3 of the Idaho Constitution was amended to authorize the state to "regulate and limit the use" of hydropower water rights. *See discussion* Dennis C. Colson, *Idaho's Constitution – The Tie that Binds*, p. 173 (1991 University of Idaho Press). Term conditions are a logical outgrowth of this guiding principle and the policy reasons for term conditions can be found by looking to a newsletter written by the Department in 1984. (Agency R. p. 185). Prior to the enactment of Idaho Code § 42-203B, the Idaho Water Resource Board adopted a resolution asking the Department to start including term limits in permits for hydropower.[5] (Agency R. p. 185). As explained in the article and accompanying resolution, hydropower permits can have an enormous impact on the State's water systems because they usually appropriate most of the flow of a water source, even during periods of peak runoff. This gives them the unique potential to preclude or control upstream development in ways that set hydropower apart from other uses. The Board was concerned that providing hydropower water rights in perpetuity runs counter to the public interest, as technologies and needs may change in the future. The Board recommended tying the term of the water right permits and licenses to the term of the FERC licenses because the FERC licenses usually are for terms of 50 years. The

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[5] The Idaho Water Resource Board is a separate entity that sets water policy for the State of Idaho. *See* Idaho Code § 42-1732.

Board pointed out that tying the water right permits and licenses to the length of the FERC license would provide backers of the projects ample time to pay off loans and recoup their investments. The Board concluded that it would be appropriate to reevaluate the hydropower license at the same time FERC is reviewing the FERC license.

3. The history of the Swan Falls Agreement and the legislative history leading up to the enactment of Idaho Code § 42-203B shows that the Legislature intended to exercise its full authority and authorize the Director to include term conditions at the time of licensing.

The express statutory authority of the Director to limit a hydropower water right to a specific term of years came as a result of legislation enacted to implement what is commonly referred to as the Swan Falls Agreement. While the Idaho Supreme Court has long been involved in the contentious issues surrounding Idaho Power's water rights at Swan Falls dam[6], it is the settlement agreement reached between the State of Idaho and Idaho Power that is significant in this proceeding. Put simply, the Swan Falls Agreement sought not only to resolve the litigation over Idaho Power's hydropower water rights at Swan Falls dam and several other Idaho Power facilities downstream from Milner Dam, but it also sought to prevent future Swan Falls-type controversies by exercising the Legislature's full constitutional authority to regulate and limit hydropower water rights. Relevant to this proceeding, the Swan Falls Agreement provided for the introduction of the legislation at issue here, which expressly authorizes the Director to include subordination and term conditions on hydropower licenses. The term

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6 *See Idaho Power Co. v. State,* 104 Idaho 575, 661 P.2d 741 (1983) and *In re Snake River Basin Water System,* 115 Idaho 1, 764 P.2d 78 (1988).

condition legislation was outlined in Exhibit 7A to the written agreement signed by the parties on October 25, 1984. Swan Falls Agreement, at 27 (attached hereto as Addendum A). The full implementation of the Swan Falls Agreement was made contingent on its enactment into law. *Id.*, at 8.

Idaho Code § 42-203B was part of Senate Bill 1008, the so called "centerpiece of the legislation . . . contemplated by" the Swan Falls Agreement reached between Idaho Power and the State of Idaho.[7] 1985 Idaho Senate Journal at 59 (Statement of Legislative Intent S 1008) (attached hereto as Addendum G). One of the primary objectives of the Swan Falls Agreement was to implement the State's constitutional authority to regulate and limit hydropower water rights. In explaining the purposes behind the changes to Idaho Code § 42-203B, the Statement of Legislative Intent provided:

> This legislation is an exercise of the State's authority under the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes. The section represents a specific legislative finding that it is in the public interest of the State of Idaho to assure that the State has the power to regulate and limit the use of water for power purposes to assure an adequate supply of water for future beneficial upstream uses.

1985 Senate Journal at p. 59 (Statement of Legislative Intent S 1008).

The Legislature ratified these views by enacting Idaho Code § 42-203B. The Legislature sought to avoid a repeat of the Swan Falls controversy by expressly authorizing the Director to

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7 "The Swan Falls Agreement was specifically conditioned on the enactment of Senate Bill 1008." *Memorandum Decision And Order On Cross-Motions For Summary Judgment, In re SRBA, Consolidated Subcase No. 00-92023*, at 22 (Apr. 18, 2008), attached as Addendum B.

subordinate hydropower water rights and limit hydropower water rights to a term of years. This was highlighted in the legislative testimony when Pat Kole, one of the State of Idaho's negotiators in the Swan Falls Agreement, was asked by Senator William Ringert why the provision allowing the director to limit a permit or license for power purposes was in the legislation. Mr. Kole stated, "And the effort [behind the subordination and term limit provision] was to make sure that as best we can foresee, we do not get ourselves into another Swan Falls situation in the future." Transcript of Senate Resources and Environment Committee Meeting (Jan. 18, 1985), at pp. 42-43, attached hereto as Addendum H. Then-IDWR Director Kenneth Dunn echoed this comment in his testimony, "[T]he primary reason [for the subordination and term limit provision] is to avoid Swan Falls from recurring again." *Id.* at 43.

Because of concern over potential future issues regarding the interpretation of the Swan Falls Agreement, the Idaho Senate adopted a Statement of Legislative Intent, which provided as follows:

> The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses, to assure the availability of water for such uses. The director also shall have the authority to limit permits or licenses for power purposes to a specific term.[8]

1985 Idaho Senate Journal at 60 (Statement of Legislative Intent S 1008).

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[8] The Statement of Legislative intent was drafted by Senator Michael Crapo with input from Idaho Power and the State of Idaho. Transcript of Senate Resources and Environment Committee Meeting (Feb. 1, 1985), pp. 3-4, attached as Addendum F.

This statement is significant because it confirms the breadth of authority the Legislature intended for the Director to have. It was the common understanding that the Director would be authorized to subordinate all future licenses and to limit all future licenses to a specific term of years. Moreover, the legislative record for Senate Bill 1008 also demonstrates that the Legislature considered this very issue in committee meetings in 1985. Before the Senate Resources and Environment Committee discussing the legislation that would be codified as Idaho Code § 42-203B(6), John Runft testified as follows:

> Section 42-203B(6). The last sentence of this subsection provides that it 'shall not apply to licenses which have already been issued as of the effective date of this act.' We recommend that permits should be so grandfathered as well as licenses. Water permits are a defeasible property right which may be terminated if the permit holder does not prove up on the development for which the right was granted. Permittees, such as my clients, have spent considerable sums of money in reliance upon their right to prove up on the permit and eventually secure a license. Likewise, other investors, lenders and governmental agencies (FERC) have acted in reliance upon the viability of these permits. We submit a serious issue of taking without due process of law could be raised by this ex post facto imposition of the provisions of subsection 6 on permits.

Attachment to Senate Resources and Environment Committee Minutes (Jan. 21, 1985), entitled "*Revised and Supplemented Testimony By John L. Runft Before the Idaho Senate Committee on Resources and Environment January, 21, 1985*," p. 5 (attached hereto as Addendum E).[9]

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[9] As Pat Kole testified before the Senate Resources and Environment Committee on January 25, 1985, "Well, one of the primary concerns of Idaho Power Company and other users has been that there are so many permits out there, they could have an adverse impact on the ability to manage the stream system. If agricultural permits are going to be reevaluated, it struck the negotiators that it would be only fair that all permits be reevaluated." Transcript of Senate Resources and Environment Committee Meeting (Jan. 25, 1985) at p. 9, attached hereto as

Mr. Runft's testimony was specifically addressed by then-Attorney General Jim Jones through his testimony before the Committee:

> The concerns raised by Mr. Runft were considered by the negotiators and were either rejected as incompatible with resolution of the Swan Falls controversy or provided for by the mechanisms in the agreement.
>
> ...
>
> Mr. Runft's objection to term permits is also without merit. The director has established a policy of issuing water right licenses for power purposes to a term consistent with the Federal Energy Regulatory Commission license. To date both lenders and investors have found this practice to be satisfactory...Mr. Runft next argues that 42-203B(6) should be amended to not affect permits which have been issued as of this date. His analysis overlooks the Hidden Springs Trout Ranch case, see 102 Idaho 623, which allows the State to restrict permits that have not yet been fully developed into property rights. There is simply no takings issue presented by 42-203B(6).

Attachment to Senate Resources and Environment Committee Minutes (Jan. 25, 1985) entitled "Supplemental Testimony of Attorney General Jim Jones before the Idaho Senate Committee of Resources and Environment," pp. 1, 3 (attached hereto as Addendum E).

In a subsequent hearing of the same committee, the issue of the State's authority to insert a new condition at licensing was again raised. Tom Nelson, Idaho Power's attorney and Swan Falls negotiator, discussed this very issue with Senator William Ringert:

> CHAIRMAN NOH: Senator Ringert.
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> SENATOR RINGERT: Mr. Chairman, Tom, on page 3, line 43, it says "permit or license." Now, my question there is, I can understand if that's -- if that's a valid premise to start with to see if the condition would be placed in the permit, therefore, that same condition would carry over into the license. But I am

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Addendum I. Tom Nelson, Idaho Power's attorney was in attendance at this meeting and voiced no objection to Mr. Kole's testimony. *See id.*

of concern that this language would permit the director to impose subordination on the licensed water right that didn't have that condition when it was a permit.

MR. NELSON: Mr. Chairman, Senator Ringert, that is addressed in the last full sentence of sub 6, "Shall not apply the licenses which have already been issued as of the effective date of this act." In other words, what the state wanted here --

SENATOR RINGERT: Well Tom, forgive me, but that is not my concern. My concern is the – is the small hydro operator who received a permit in 1990, and that permit does not have a subordination provision in it. And he builds his plant and gets into operation, and here comes the director and looks at that and says, "I probably should have done this while it was a permit, but I'm going to do it now."

MR. NELSON: Mr. Chairman, Senator Ringert, that interpretation is obviously possible under that language. What the state was wanting, I can tell you, was that there are existing permits out there for hydropower purposes, some of which may be unsubordinated. I think there is only a handful. They wanted the power to go back and subordinate those permits at the time that they issued the license. So they were thinking of the existing situation, not what happens in 1990. But that interpretation would be possible. All I can tell you is that this was the state's section -- going back to your discussion of who did what, all I added was the last sentence to make sure they wouldn't come back and undo everything we had done with the contract.

Transcript of Senate Resources and Environment Committee Meeting (Feb. 1, 1985), at pp. 33-34, attached as Addendum F.

Importantly, this dialogue shows that the question of whether the Director could add new conditions on permits at the time of licensing was raised before the Legislature and even Idaho Power's own attorney recognized that the legislation could be read to allow such a result, and in fact it was the State of Idaho's intent by including that language to allow the inclusion of new conditions on permits at the time the time they are licensed. As such, this testimony supports the Department's interpretation of Idaho Code § 42-203B.

B. THE DISTRICT COURT ERRED IN HOLDING THAT THE LEGISLATURE DID NOT INTEND BY ITS ENACTMENT OF IDAHO CODE § 42-203B TO AUTHORIZE THE DIRECTOR TO ADD A TERM CONDITION TO A WATER RIGHT AT THE TIME OF LICENSING.

The plain language of Idaho Code § 42-203B(6), the policies supporting term conditions, and the legislative history behind the amendments to Idaho Code § 42-203B show that the Legislature expressly intended to authorize the Director to insert term conditions on any water right license for power purposes issued after the 1985 addition of Idaho Code § 42-203B(6). However, the district court's decision failed to give effect to the plain reading of Idaho Code § 42-203B and failed to consider its legislative history. Instead, the district court discounted the plain language of Idaho Code § 42-203B(6) and ignored the policies and legislative history behind the statutory changes to Idaho Code § 42-203B altogether. Instead of reviewing the statute in light of the legislative history specific to Idaho Code § 42-203B, the district court skipped this step and instead conducted an analysis of case law to determine whether Idaho Power has a quasi-vested interest in the water right permit. The district court then used the analysis to bootstrap itself into a conclusion that the Legislature would not have intended to impact a quasi-vested right.

1. The district court erred in not considering the policies and legislative history surrounding Idaho Code § 42-203B.

When interpreting a statute, the Court should examine the policies and legislative history surrounding the legislation. *Hayden Lake First Prot. Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73 (2005). In this case, instead of examining the policy and history behind the legislative changes to Idaho Code § 42-203(B), the district court ignored the legislative history surrounding the

enactment of Idaho Code § 42-203B and the Swan Falls Agreement. The district court improperly focused on the general case law surrounding the appropriation of water rather than the unique and inferior status of hydropower water rights under the Idaho Constitution and the Idaho Code.

The district court started by downplaying the significance of Idaho Code § 42-203B by saying that it was "simply one amendment in a long development of the statutory scheme that regulates the exercise of the constitutional right to appropriate waters." *Memorandum Decision*, at 8. This statement disregards the constitutional authorization to regulate and limit hydropower water rights and specifically ignores the history of the legislative amendments that grew out of the negotiated settlement with Idaho Power. Idaho Code § 42-203B was part of Senate Bill 1008, the "centerpiece of the legislation . . . contemplated by" the Swan Falls Agreement reached between Idaho Power and the State of Idaho. The legislation was not an inconsequential amendment to the appropriation process, but was specifically intended to limit hydropower rights and protect against future Swan Falls-type disputes. Through this legislation, the Legislature intended to fully exercise its constitutional authority to prevent such disputes. Conditioning water rights at the time of licensing is consistent with the Legislature's stated intent:

> The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses, to assure the availability of water for such uses. The director also shall have the authority to limit permits or licenses for power purposes to a specific term.

1985 Idaho Senate Journal at 60 (Statement of Legislative Intent S 1008). The testimony of Attorney General Jim Jones in response to the statements of John Runft, plus the dialogue

between Senator William Ringert and Idaho Power attorney Tom Nelson shows that it was the legislative intent to have the Director apply term conditions to existing permits that had yet to be licensed. As expressed in the legislative history, the changes to Idaho Code § 42-203B were not simple amendments to the water appropriation statutes, but were targeted changes made to ensure that hydropower water rights would not prevent future economic development and ensure that the waters of the state of Idaho are used consistent with the public interest.

2. The district court erred by undertaking an analysis of whether a permit is a quasi-vested property right.

Instead of examining the legislative history of Idaho Code § 42-203B, the district court undertook an analysis of how a water right is perfected in Idaho. The court placed special emphasis on the physical act of applying water to beneficial use, stating "Idaho Water law has historically enshrined the act of appropriation of water to beneficial use as an act of paramount legal significance in relation to defining a property right in water." *Memorandum Decision*, at 9. The district court cited a handful of this Court's decisions and then concluded that Idaho Power gained what can only be described as some sort of quasi-vested water right once it applied water to beneficial use. *Memorandum Decision*, at 11-12. The district court concluded that the Legislature could not have intended to impact a quasi-vested water right by providing for the inclusion of term conditions after a water right was put to beneficial use. *Memorandum Decision*, at 12 ("The question is, did the legislature intend to strip away whatever rights Idaho Power held, simply because the Department could have but did not issue the final license prior to

the 1985 enactment? [10] This court is constrained to conclude that the legislature did not so intend.") In short, the court concluded that the Legislature would have needed to expressly overturn the "long established principles of law" that were outlined in the cases cited by the district court.

The problem with the district court's analysis is threefold. First, under this Court's decisions, the district court should have turned to the legislative history of Idaho Code § 42-203B to determine the legislative intent. And as described above, the legislative record reflects that it was the intent of the Legislature to authorize the Director to apply term conditions to any license issued after the 1985 amendments. In this case, we can examine the actual legislative history and the policies surrounding this statue, instead of trying to guess what the legislature intended by reviewing case law. The district court should have focused on the actual legislative history instead of turning to case law to determine legislative intent. The district court erred in not examining the legislative history of Idaho Code § 42-203B.

Second, regardless of whether Idaho Power received a quasi-vested water right, because hydropower water rights are constitutionally subject to regulation and limitation by the State, the

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[10] The Department disagrees with the assumption made by the district court that the Department could have issued the permit prior to the 1985 enactment of Idaho Code § 42-203B. Pursuant to Idaho Code § 42-219, a license can only be issued after a beneficial use exam has been completed. The beneficial use exam for this water right was not completed until September 8, 1985. (Agency R. p. 88-98.) The statutory changes to Idaho Code § 42-203B took effect on July 1, 1985, prior to the beneficial use exam. Thus, the Department could not have issued the license prior to the enactment of Idaho Code § 42-203B.

remedy for any alleged injury is to seek compensation through an inverse condemnation action, not to avoid the express legislative intent.

Under the Idaho Constitution, hydropower is inherently secondary to all other uses of water. Section 3 of Article XV of the Idaho Constitution expressly authorizes the State to "regulate and limit" the "right to divert and appropriate" for hydropower uses. IDAHO CONST. XV, § 3. This authority was added to the Idaho Constitution in a 1928 amendment after it became apparent that unconditioned hydropower water rights posed a significant risk to the future development of the State's water resources.[11] Significantly, the "regulate and limit" authority applies without limitation to all rights for hydropower uses—it is not limited to inchoate or unperfected rights and is not limited to undeveloped permits.

Idaho Code § 42-203B expressly implements the State's constitutional authority to regulate and limit hydropower water rights. Idaho Code § 42-203B(1). Like the constitutional provision, section 42-203B(6) is not limited to inchoate or unperfected rights, or undeveloped permits. Rather, the subordination authority of Idaho Code § 42-203B(6) extends to all "permits and licenses" for hydropower use, with a single exception: licenses that were in existence when the statute first went into effect, on July 1, 1985.

It is undisputed that Idaho Power did not obtain this water right license until after 1985. Thus, the statute that expressly implements the State's constitutional authority to regulate and

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[11] *See Memorandum Decision And Order On Cross-Motions For Summary Judgment* (SRBA Consolidated Subcase 00-92023, (Apr. 18, 2008) at 5 (stating that the "regulate and limit" authority was added to the Idaho Constitution "after the development of hydropower projects on the Snake River and its tributaries began in earnest").

limit hydropower water rights specifically authorized the Director to insert a term condition in the license for water right no. 03-0718, regardless of whether Idaho Power had a vested property interest in the permit.[12] While Idaho Power may seek compensation for any alleged deprivation of their claimed property interest through an inverse condemnation proceeding, it has no right to prevent the Director from exercising his authority to limit hydropower water rights under Idaho Code § 42-203B(6) and section 3 of Article XV of the Idaho Constitution. Unlike other water rights, hydropower water rights are constitutionally and statutorily subject to regulation and limitation by the State pursuant to Article XV, section 3.

Additionally, hydropower permit holders or developers cannot reasonably claim insufficient notice of the possibility that a term condition might be included at licensing, or that doing so exceeds the Director's statutory or constitutional authority. The "regulate and limit" authority was added to the Idaho Constitution in 1928, and Idaho Code § 42-203B(6) has been in effect for almost a quarter-century. In addition, as discussed above, Idaho Code § 42-203B(6) was explicitly intended to prevent hydropower water rights from blocking or precluding other uses and developments of the State's water resources.

Claims of insufficient notice from Idaho Power especially ring hollow. The very purpose of the Swan Falls Agreement was to settle disputes between Idaho Power and the State of Idaho. The enactment of Idaho Code § 42-203B(6) was a condition of the settlement agreement. Idaho

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[12] For purposes of this argument only, the State assumes the Director's exercise of his authority under Idaho Code § 42-203B(6) to condition a hydropower permit constitutes a taking of any compensable property interest.

Power negotiated the Swan Falls Agreement, which "incorporates the provisions of Idaho Code § 42-203B." *Memorandum Decision And Order on Cross-Motions For Summary Judgment, In re SRBA, Consolidated Subcase 00-92023*, at 22 (Apr. 18, 2008). Idaho Power assisted in the drafting of the statement of legislative intent which included a broad statement of authority for the Director.[13] Moreover, Idaho Power's own attorney testified before the Senate Committee and agreed that Idaho Code § 42-203B(6) could be read to grant the Director the authority to apply new conditions to existing permits when they are licensed and he also stated that this was in fact the intent of the legislation. As such, Idaho Power is in no position to claim surprise or injury when the statute is invoked to add a term condition to this water right.

The third problem with the district court's analysis is that the cases cited by the district court do not stand for the proposition that a quasi-vested property right is created before completion of the licensing process of Idaho Code § 42-219. The district court suggests that the Legislature was aware of and would have to expressly overturn the "long established principles of law" that were outlined in the cases cited by the court if the Legislature had intended to authorize the Director to insert term conditions on all licenses issued after the passage of Idaho Code § 42-203B. The problem with this argument is that it assumes that the 1985 Legislature would have interpreted the cases cited by the district court the same way as the district court. The difficulty with this assumption is that these cases do not stand for the proposition that application of water to beneficial use gives a water user some quasi-vested water right. In fact,

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13 *See* explanation of Legislative intent *supra* note 8.

language in three of the cases cited by the district court lead to the opposite conclusion. Furthermore, none of these decisions addressed hydropower water rights, Idaho Code § 42-203B, or the State's authority under the 1928 constitutional amendment – indeed a number of them pre-dated the 1928 constitutional amendment and the statute.

The first case cited by the district court was *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). This case does not address Idaho Code § 42-203B, nor does it discuss the issue of when a water right becomes a vested right. *Pioneer*, instead, addresses the question of who holds title to a water right. While the diversion of water and its application to beneficial use are important in the process of establishing a water right, it is a leap in logic to say this means that a water user is entitled to some sort of quasi-vested water right without completing the steps in the statutory appropriation process.

The same is true with the remaining cases cited by the district court. In *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915), the Court had cause to examine both the posted notice and licensing process for establishing water rights. When evaluating whether a water user failed to comply with the steps in the licensing process, the Court stated:

> The granting by the state engineer of a permit for the right to use the waters of this state, in and of itself secures to the applicant no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit and a fulfillment of the conditions and limitations therein, but a compliance with the conditions and limitations prescribed in such permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit.

Washington State Sugar Co., 27 Idaho at 38, 147 P. at 1077.

While the district court reads this language to suggest that a water right vests upon application of water to beneficial use, the statement that the applicant has "no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit" suggests that a water right vests only after completion of the entire licensing process as required by Idaho Code § 42-219. Until the Department examines the extent of beneficial use and issues the license, the water right does not vest. A similar conclusion can be drawn from the case *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909). *Speer* addressed the constitutionality of Idaho's original licensing statutes. Language in this case also supports the proposition that a water right does not vest until the licensing process is completed. "The right given by the permit is merely a contingent right, which may ripen into a complete appropriation or may be defeated by the failure of the holder to comply with the requirements of the statute." *Speer*, 16 Idaho at 716, 102 P. at 368. Finally, from *Bassinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917), the same conclusion can be drawn. In *Bassinger*, the Court stated:

> A permit from the state engineer is not a water right, and this court has held that it is not an appropriation of the public waters of the state and is not real property. A permit merely expresses the consent of the state that the holder may acquire a water right, and if the holder of the permit substantially complies with all the requirements of the statute, to and including the actual application of the water to the beneficial use specified in the application for the permit, he may become the owner of a water right, the priority of which will relate back to the date of the permit.

Bassinger, 30 Idaho at 297, 164 P. at 524 (citations omitted) (emphasis added).

To suggest that a water right vests simply upon beneficial use is to ignore Idaho Code §

42-219. Until the licensing process is complete and a water right license has been issued, there is no vested water right. Moreover, it is significant that two former SRBA district court judges specifically examined the issue of when a water right vests and came to the opposite conclusion of the district court. In his *Order Granting Motion to Dismiss Petition for Writ of Mandate* issued January 25, 2008, the Hon. John M. Melanson considered a case in which the petitioner held a hydropower permit that was issued prior to the passage of Idaho Code § 42-203B. *North Side Canal Co. v. Idaho Dept. of Water Resources*, Jerome County Case No. CV 2007-1093 (Jan. 25, 2008).[14] Following enactment of the statute, the Department imposed a limited subordination condition on petitioners' permit. Later, when the Department announced that it was prepared to issue the license, it invited comment as to whether the subordination condition should be broadened to include aquifer recharge. The petitioners argued that the Director could not modify a condition on a permit when issuing a license, and that the issuance of a license was a ministerial act. Judge Melanson court determined that issuing a license is not a ministerial act but rather one requiring the Director to exercise discretion in whether to issue a license or not. *Id.* at 12. In reaching that conclusion, Judge Melanson cited to a previous ruling in the SRBA which held that a water right did not vest until the license was issued, *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimants Notice of Challenge, In Re SRBA Case No. 39576 (Subcase No. 36-08099),* (Jan. 11, 2000).

In *In Re SRBA Case No. 39576 (Subcase No. 36-08099)*, the applicant received a permit

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[14] A copy of this decision is attached as Addendum J.

for a hydropower right in 1982. The permit included a subordination condition at the time it was issued. The applicant challenged the inclusion of the subordination provision at licensing, arguing that the Department lacked the statutory authority to insert the subordination provision at the time of permitting and because of this, the Department could not apply Idaho Code § 42-203B retroactively to a vested right. Then Presiding judge of the SRBA, the Hon. Barry Wood, ruled that, on the contrary, a water right vests when a license is issued. Judge Wood held:

> It is clear that IDWR had the authority, pursuant to I.C. § 42-203B(6), to require subordination of River Grove's hydropower right in 1991 when the license was actually issued. River Grove asserts that its right became vested on or before February 26, 1985 and therefore I.C. § 42-203B(6) cannot be applied retroactively to its water right.
>
> . . .
>
> [I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.
>
> . . .
>
> Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is then to carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, IDWR may refuse to issue the license. I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that '[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . ..' <u>It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- including issuance of the license -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right</u>. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.

In Re SRBA Case No. 39576 (Subcase No. 36-08099), at 24-25 (emphasis added).[15]

Idaho Code § 42-201 provides:

> The right to the use of the unappropriated waters of rivers, streams, lakes, springs, and of subterranean waters or other sources within this state shall hereafter be acquired only by appropriation under the application, permit and license procedure as provided for in this title, unless hereinafter in this title excepted.

Idaho Code § 42-103 (emphasis added).

Idaho Code § 42-204 provides that a permittee is authorized to "take all steps required to apply the water to a beneficial use and perfect the proposed appropriation." Idaho Code § 42-204 (emphasis added). The conjunctive "and" indicates that there is more to establishing a water right than just putting it to beneficial use. Furthermore, Idaho Code § 42-217 requires that a survey be conducted and be submitted to the Department prior to issuing a license. This is an additional step after submission of the statement of proof of beneficial use but before a license can issue.

The cases cited by the district court do not stand for the proposition that a water right holder is entitled to a quasi-vested water right upon application of water to beneficial use. Indeed, two SRBA district court judges who have examined the issue of when a water right vests have reached the opposite conclusion as the district court. Thus, it was unreasonable for the district court to conclude that Legislature had knowledge of a rule of law that provided for the quasi-vesting of water rights simply upon application of water to beneficial use and that the Legislature would have needed to express some clear intent to overrule these cases.

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15 A copy of this case is attached as Addendum K.

3. The delay in issuing the license was reasonable in light of the Snake River Basin Adjudication and the history of litigation over hydropower water rights.

Given the district court's suggestion that the Department's delay in issuing the license was unreasonable, the Department is compelled to address the issue of the length of time between the completion of the beneficial use field exam and the issuance of the license. The reason for the delay relates back to the Swan Falls Agreement. As explained in the case *In re Snake River Basin Water System*, the State of Idaho and Idaho Power realized that to administer water rights in the Snake River Basin, it was going to be necessary to adjudicate the water rights in the basin. *In re Snake River Basin Water System*, 115 Idaho 1, 3, 764 P.2d 78, 80 (1988). Thus, as part of the Swan Falls Agreement, the parties agreed to support legislation for the commencement of the SRBA. The petition to commence the SRBA was filed on June 17, 1987. The SRBA was officially commenced on November 19, 1987. The adjudication is only now nearing completion. The approach to dealing with the approximately 150,000 water rights claims filed in the SRBA has been a methodical one, with the Department recommending water rights on a basin-by-basin approach. The recommendations for the Basin 02 water rights (the basin in which this water right is located) having only been filed with the SRBA district court in December of 2006.

In addition, litigation surround the effect of the Swan Falls Agreement was only recently resolved when the State of Idaho and Idaho Power, after additional litigation in the SRBA, agreed to re-affirm the Swan Falls Agreement. 2009 Idaho Sess. Laws 741-42. Thus, as the majority of the issues surrounding Idaho Power's water rights were before the SRBA court

starting in 2006 and moving towards resolution then, it makes sense that the Department would license this water right in 2007. It is also significant that Idaho Power never requested that the Department expedite issuance of the license. The most logical interpretation of the delay is that both the Department and Idaho Power were waiting to see how litigation relating to hydropower water rights was going to play out in the SRBA. The Department should not be penalized for the delay in issuing the license when Idaho Power was complacent in that delay. Moreover, the delay did not prejudice Idaho Power. As evidenced by its attorney's testimony before the Senate Legislative Committee, Idaho Power was aware of the changes to Idaho Code § 42-203B(6) and the impact they would have on permits. Furthermore, even assuming that the Department could have issued the license immediately after the beneficial use field exam was completed, it still would have been issued after the passage of the addition of Idaho Code § 42-203B. The statutory changes to Idaho Code §42-203B became effective on July 1, 1985. The beneficial use exam was completed on September 8, 1985. (Agency R. pp. 88-98.) Even if the Department had issued the license once the beneficial use exam was completed, the statute authorizing the inclusion of the term condition was already in effect. Thus, Idaho Power is in the same position today as it would have been if the Department had licensed the water right in 1985 after the completion of the beneficial use exam. Moreover, Idaho Power has been generating power under this permit and the imposition of the term condition will in no way alter its right to continue to generate power throughout the term of its FERC license.

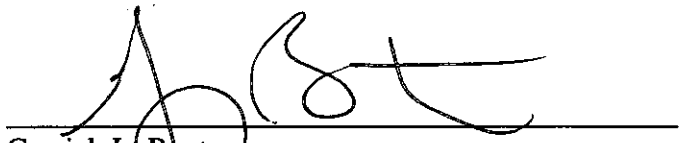
CONCLUSION

The district court erred in holding that Idaho Code § 42-203B does not authorize the Director to add a term condition to a hydropower water right at the time of licensing. First, the plain language of Idaho Code § 42-203B(6) provides for inclusion of term conditions at the licensing stage. Second, this interpretation is consistent with the policy of protecting future growth and development in the state as outlined in the Water Board's resolution on term conditions and Article XV, Section 3 of the Idaho Constitution. Third, the legislative history shows that it was the intent of the Legislature to authorize the Director to insert term conditions at licensing. This includes the Statement of Legislative intent, the testimony of John Runft and Attorney General Jim Jones, and the legislative dialog between Senator William Ringert and Idaho Power's attorney Tom Nelson, who specifically stated that the statute had been so drafted because the State wanted the power to go back and insert new conditions in the permits at the time the license is issued. Moreover, this interpretation that makes sense in light of the history of the Swan Falls Agreement and the legislation's stated purpose of preventing future Swan Falls type issues. As such, the Department respectfully requests that this court reverse the decision of the District Court and find that Idaho Code § 42-203B(6) authorizes the Director to add a term condition to a hydropower water right at the time of licensing.

DATED this 25 day of May, 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Chief, Natural Resources Division
Deputy Attorney General



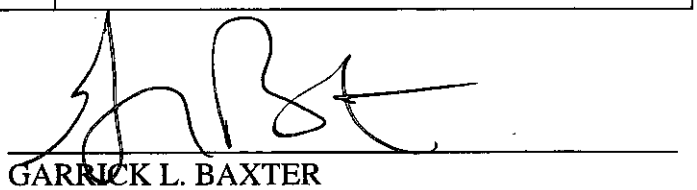
Garrick L. Baxter
Deputy Attorneys General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a duly licensed attorney in the state of Idaho, employed by the Attorney General of the state of Idaho and residing in Boise, Idaho; and that I served two true and correct copies of the following described document on the persons listed below by mailing in the United States mail, first class, with the correct postage affixed thereon on this 25TH day of May, 2010.

Document Served: **APPELLANT'S BRIEF**

James C. Tucker Senior Attorney IDAHO POWER COMPANY 1221 West Idaho Street Boise, ID 83702-5627	John K. Simpson BARKER ROSHOLT & SIMPSON LLP 1010 W. Jefferson, Suite 102 P.O. Box 2139 Boise, ID 83701-2139



GARRICK L. BAXTER
Deputy Attorney General

ADDENDUM A

SWAN FALLS AGREEMENT

AGREEMENT

This Agreement is made and entered into among the State of Idaho, by and through the Governor, hereinafter referred to as "State"; John V. Evans, in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation hereinafter referred to as "Company".

1. Effective Date

This Agreement shall take effect upon execution, except as to paragraphs 7, 8, and 11.

2. Executive Commitment

When the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions.

3. Attorney General

Jim Jones is a party to this Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 62237 and Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375.

4. Good Faith

When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.

The State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement.

5. Stay Of Current Court And Regulatory Action

A. The parties shall file a motion with the court in Ada County Civil Case Numbers 81375 and 62237, seeking a

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 4th day of January 2008.

EXHIBIT
Exhibit 1

stay of further proceedings until seven days following the adjournment of the First Regular Session of the 48th Idaho Legislature, except as to preservation of testimony pursuant to the Idaho Rules of Civil Procedure, completion of designated discovery filed by the State of Idaho and dismissal of various defendants by Company. The State shall designate in writing, within fifteen (15) days from the execution of this Agreement, those items of its discovery that must be responded to by Company. The Company shall respond to those items of discovery designated by the State within ninety (90) days from execution of this Agreement.

B. The parties shall request the Federal Energy Regulatory Commission (FERC) to stay any subordination-related decisions in any Company project listed in paragraph 7 licensing or relicensing proceeding pending implementation of this Agreement except as contemplated in paragraph 12 of this Agreement. The parties acknowledge, however, that FERC could independently take action prejudicial to their interests and, in such event, the parties may take reasonable actions necessary to protect their interests. Further, the State shall not file any motions to intervene in Project Numbers 2777 (Upper Salmon) and 2778 (Shoshone Falls); however, by agreeing to this provision, the Company in return waives any defense to the timeliness of a motion to intervene caused by this Agreement in the event this Agreement is not implemented. Company is not agreeing, however, that a motion to intervene would be timely if filed now.

C. The parties shall not attempt to influence any executive agency of the United States to take a particular position regarding subordination in any Company FERC licensing or relicensing proceeding pending implementation of this Agreement.

6. Legislative Program

The parties agree to propose and support the following legislation to implement this Agreement:

A. Enactment of Public Interest Criteria as set forth in Exhibit 1 attached hereto.

B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.

C. Establishment of an effective water marketing system.

D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.

E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.

F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.

G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

State and Company agree that Company's water right shall be as follows (Bracketed names used below refer to Company projects):

A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion. The Murphy gauging station is located at latitude 43° 17' 31", Longitude 116° 25' 12", in NW1/4NE1/4SE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.

B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad),

37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs),02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

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

F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with paragraph 7B. Company retains its right to seek injunctions, compensation, damages, or other relief from any future appropriator, as defined in paragraph 7(B), whose use of water violates or will violate the Company's water right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, as measured at the Murphy gauging station, and also retains its rights against the state and its agencies as set out in paragraph 7(B).

9. Proposed 1180 Contract

The parties acknowledge that the Governor and the Company have finalized the terms of a contract that would implement the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, presently codified as §§ 61-539 and 61-540, Idaho Code which is being executed on this date.

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and 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.

11. Status of State Water Plan

State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River Watershed.

12. Regulatory Approvals

A. Within 45 days of the execution of this Agreement, Company shall file appropriate pleadings or other documents with the Idaho Public Utilities Commission (IPUC), to obtain an order determining that the execution and implementation of this Agreement is in the public interest, and does not constitute an abandonment, relinquishment or transfer of utility property. Such pleadings or other documents shall also provide that the order shall state that any effect upon the Company's hydro generation resulting from execution and implementation of this Agreement shall not be grounds now or in the future for a finding or an order that the Company's rate base or any part thereof is overstated or that any portion of its electrical plant in service is no longer used and useful or not devoted to public service, nor will such effect upon the Company's hydro generation be grounds for a finding or an order reducing the Company's present or future revenue requirement or any present or future rate, tariff, schedule or charge.

In the event the IPUC does not issue an order acceptable to the parties, the parties will seek appropriate remedial legislation.

B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).

ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.

iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water right in those proceedings.

C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.

D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:

i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;

ii. Enactment of the legislative program outlined in paragraph 6;

iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;

iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);

v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;

vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

vii. Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall be void.

14. Authority of Department of Water Resources and Idaho Water Resource Board Not Affected

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.

15. Waiver, Modification or Amendment

No waiver, modification, or amendment of this Agreement or of any covenants, conditions, or limitations herein contained shall be valid unless in writing duly executed by the parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

16. Termination of Contract

This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13. The parties shall meet on May 15, 1985, to determine if the contract shall be continued or terminated.

17. Subsequent Changes In Law

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

18. Successors

The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

19. Entire Agreement

This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

20. Effect of Section Headings

The section headings appearing in this Agreement are not to be construed as interpretations of the text but are inserted for convenience and reference only.

21. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

STATE OF IDAHO

By: _____
JOHN V. EVANS
Governor of the
State of Idaho

IDAHO POWER COMPANY

By: _____
JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer

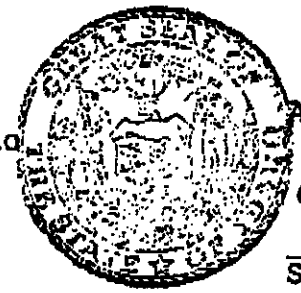
By: _____
JIM JONES
Attorney General of the
State of Idaho

ATTEST:

PETE T. CENARRUSA
Secretary of State

(Seal of the State of Idaho)

(Corporate Seal of Idaho Power Company)



ATTEST:

Secretary of Idaho Power

CERTIFICATE OF SECRETARY

Paul L. Jauregui, as secretary of Idaho Power Company, a Maine Corporation, hereby certifies as follows:

(1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the corporation, or a true facsimile thereof, as the case may be; and

(2) That any officer of the corporation executing the instrument does in fact occupy the official position indicated, that one in such position is duly authorized to execute such instrument on behalf of the corporation, and that the signature of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this 25th day of October, 1984.

Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE

OF THE STATE OF IDAHO

PETE T. CENARRUSA, as Secretary of State of the State of Idaho, hereby certifies as follows:

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and

2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and

3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this 25th day of October, 1984.

PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

identified to me to be the President and Secretary, respectively, of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

Exhibit 1

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, BY MAKING CERTAIN ORGANIZATIONAL CHANGES AND BY PROVIDING FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER PUBLIC INTEREST CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AND AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THIS ACT'S EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-203, Idaho Code be, and the same is hereby amended to read as follows:

42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. ~~On and after the passage/ approval and effective date of this section/~~ (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; ~~and~~ (b) the

date of filing thereof/; (c) the name and post-office address of the applicant/ (d) the source of the water supply/; (e) the amount of water to be appropriated/ (f) in general the nature of the proposed use/ (g) the approximate location of the point of diversion/ (h) and the point of use/. The department shall also stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of 20 c.f.s. or 2,000 acre feet, the director shall cause the notice to be published in the newspaper(s) sufficient to achieve statewide circulation. This notice shall be published at least once a week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a1) that it will reduce the quantity of water under existing water rights, or (b2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c3) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use/; tThe director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller lesser quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

(6) Any person or corporation who has formally appeared at the hearing, feeling aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1071A(4), Idaho Code.

SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203C, Idaho Code, and to read as follows:

42-203C. PUBLIC INTEREST DETERMINATION — CRITERIA — WEIGHT — BURDEN OF PROOF.

(1) If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.

(2)(a) The director in making such determinations for purposes of this section shall consider:

(i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

(ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy;

(iii) the promotion of the family farming tradition;

(iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho;

(v) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under this section shall be on the protestant.

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203D, Idaho Code, and to read as follows:

42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. The department shall review all permits issued prior to the effective date of this section, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of chapter 2, title 42, Idaho Code. If the department finds that the proposed use does not satisfy the criteria of chapter 2, title 42, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with chapter 2, title 42, Idaho Code. If the department finds that the permit satisfies the criteria established by chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.

The department shall provide an opportunity for hearing in accordance with section 1701A, title 42, Idaho Code and sections 5209 through 5215, title 67, Idaho Code, for each holder of a permit that is either cancelled or made subject to new conditions.

Exhibit 2

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS, AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A PROVIDING FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND PROVIDING A PROCEDURE FOR COLLECTION OF THE FEES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777 PROVIDING FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION - COMMENCEMENT. (1) Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources on or after July 1, 1985 shall petition the district court of Ada County to commence an adjudication of the water rights of the Snake River Basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) the boundaries of the entire system within the state to be adjudicated;

(b) the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1413, Idaho Code; and

(c) the uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) authorizes the director to commence an investigation and determination of the various water rights existing within the system;

(b) defines the system boundaries;

(c) defines the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1412, Idaho Code; and

(d) defines any uses of water excluded from the adjudication proceeding;

the adjudication shall proceed in the manner provided by the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407.

SECTION 2. That section 42-1414, Idaho Code, be, and the same is hereby amended to read as follows:

42-1414. FEES FOR FILING NOTICE OF CLAIM - In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim required under the provisions of section 42-4109, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the quantity of water claimed which shall be determined on the same basis as the fee for filing an application for a permit to appropriate the public waters of this state as provided in section 42-221, Idaho Code, except that where such claim is in connection with a water right established pursuant to a valid permit or license previously issued by the department of water administration or a water right which has previously been adjudicated by a state or federal court, the claimant shall pay a filing fee of only

ten dollars ($10/00) fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. Provided/ however/ that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act/ Chapter 153/ Laws of 1971/ was enacted/ The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

1. Claims for domestic and/or stock-watering rights $25.00

2. Claims for all other rights. $50.00

B. Additional variable water use fee for each claim filed:

1.	Irrigation use:	$ 1.00 per acre.
2.	Power:	$ 25.00 per c.f.s.
3.	Aquaculture:	$ 10.00 per c.f.s.
4.	Municipal, Industrial, Commercial, Mining, Heating, Cooling:	$100.00 per c.f.s.
5.	Public:	$100.00 per c.f.s.
6.	Miscellaneous:	flat fee only.

C. Payment of a variable water use fee of more than $1,000.00 may be spread out over as many as five annual equal payments with 10 percent interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established by section 42-1777, Idaho Code.

SECTION 3. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1777, Idaho Code, and to read as follows:

42-1777. WATER RESOURCES ADJUDICATION ACCOUNT. - A water resource adjudication account is hereby created and established in the agency asset fund. Fee moneys in the account

are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to the Snake River Basin adjudication provided for by section 42-7406A, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

Exhibit 3

- -

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR FOR THE DIVISION OF FINANCIAL MANAGEMENT, FOR FISCAL YEAR 1986.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. There is hereby appropriated to the Office of the Governor from the general account the amount of $200,000 to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin. A technical advisory committee named by the Governor shall oversee the studies.

Exhibit 4

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-502B TO PROVIDE THAT GAIN UPON SALE OF A PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1 - That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 61-502B, Idaho Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT.

The gain upon sale of a public utility's water right used for the generation of electricity shall accrue to the benefit of the ratepayers.

MEMORANDUM

SUBJECT: PROPOSED LEGISLATION RELATING TO UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENT AND OTHER REGULATORY IMPLICATIONS OF SWAN FALLS COMPROMISE.

SECTION 1 -- FINDINGS AND STATEMENT OF PURPOSE.--After hearing testimony from the Office of the Governor, the Office of the Attorney General, the Idaho Public Utilities Commission, the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Department of Fish and Game, other governmental entities and other interested groups and individuals of the State of Idaho, the legislature hereby finds that while portions of the testimony differ, the [describe the settlement and stipulation] is in the public interest for all purposes, including but not limited to, all purposes under the Public Utilities Law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2 -- PUBLIC UTILITIES COMMISSION--JURISDICTION.--The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with [describe the settlement and stipulation].

SECTION 3 -- IPUC--EFFECT OF AGREEMENT.--In any proceeding before the Idaho Public Utilities Commission, including but not limited to a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility (including Idaho Power Company), the commission shall accept as reasonable and in the public interest for all purposes, the [describe the settlement and stipulation], including without limitation the effects of implementation of such [describe the settlement and stipulation] on the utility's revenue requirements and hydroelectric generation.

SECTION 4 -- EXEMPTION.--Implementation of the [ ] shall not constitute a sale, assignment, conveyance or transfer within the meaning of §§61-327, 61-328, 61-329, 61-330, and 61-331, I.C., to the extent any of those sections may apply.

EXHIBIT 6

The executive branch of the State of Idaho and the Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan.

1. The minimum daily flow at the Murphy gauging station should be increased to 3,900 c.f.s. from April 1 through October 31 and to 5,600 c.f.s from November 1 to March 31.

2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.

3. New storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized.

4. The Idaho Water Resource Board should consider reserving a block of water for future DCMI purposes.

5. There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River between Milner and Murphy on hydropower production from November 1 to March 31. In this regard, approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River between Milner Dam and Murphy Gauge should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

   [The parties are proposing a policy which is neutral on the question of which Company facilities should be considered in mitigation decisions. At any later time the Board considers that question, the parties reserve the right to take any position they deem appropriate.]

Exhibit 7A

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

SECTION 2. This Act does not apply to licenses which have already been issued as of the effective date of this Act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Section 1:

1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by Sections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

2. A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

3. Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the users of water for power purposes and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

4. The user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as

being held in trust by the State according to Section 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

Section 2: This Act shall not be construed as modifying, amending, or repealing any interstate compact.

Section 3: The provisions of this Act are hereby declared to be severable. If any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this Act.

Section 4: An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Exhibit 8

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO ESTABLISH RULES AND REGULATIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-1805, be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES -- In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notice of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) To suspend the issuance of licenses or permits of a defined class or in a defined geographic area, as necessary to protect existing uses, ensure compliance with state law or implement the State Water Plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 4th day of January 08

ADDENDUM B

MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
APR 18 2008
By
Clerk
Deputy Clerk

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

In Re SRBA	**Consolidated Subcase: 00-92023 (92-23)**
Case No. 39576	**MEMORANDUM DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Holding: Granting State of Idaho's *Motion for Summary Judgment* on different grounds. Holding Idaho Power's rights exceeding the minimum flows are held in trust pursuant to the October 25, 1984, Swan Falls Agreement, which the Court finds to be unambiguous. As a term and condition of the Agreement, Idaho Power agreed to the regulatory authority of the State as is now codified at I.C. § 42-203B. The Court makes no ruling regarding the scope of the State's regulatory authority other than as agreed by Idaho Power in the October 25, 1984, Swan Falls Agreement. Holding that trust *res* contains water rights is dispositive of cause of action for mutual mistake. Denying Idaho Power's *Cross-Motion for Summary Judgment.*

I. APPEARANCES

James S. Lochhead, Michael A. Gheleta of Brownstein Hyatt Farber Schreck, PC, Denver, Colorado; John K. Simpson, Shelly M. Davis, Barker Rosholt & Simpson LLP, Boise, Idaho; James Tucker, Idaho Power Company, Boise, Idaho, Attorneys for Idaho Power Company, Boise, Idaho;

Lawrence G. Wasden, Attorney General, State of Idaho; Steven L. Olsen, Karl T. Klein, Michael C. Orr, Deputy Attorneys General of the State of Idaho, Boise, Idaho;

Dave Hensley, Counsel to the Governor, Boise, Idaho;

Josephine Beeman, Beeman & Associates, LLC, Boise, Idaho, Attorney for City of Pocatello.

Candice M. McHugh, Randall C. Budge, Scott J. Smith, Thomas J. Budge, Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, Attorneys for Aberdeen-American Falls Ground Water District *et al.*

II. SRBA PROCEDURAL BACKGROUND

Consolidated Subcase 00-92023 (also listed on the Court's registry of actions as 92-23)[1] is a consolidation of common issues raised with respect to the meaning and application of the terms of the "Swan Falls Agreement" as applied to twenty-six water right claims filed by Idaho Power Company ("Idaho Power").[2] The claims were originally scheduled to be assigned, or were already assigned and pending, before the three different special masters. For purposes of judicial economy, the common issues were separated from the individual subcases and consolidated. *See* ***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; and Notice of Scheduling Conference*** (July 24, 2007).

The *Director's Report for Basin 36, Reporting Area 3, Irrigation and Other Rights* was filed November 2, 1992, and included recommendations for hydropower claims 36-02013, 36-02018 and 36-02026. The recommendations did not contain subordination remarks. The recommendations were uncontested and the claims were decreed as recommended. ***Partial Decrees*** were issued for the three hydropower claims in the name of Idaho Power on November 11, 1997, and did not contain subordination remarks.

The *Director's Report for Irrigation and other Uses, Reporting Area 16, IDWR Basin 37, Part I (Surface Water)* was filed November 4, 2005, and included recommendations for hydropower claims 37-02128, 37-02471, 37-02472, 37-20709 and 37-20710. The claims were not initially recommended with a split in ownership showing both Idaho Power and the State of Idaho as owners. The original *Director's Reports* recommended Idaho power as the sole owner. Idaho Power objected to the

[1] Changed to accommodate forthcoming North Idaho Adjudication which includes Basin 92.

recommendations regarding the various remarks pertaining to the Swan Falls Agreement under the section "Other Provisions Necessary for the Definition or Administration of Water Right." On February 20, 2007, a *Notice of Completed Administrative Proceeding* and *Amended Director's Report* was filed, which recommended a split in the ownership of the water right claims into legal and equitable title with the State of Idaho holding legal title and Idaho Power and the State of Idaho, in and for the people of the State of Idaho, holding equitable title. The State of Idaho filed late objections to the recommendations in the *Amended Director's Report*, objecting to the equitable title holders' names being included in the name and address section as opposed to being included in a remark in order to be consistent with the holding in *U.S. v. Pioneer Irr. District et. al.*, 144 Idaho 106, 157 P.3d 600 (2007).

On May 10, 2007, Idaho Power filed a *Complaint and Petition for Declaratory and Injunctive Relief* (hereinafter "*Complaint and Petition*"), designated by the Court as Subcase 00-92023, naming the State of Idaho, the Governor, the Attorney General and the Director of the Idaho Department of Water Resources ("IDWR") as parties. Idaho Power also included the same allegations in its *Responses* filed in subcases 37-02128, 37-02472, 37-02471, 37-20709 and 37-20710 and styled them as a *Counterclaim*.

The *Director's Report for Irrigation and Other Uses, Reporting Area Basin 02* was filed December 29, 2006, and included recommendations for hydropower claims 02-00100, 02-02001A & B, 02-02032A & B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 02-02065, 02-04000A & B, 02-04001A & B, 02-10135 & 02-00034.[3] Both Idaho Power and the State of Idaho filed objections.

On July 24, 2007, this Court consolidated the common issues into Consolidated Subcase 00-92023. The *Responses* received for Idaho Power's Basin 02 claims also

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[2] These are subcases 36-02013, 36-02018, 36-02026, 37-02128, 37-02472, 37-02471, 37-20709, 37-20710, 02-00100, 02-02001A & B, 02-02032A & B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 02-02065, 02-04000A & B, 02-04001A & B, 02-10135 and 02-00034.

[3] Water right claims 02-02001A & B, 02-02032B, 02-02036, 02-02056, 02-02057, 02-02059, 02-02060, 02-02064, 02-02065, 02-04001B and 02-10135 were recommended with title being split between equitable and legal interests. Water right claims 02-00100, 02-02032A, 02-04000A, 02-04001A, 02-00034 were recommended in the name of Idaho Power only. Water right claim 02-00034 is for a commercial purpose of use.

included the additional claims 02-10135 and 02-00034, which were not included in the Court's July 24, 2007, ***Order.***

On December 14, 2007, the State of Idaho filed a *Motion for Partial Summary Judgment.* In support of its *Motion,* the State of Idaho filed the following affidavits: *Affidavit of Michael C. Orr*, with exhibits 1 through 75; *Affidavit of Kristin M. Ford*; *Affidavit of Patsy McGourty*; and the *Affidavit of Laird Noh.* The State of Idaho also filed a *Second Affidavit of Michael C. Orr* in response to Idaho Power's *Cross-Motion for Summary Judgment.*

The City of Pocatello, the Governor of the State of Idaho, the Speaker of the Idaho House of Representatives and President Pro Tempore of the Idaho State Senate filed statements in concurrence with the State's *Motion.*

On January 25, 2008, Idaho Power filed a *Cross-Motion for Summary Judgment.* In support of its *Motion* and/or in response to the State of Idaho's *Motion,* Idaho Power filed the following affidavits: *Affidavit of Shelley M. Davis*; *Supplemental Affidavit of Shelley M. Davis*, *Affidavit of Michael A. Gheleta* with exhibits A through Z and AA through KK; *Supplemental Affidavit of Michael A Gheleta*; *Affidavit of Greg Panter* and the *Affidavit of Sharon Strickland.*

Extensive briefing was lodged by both parties in support of their respective *Motions* and in opposition to the other side's *Motion.* Both parties also filed electronic versions with the Court as a courtesy and for which the Court is most appreciative given the volume of material. A hearing was held on the *Cross-Motions* on February 21, 2008. The Court also heard oral argument on the State of Idaho's *Motion to Strike Affidavit of Greg Panter* filed previously on February 15, 2008.

III. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in these matters on February 21, 2008. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, these matters are deemed fully submitted for decision the next business day, or February 22, 2008.

IV. MOTION TO STRIKE

The State of Idaho filed a *Motion to Strike Affidavit of Greg Panter* asserting that the affidavit did not meet the criteria of I.R.C.P. 56(e) because it is not based on Mr. Panter's personal knowledge; does not set forth facts that would be admissible in evidence; and fails to show that Mr. Panter is competent to testify to the matters recited in the affidavit. At the hearing on the *Motion to Strike*, the Court ruled that there were certain portions of the affidavit that did not meet the criteria of I.R.C.P. 56(e) and certain portions which did satisfy the criteria. Accordingly, the Court ruled that the affidavit would not be struck in its entirety but that the Court would rely on only those portions of the affidavit which satisfy the I.R.C.P. 56(c) standard. The Court refers to specific portions of the affidavit on which it is relying.

V. FACTUAL BACKGROUND

The inevitable conflict between those who use the water of the Snake River for power generation and those who use it for irrigation and other consumptive uses was foreseen prior to Idaho's statehood. Delegates to the constitutional convention recognized that because power generation relies upon instream flows, an unlimited right to appropriate water for hydropower generation could result in water being unavailable for appropriation for upstream consumptive uses such as irrigation. *II Proceedings and Debates of the Constitutional Convention of Idaho 1889*, I.W. Hart, ed., 1912 at 1125-26. Nonetheless, the Idaho Constitution did not initially treat water rights for power generation differently from other uses. As enacted, Art. XV, § 3 of the Idaho Constitution began with the following sentence: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied." It was not until 1928, after the development of hydropower projects on the Snake River and its tributaries began in earnest, that the Idaho Constitution was amended to add the following provision to that sentence: "except that the state may regulate and limit the use thereof for power purposes." *See discussion* Dennis C. Colson, *Idaho's Constitution - The Tie that Binds*, p.173 (1991 University of Idaho Press). Even then, however, it was

not until the 1980's that matters came to a head. 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. In the 1950's and 1960's, however, with 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 — some of it for pumping — and new hydropower projects constructed to meet that demand, it became obvious that downstream, unsubordinated use of water for hydropower production would soon hinder development of upstream consumptive use of water or *vice versa*. A brief but comprehensive history of the conflict and some of its causes and effects are set forth in the first few pages of *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983). It was that case that set the stage for the Swan Falls Agreement which is the subject of this decision.

In 1983 ratepayers filed a petition with the Idaho Public Utilities Commission ("IPUC") claiming that Idaho Power had failed to protect its water rights at the Swan Falls facility against upstream depletions. The IPUC denied Idaho Power's motion to dismiss. Idaho Power then filed suit against IDWR and others asserting that Idaho Power's Swan Falls water rights were not subordinated to upstream appropriations. *Idaho Power Company v. Idaho Department of Water Resources, et al.*, Case no. 81375 (entered Feb. 12, 1990). The State defended, asserting that the 1928 amendment to Article XV, § 3 authorized the state to regulate and limit Idaho Power's water rights — even those predating the amendment. Granting the State's motion for summary judgment, the district court ruled that Idaho Power's Federal Energy Regulatory Commission ("FERC") license for the Hells Canyon project subordinated not only the Hells Canyon water rights but also upstream hydropower rights, including those at Swan Falls. On appeal, the Idaho Supreme Court ruled that Idaho Power's water rights for the Hells Canyon project were subordinate to consumptive upstream uses, but that such subordination only applied to the Hells Canyon water rights and not to those held by Idaho Power for the Swan Falls project. *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983). Idaho Power then filed suit against the State and thousands of water right holders claiming unsubordinated water rights at Swan Falls and other facilities

below Milner. *Idaho Power Company v. State of Idaho, et al.*, Idaho Fourth Judicial District, Case no. 62237 (entered Mar. 7, 1990). Thus, the *Idaho Power Co. v. State* decision and its aftermath brought into sharp focus the conflict predicted before statehood and the need to either limit the Swan Falls hydropower water rights or limit upstream consumptive uses of water, including irrigation.

Unsuccessful attempts were made to resolve the conflict in the 1983 and 1984 sessions of the legislature. In 1984, the parties began to discuss settlement. In a May 9, 1984 letter, in response to Idaho Power's suggestion that the parties negotiate a settlement, Governor John V. Evans proposed to Idaho Power CEO James Bruce that Idaho Power convey its water rights on the Snake River to the State in exchange for an agreed upon minimum streamflow and that the State would then agree to review future allocations of water on the Snake River against criteria which included preservation of the hydropower base. *Panter Aff.*, Exh. A. This offer was rejected. *Panter Aff.*, Exh. B. However, negotiations continued and by October 1984, the parties executed a "Framework for Final Resolution of Snake River Water Rights Controversy." *Panter Aff.*, Exh. C. This agreement (hereinafter referred to as the "Framework") was signed by Governor John V. Evans, Attorney General Jim Jones, and Idaho Power CEO and Chairman of the Board James E. Bruce on October 1, 1984. The Framework referred to the pending litigation between Idaho Power and the State:

> In order to resolve the controversy and settle the pending litigation, we have identified a series of judicial, legislative and administrative actions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction.

Panter Aff., Exh. C at 2. The Framework called for a minimum streamflow at the Murphy gauge[4] of 3,900 c.f.s. during the irrigation season and 5,600 c.f.s. during the non-irrigation season. *Id.* The Framework referred to the "best hydrologic data" indicating that existing uses result in a potential irrigation seasonal low flow of approximately 4,500 c.f.s. at the Murphy gauge and that establishing a minimum flow of 3,900 c.f.s. during the irrigation season would allow "a significant amount of further development of water uses

[4] This is a reference to the U.S.G.S. gauging station located below Swan Falls dam on the Snake River.

(approximately 600 c.f.s.) without violating the minimum streamflow." *Id.* The Framework recognized:

> The actual amount of development that can take place without violation of these minimum streamflows will depend on the nature and location of each new development, as well as the implementation of new practices to augment streamflow.

Id. at 3. The Framework encouraged the development of new DCMI (Domestic, Commercial, Municipal, Industrial) uses "without further impediment" because of their "minimal effect on total water supply." The Framework also provided that the right to develop the remaining water resources on the Snake River system "should be allocated in a manner which will maximize long-term economic benefit to all sectors of society." Further, it provided "[p]riority should be given to projects which promote Idaho's family farming tradition and which will create jobs." The Framework also provided that future water rights allocation decisions should "weigh the benefits to be obtained from each development against the probable impact it will have on the Company's hydropower resources." *Id.* at 4.

The Framework stated that settlement of the pending litigation "should be structured in a way which will allow the State to utilize Idaho Power Company's asserted water rights 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."[5] The Framework called for legislation to be adopted to (1) enunciate state policy regarding the types of water resources development deemed to be beneficial and recognize the benefit of hydropower generation as an element of public interest determination; (2) clarify the authority of IDWR to impose and lift moratoriums; and (3) clarify that proceeds from utility sales of hydropower water rights would benefit ratepayers. *Id.* at 5-8.

The Framework called for the commencement of a general adjudication of the entire Snake River basin in Idaho, recognizing that effective management of the river "lies in a comprehensive determination of the nature, extent and priority of all of the

[5] Under Art. XV, § 3 of the Idaho Constitution, the State may not have had such authority if the State were dealing with unappropriated water.

outstanding claims to water rights." The Framework recognized that such an adjudication would take "many years" to complete and that it should be initiated as soon as possible so that it will be completed "before an even more severe water rights crisis is upon us." [6] *Id.* at 5-6. The Framework also called for the establishment of an effective water marketing system and funding of hydrologic and economic studies. *Id.* at 7. Finally, an "implementation timetable" was set forth in the Framework providing for, among other things, a deadline for execution of a "Settlement Agreement, S.B. 1180 Contract[7] and Stipulation" and a deadline for proposed legislation and meetings with legislative committees and comments on proposed legislation. *Id.* at 9.

The Framework did not specifically mention conveyance of Idaho Power's water rights nor did it mention that the rights (or the water itself) would be held in trust. The Framework only provided for the minimum streamflows mentioned above which were significantly less than would have been provided by the water rights then asserted by Idaho Power.

The "Settlement Agreement" referred to in the Framework is what would later come to be known as the Swan Falls Agreement (hereinafter "Swan Falls Agreement" or "the Agreement"). The Swan Falls Agreement is attached hereto as Exhibit 1. Like the Framework, the Swan Falls Agreement was signed by Governor Evans, Attorney General Jones and Idaho Power CEO Bruce. The Agreement was signed on October 25, 1984. The Agreement provided for a stay of the lawsuit by Idaho Power against upstream water users and a stay of proceedings before FERC relating to subordination issues. It also provided that the parties would propose and support legislation consistent with the provisions of the Framework, including what became I.C. § 42-203B. Section 7 of the Agreement deals with Idaho Power's water rights. It provides:

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[6] In retrospect, this observation rings true given the drought of the last several years, ongoing disputes over depletion of the aquifer and conjunctive administration, and this litigation.

[7] The S.B. 1180 Contract referred to in the Framework was actually entitled Contract to Implement Chapter 259, Sess. Laws, 1983. Like the Framework, it was signed by Governor Evans, Attorney General Jones and Idaho Power CEO Bruce. It provided, among other things, for dismissal of certain defendants in the lawsuit brought by Idaho Power against numerous upstream water users (Ada County Case No. 81375) and an agreement that Idaho Power would not assert a claim for relief for depleted Snake River flows against those parties. The Contract also provided for legislation which was enacted as I.C. §§ 61-539 and 61-540.

7. Company's Water Right[8]

State and Company agree that Company's water right shall be as follows (Bracketed Names used below refer to Company projects):

A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion. The Murphy gauging station is located at latitude 43° 17" 31", longitude 116° 25' 12", in NW1/4, NE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls power plant, 7.5 miles NE of Murphy, at river mile 453.5.

B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains its right to compel State to take reasonable steps to insure the average daily flows established by this agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

[8] Note that the Agreement uses the singular term "right."

C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. The Company's rights listed in 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

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

F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

Except for paragraph 4 of the Agreement, which provides that the State shall enforce the state water plan and assert the existence of water rights held in trust, the body of the Agreement is silent as to Idaho Power's water rights. Paragraph 6 of the Agreement, however, provides for enactment or amendment of various provisions of Idaho water law. Specifically, paragraph 13(A)(vii) of the Agreement refers to and provides for enactment of subordination legislation "as set forth in Exhibits 7A and 7B attached to this agreement." Exhibit 7A and 7B were attached to the Agreement and were to be enacted as I.C. § 42-203B. Exhibit 7B, Section 1, Paragraphs 1 – 5 provides:

> 1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

2. A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

3. Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the Governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law.

4. The user of water for power purposes as beneficiary of the trust established in subsections 2 and 3 of this section shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as being held in trust by the state according to subsection 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement.

After the Agreement was signed, Exhibit 7B to the Agreement was introduced as part of Senate Bill 1008 in the 1985 Legislature. Hearings on the Bill were held before the Senate Resources and Environment Committee on January 18, 21, 25 and February 1, 1985. In the House Resources and Environment Committee, hearings were held on February 1, 11, and 13, 1985. *Orr. Aff.*, Exh. 8 – 11 and 19-21. The three attorneys who

negotiated the Agreement jointly on behalf of the signatories attended three of the Senate committee meetings and the principal House committee meeting. At the first of the Senate committee hearings, Governor Evans' counsel, Pat Costello, provided a section by section summary of S.B. 1008. He explained:

> [Exhibit] 7B is the one that would impose 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 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 . . . .

Orr Aff., Exh. 33. At the hearing, Mr. Costello answered a question about the trust portion of the proposed legislation:

> [The trust] was simply 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 will go to the state.

Orr Aff., Exh. 33. At the same hearing, the Attorney General's written testimony stated that, "[a]s drafted, the state possess[es] legal title to all waters previously claimed by the Company above 3900 c.f.s." *Orr Aff.*, Exh. 8. Idaho Power's attorney, Tom Nelson, was present at this hearing and did not voice any disagreement with Mr. Costello's or the Attorney General's characterization of the Agreement. Mr. Nelson told the committee members: "The state then takes that water and places it in trust, subject to reallocation. This does two things, it makes clear the state's control of the allocation of the water, and it left the water unsubordinated." Idaho Power's written statement in support of S.B. 1008 stated: "The state, as trustee, can protect those rights, and so can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated water right." *Orr Aff.*, Exh. 10. The statement also acknowledged that the Agreement was not a voluntary transfer of Idaho Power's water rights but was based upon the State's power to regulate and limit the use of water for hydropower purposes.[9]

[9] 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. *See*, I.C. § 61-539, enacted in 1983 pursuant to the S.B. 1180 contract and the Framework, discussed herein.

S.B. 1008 was passed on February 6, 1985, and I.C. § 42-203B was enacted. It has since been amended to reflect changes in administrative rules but remains essentially as it was adopted by the legislature and as provided in Exhibit 7B to the Agreement. It provides:

> **§ 42-203B. Authority to subordinate rights--Nature of subordinated water right and authority to establish a subordination condition--Authority to limit term of permit or license**
>
> (1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.
>
> (2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; provided, however, that application 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. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.
>
> (3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in

excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law, excluding compliance with the requirements of section 42-203C, Idaho Code.

(4) The user of water for power purposes as beneficiary of the trust established in subsections (2) and (3) of this section shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

(5) The governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as being held in trust by the state under subsection (2) of this section. Such agreements shall be subject to ratification by law. The contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement.

(6) The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

Subsection (6) of this section shall not apply to licenses which have already been issued as of the effective date of this act.

(7) The director in the exercise of the authority to limit a permit or license for power purposes to a specific term of years shall designate the number of years through which the term of the license shall extend and for purposes of determining such date shall consider among other factors:

(a) The term of any power purchase contract which is, or reasonably may become, applicable to, such permit or license;

(b) The policy of the Idaho public utilities commission (IPUC) regarding

the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA);

(c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;

(d) Existing downstream water uses established pursuant to state law.
The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

It is undisputed that the parties have satisfied the contingencies set forth in the Agreement.

One of the provisions of Paragraph 7 of the Agreement (the same paragraph that describes Idaho Power's water right) was a provision that upon implementation of the Agreement, "State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in Paragraphs 7(A) through 7(E)." The two decrees entered in those cases contain verbatim recitations from paragraph 7 of the Agreement. It is these two Ada County decrees which form the basis of Idaho Power's *Cross Motion for Summary Judgment* in which Idaho Power asserts that the State's claim that it owns legal title to the subordinated flows is barred by *res judicata* and judicial estoppel.

On May 10, 2007, Idaho Power filed the *Complaint and Petition* seeking the following relief:

A. A declaration that there was no "Trust Water" available when the Swan Falls Agreement was executed in 1984, and therefore no trust *res* and no valid trust established under the Swan Falls Settlement.

B. A reformation of the Swan Falls Settlement based on mutual mistake of fact regarding the existence of Trust Water, eliminating any asserted trust while retaining provisions unrelated to the purported trust.

C. A declaration that to the extent there is a valid trust, the trust *res* is water and not water rights, the State of Idaho does not hold legal title to

Idaho Power's water rights, and title to the water rights referenced in the Swan Falls Settlement is quieted in Idaho Power.

D. A declaration that the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.

E. A declaration that Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to the use of water for ground water recharge.

F. A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for the multiple year impacts of ground water pumping.

G. Preliminary and permanent injunctions: (a) enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights; (b) ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20 year terms of previously granted permits for new appropriations of Trust Water; (c) ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement; and (d) ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore 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 ESPA.

The State of Idaho then filed a *Motion to Strike or Alternatively to Dismiss Complaint and Petition for Declaratory and Injunctive Relief.* After a hearing on the State's *Motion* this Court entered the July 24, 2006, ***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; and Notice of Scheduling Conference.*** Pursuant to the ***Order***, this Court dismissed the claim for relief pertaining to the repeal of Idaho Attorney General Opinion 06-02. This Court ruled that the SRBA District Court has jurisdiction to preside over the declaratory relief sought by Idaho Power.

The State's *Motion for Partial Summary Judgment* followed, asserting that the State "holds legal title to any portion of the hydropower rights subject to the Swan Falls

settlement in excess of the minimum flows established at the Murphy gauge, and that the water rights held in trust are subordinate to junior water rights approved pursuant to State law."[10] Specifically, the State of Idaho asserted:

> 1. That pursuant to Idaho Code § 42-203B, legal title to any portion of the water rights subject to the Swan Falls settlement for flows in excess of the minimum flows established at the Murphy Gage under the State Water Plan is held in trust by the State of Idaho, by and through the governor, for the benefit of Idaho Power Company and for the benefit of the people of the State of Idaho;
>
> 2. That pursuant to Idaho Code § 42-203B, the water rights for power purposes held in trust by the State under Idaho Code § 42-203B are subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to State law; and
>
> 3. That the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches cannot be invoked or applied in a manner contrary to or inconsistent with Idaho Code § 42-203B.

Idaho Power then filed a *Cross Motion for Partial Summary Judgment* asserting that Idaho Power is the "sole and lawful owner of the water rights as described in Ada County cases *Idaho Power Company v. the State of Idaho, et al.*, Case No 62237, and *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case No. 81375, and quieting title thereto in Idaho Power."[11]

VI. STANDARD OF REVIEW

Summary judgment shall be rendered when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). Generally, disputed facts are to be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 175 P.3d 172 (2007). However,

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[10] *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment*, p. 3.

[11] *Idaho Power Company's Cross Motion for Summary Judgment*, p. 2.

> [I]f an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.

Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991); *Blackmon v. Zufelt*, 108 Idaho 469, 470, 700 P.2d 91, 92 (Ct.App.1985) (citing *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

Here, both parties have moved for summary judgment. The State's motion seeks a ruling that the State "holds legal title to any portion of the hydropower rights subject to the Swan Falls settlement in excess of the minimum flows established at the Murphy Gauge and that the water rights held in trust are subordinate to junior water rights approved pursuant to State law." Idaho Power denies that the State owns the water rights and seeks a ruling that Idaho Power is "the sole and lawful owner of the water rights described in Ada County cases *Idaho Power Company v. the State of Idaho, et al.*, Case No. 62237, and *Idaho Power Company v. the Idaho Department of water Resources, et al.*, Case No. 81375, and quieting title in Idaho Power." It is undisputed that the water rights referred to by the State as being "subject to the Swan Falls Agreement" and those water rights referred to by Idaho Power as being described in the two Ada County cases are the same water rights. Therefore, the two motions plainly deal with the same subject matter. The parties rely upon closely related issues, and while their legal theories are different, they both ask the Court to rule that they own the water rights. The State relies upon the terms of the Swan Falls Agreement and Idaho Power relies upon two consent decrees in cases which were settled as part and parcel of the Swan Falls Agreement. Our Supreme Court has explained the legal standards to be applied when deciding cross motions for summary judgment as follows:

> In *Brown v. Perkins,* 129 Idaho 189, 923 P.2d 434 (1996), this Court held that when both parties file a motion for summary judgment relying on the same facts, issues, and theories, the parties essentially stipulate that there is no genuine issue of material fact which would preclude the district court from entering summary judgment. *Brown,* 129 Idaho at 191, 923 P.2d at 436. In *Wells v. Williamson,* 118 Idaho 37, 794 P.2d 626 (1990), this Court recognized that when opposing parties file cross motions for summary judgment, based upon different theories, the parties should not

> be considered to have effectively stipulated that there is no genuine issue of material fact. *Wells,* 118 Idaho at 40, 794 P.2d at 629.

Eastern Idaho Agricultural Credit Association v. Niebaur, 130 Idaho 623, 626-627, 944 P.2d 1386, 1389-1390 (1997).

Finally, it is well established that a party opposing a motion for summary judgment cannot rely upon bare conclusory allegations:

> The burden of proving the absence of an issue of material fact rests at all times upon the moving party. *McCoy v. Lyons,* 120 Idaho 765, 769, 820 P.2d 360, 364 (1991); *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). To meet this burden the moving party must challenge in its motion and establish through evidence that no issue of material fact exists for an element of the nonmoving party's case. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). If the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. *Id.* at 719, 918 P.2d at 588. The non-moving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). A mere scintilla of evidence or only slight doubt is not sufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In a motion for summary judgment, this Court will liberally construe the facts in favor of the nonmoving party. *S. Griffin Const., Inc. v. City of Lewiston,* 135 Idaho 181, 185, 16 P.3d 278, 282 (2000).

Blickenstaff v. Clegg, 140 Idaho 572, 577, 97 P.3d 439, 444 (2004).

VII. DISCUSSION

At issue in these cross-motions for summary judgment is the title to Idaho Power's hydropower claims or portions of the claims which exceed the minimum flows set at the Murphy Gauge located below the Swan Falls dam. The State of Idaho argues that pursuant to I.C. § 42-203B, the portions of the claims exceeding the minimum flows are held in trust by the State of Idaho for the benefit of Idaho Power and the citizens of the State of Idaho. The result is that the State of Idaho holds legal title and Idaho Power

and the citizens of the State of Idaho share equitable title to rights held in trust. The State's argument in support of its *Motion* rests entirely on the State's regulatory authority over hydropower rights as defined by I.C. § 42-203B and authorized by Article 15 § 3 of the Idaho Constitution as amended in 1928. The State also notes that I.C. § 42-203B was enacted not only for the purpose of resolving the dispute with Idaho Power, but also as a means of resolving future disputes over other existing unsubordinated hydropower rights. The State's position is that the Swan Falls Agreement is not relevant to the determination of ownership; rather it is solely the application of I.C. § 42-203B that is controlling.

Idaho Power raises a number of arguments in opposition. First, it argues that I.C. § 42-203B is ambiguous as to whether the legislature intended that the corpus or *res* of the statutorily created trust consists of the water that was made available by subordinating portions of the hydropower rights, or of Idaho Power's water rights. Idaho Power argues that the Court must look at the legislative history of the statute, the entirety of the legislation surrounding the Swan Falls Agreement as well as the subsequent actions of the State in interpreting and applying the legislation. Idaho Power also argues that the legislation must be read in conjunction with the Swan Falls Agreement as the legislation was an implementation of the Agreement. Idaho Power also asserts that since the entry of the Consent Judgments in Ada County, the State has taken numerous actions which are inconsistent with its arguments that it holds legal title to Idaho Power's water rights. Finally, Idaho Power challenges the State's constitutional authority to regulate its vested rights.

Idaho Power argues in the alternative that the Consent Judgments entered in Ada County case *Idaho Power Company v. State of Idaho, et al.*, Idaho Fourth Judicial District, Case no. 62237 (entered Mar. 7, 1990), and Ada County case *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case no. 81375 (entered Feb. 12, 1990) define Idaho Power's rights. Principles of *res judicata* and collateral estoppel prevent these issue or claims from being re-litigated or collaterally attacked in these subsequent proceedings. In opposition, the State of Idaho argues that the issue of ownership of the disputed portions of the hydropower claims was never at issue nor was it litigated in the Ada County proceedings. The State also argues that once the Snake

River Basin Adjudication was commenced in 1987, the Ada County District Court was divested of jurisdiction to adjudicate Idaho Power's claims.

A. The Court must consider the Swan Falls Agreement in Conjunction with Idaho Code § 42-203B.

The State urges the Court to decide the issue of ownership based solely on the application of I.C. § 42-203B. For the reasons discussed below, this Court holds that the issue can and should be decided based on analysis of the Swan Falls Agreement, which incorporates the provisions of I.C. § 42-203B. The Court declines to decide the issue based solely on the State's general regulatory authority. While the distinction may appear subtle, the issues involved are not.

First, Idaho Code § 42-203B was not enacted in a vacuum but was a means of settling disputes over unsubordinated hydropower claims. Senate Bill 1008, later codified as Idaho Code § 42-203B, was proposed and introduced into the legislature pursuant to and in accordance with the Swan Falls Agreement. The Swan Falls Agreement was specifically conditioned on the enactment of Senate Bill 1008. Paragraph 13 of the Swan Falls Agreement provides in relevant part:

> 13. Conditions on Effectiveness
>
> A. The provisions of paragraphs 7 [which defines Idaho Power's water right], 8 [damages waiver], and 11 [state water plan] *shall not be binding and effective until each of the following conditions have been implemented*:
> . . .
>
> vii. *Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.*
>
> B. *In the event any of these conditions are not implemented,* or should this Agreement be terminated . . . *then this Agreement shall be void.*

(emphasis added). Exhibit 7B to the Agreement consists of the provisions of Senate Bill 1008, later codified as Idaho Code § 42-203B. Idaho Code § 42-203B also refers to and

ratifies the Swan Falls Agreement. Specifically, "[t]he contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the governor's authority and power to enter into this agreement." I.C. § 42-203B(5).

Accordingly, to the extent there is an alleged discrepancy or ambiguity between the Agreement and the legislation, the starting point is the Agreement, not the legislation. While the State may still be able to enforce the terms of the statute, to the extent its provisions are alleged to vary from the terms of the Agreement it would not be able to do so without implicating claims for breach of contract or takings. The resolution of breach of contract or takings claims would require an examination of the intent of the parties as evidenced by the underlying Agreement. Simply put, starting with the interpretation of the Agreement avoids "begging the question" of the intent of the parties which would have to be addressed even if the Court only considered the statute.

Even if this Court were to rely solely on the application of I.C. § 42-203B, it would be necessary to ascertain the intent of the parties concerning the definition of Idaho Power's rights based on the way in which the claims were recommended in the *Director's Reports*. Idaho Power's various claims were recommended in *Director's Reports* as individual water rights. However, the only claims that were recommended solely in the name of Idaho Power were the unsubordinated portions of the rights at the Swan Falls facility. The subordinated portion of the flows at the Swan Falls facility, as well as every other claim for use at a facility located upstream, was recommended in its entirety with title being split between equitable and legal title as opposed to being apportioned. In other words, no minimum flows were set for the claims at the individual facilities, only a cumulative minimum flow was set downstream at the Murphy Gauge. Idaho Code § 42-203B speaks in terms of apportioning a hydropower right between the unsubordinated and subordinated portion of the right. Paragraph 7 of the Agreement which defines Idaho Power's rights defines them cumulatively as a single right apportioning the right between the subordinated and unsubordinated portions of the right. Yet, IDWR has recommended the claims individually. Clearly, decreeing the rights consistent with the intent of the parties requires an examination of the underlying Agreement.

Finally, deciding the issues entirely based on the State's exercise of its regulatory authority over hydropower rights independent from the underlying Agreement raises a number of significant constitutional issues. Some, but not all, of these issues were raised by Idaho Power. Specifically, issues regarding the constitutional scope of the State's authority to regulate and limit vested hydropower rights and whether the provisions of I.C. § 42-203B are consistent with that authority when applied to Idaho Power's claims.[12] For example, Idaho Power's claims include priority dates both pre-dating and post-dating the 1928 amendment to Article 15 § 3 which confers the authority to the State to regulate and limit the use of water for hydropower. This raises the issue of whether the State's ability to limit and regulate hydropower rights extends to hydropower rights which vested prior to the 1928 amendment. Another issue is whether the provisions of Article 15 § 3 are self-executing or whether they must be exercised in conjunction with the licensure proceedings? In other words, can the State retroactively place new limits or regulations on a hydropower right after a license for a water right is issued without such limits or restrictions?[13] Idaho Power's licenses were issued without subordination provisions. Does the State's authority have to be exercised through the legislature or can it be exercised directly by the Idaho Department of Water Resources? Does placing ownership of a private water right in the name of the State and then "reallocating" the right to third parties with new restrictions exceed what was contemplated by regulating and limiting a hydropower right? Lastly, does placing ownership of the right in the State for purposes of maintaining the source as fully appropriated violate the first part of Article 15 § 3 of the Idaho Constitution which provides the "right to divert the unappropriated waters . . . shall never be denied"?

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[12] The constitutional authority for I.C. § 42-203B is Article 15 § 3 of the Idaho Constitution which provides in relevant part:

> The 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.*

(emphasis added).

[13] If subordination was addressed in conjunction with the licensure proceedings and the license was issued deliberately without the inclusion of a subordination remark, then can the State later change its position under its regulatory authority?

The Court notes these issues because as the State points out, I.C. § 42-203B was not only enacted for the purpose of resolving the Swan Falls controversy with Idaho Power but also as a process for resolving unrelated disputes involving unsubordinated hydropower claims. *See* I.C. § 42-203B(3) (applying to water rights which are not defined by agreement). The Court also has before it a number of other unrelated hydropower claims that were licensed without subordination remarks. In those hydropower claims, subordination language was recommended by IDWR for reasons other than the State's regulatory authority. The State's position here in relying solely on the application of I.C. § 42-203B implies an unlimited constitutional authority to regulate and limit vested hydropower rights. The extrapolation of the State's interpretation of the scope of its constitutional authority to regulate vested hydropower rights essentially makes any other basis for recommending subordination of vested hydropower rights unnecessary.

In sum, the issues concerning the nature and scope of constitutional authority have implications extending beyond the instant case. In this Court's opinion, the issue over ownership can be fully decided based on the interpretation of the Swan Falls Agreement. Therefore, the Court need not decide the issue based on a determination of the scope of the State's regulatory power over Idaho Power's vested hydropower rights. A contractual agreement between parties to settle a water rights dispute does not raise the same constitutional issues. As the Supreme Court stated in *Idaho Power v. State*, 104 Idaho 575, 661 P.2d 741 (1983):

> We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, *e.g.* restrictive covenants and equitable servitudes. Whatever merits such an argument may have with regard to subordination clauses forced upon an unwilling appropriator by the FPC or the state, we need not decide. We hold only that a voluntary subordination agreement is not in violation of Idaho's water law, and therefore we find no conflict between our state water law and the language of the subordination clause inserted in the Hells Canyon licenses.

Id. at 587, 661 P.2d at 753. Even though Idaho Power maintains that it never directly agreed to voluntarily transfer its rights to the State, it could still concede to the State's authority or agree not to challenge the State's authority to "regulate" its rights in a manner that would achieve the same result. However, Idaho Power's consent to the State's authority would not necessarily be binding on unrelated hydropower claims.

Accordingly, the Court bases this decision on its interpretation of the Swan Falls Agreement, including the agreement between the parties to enact I.C. § 42-203B, as opposed to deciding the matter based solely on the State's regulatory authority.

1. The Swan Falls Agreement is Not Ambiguous Regarding the Trust Arrangement or the *Res* of the Trust.

In the past, the phrase "Swan Falls Agreement" has been used to include all of the related actions associated with implementing the October 25, 1984, Agreement, including contracts, legislation, administrative actions and consent decrees. As the State points out in its brief "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." *Memorandum in Support of State of Idaho's Motion for Partial Summary Judgment* at 11. In the context of proceedings such as Basin-Wide Issue 13 where the Court has to determine what action, if any, is required to memorialize the "Swan Falls Agreement," the Court must consider all the various actions that were made conditions of the Swan Falls Agreement in addition to the Agreement itself. [14] However, for the purpose of deciding the issues in this case, the Court will begin with the October 24, 1985, contract (referred to in this decision as the "Swan Falls Agreement"), which authorized the suite of legislative, judicial and administrative actions and also set forth the intent of the parties. When read in its entirety, the Court finds the Swan Falls Agreement is not ambiguous as to the ownership of Idaho Power's claims or as concerns the *res* of the trust.

[14] *See* ***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.***

The issue of whether a contract is ambiguous is a question of law. *Swanson v. Beco Construction Co.*, 145 Idaho 59, 62 175 P.3d 748, 751 (2007) (quoting *Howard v.Perry,* 141 Idaho 139, 142, 106 P.3d 465, 468 (2005)). Ambiguities can be either patent or latent. Whether a contract is patently ambiguous is determined from the face of the written agreement. *Id.* (citing *Ward v. Puregro Co.*, 128 Idaho 366, 369, 913 P.2d 582, 585 (1996)). A latent ambiguity is not evident on the face of the written instrument, but becomes apparent when applying the instrument to the facts as they exist. *Id.* (citing *In re Estate of Kirk*, 127 Idaho 817, 824, 907 P.2d 794, 801 (1995)). To determine whether a contract is patently ambiguous, the court looks to the face of the document and gives the words or phrases used their established definitions in common use or settled legal meanings. *Id.* (citing *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 70 P.3d 664 (2003)). For a contract term to be ambiguous there must be at least two different reasonable interpretations of the term or the term must be nonsensical. *Id.* (citing *Armstrong v. Farmers Ins. Co. of Idaho*, 143 Idaho 135, 139 P.2d 737 (2006) and *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 65 P.3d 184 (2003)).

Paragraph 19 of the Agreement provides the following:

> Entire Agreement
>
> This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions or understandings, either or written between them other than are herein set forth.

Paragraph 4 of the Agreement refers to the State's duty under the contract to "assert the existence of water rights held in trust."

> The State shall enforce the State Water Plan and *shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan.* State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement.

(emphasis added). This is the only reference to a trust in the body of the Agreement. Paragraph 7 then defines Idaho Power's various hydropower rights as a single cumulative right and then apportions the right between the unsubordinated and subordinated portions.

7. Company's Water Right

State and Company agree that *Company's water right shall be as follows* (Bracketed names used below refer to Company projects):

A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) *entitle the Company to an unsubordinated right* of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion.

B. *The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers* 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), *but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A).* Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

C. *The Company's rights listed in paragraph 7(A) and 7(B)* are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. *The Company's rights listed in paragraph 7(A) and 7(B)* are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

E. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that *describe the Company's water right as provided in paragraphs 7(A) through 7(E).*

(emphasis added). Paragraphs 7 A through E do not refer to a trust or to a division of ownership of the subordinated portions of Idaho Power's rights into legal and equitable title. Paragraph 7A provides that Idaho Power is "entitled to an unsubordinated right" and paragraph 7B refers to Idaho Power being "entitled to use the flow of the Snake River at its facilities to the extent of beneficial use." Paragraphs 7C and D refer to the "Company's rights listed in paragraph 7(A) and (B)." Paragraph 7E also refers to the "Company's water right as provided in paragraph 7 (A) and (B)." When read in isolation from the rest of the Agreement, one interpretation of paragraph 7 is that Idaho Power is the owner of the claims. However, the way Idaho Power's rights are defined in Paragraphs 7A through E is not inconsistent with a split in ownership as established by other sections of the Agreement.

Exhibit 7B to the Agreement sets forth the language of Senate Bill 1008 which was a condition of the Agreement pursuant to paragraph 13.A.vii. *See* text of paragraph 13.A.vii, *supra*. Exhibit 7B is unambiguous regarding the trust arrangement. Section 1, paragraph 1 of Exhibit 7B provides:

> The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. *The purposes of the trust established by Sections 2 and 3 of this act* are to assure an adequate supply

of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

(emphasis added). Section 1, paragraph 2 of Exhibit 7B provides:

> A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. *Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho.* The *rights held in trust* shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

(emphasis added). Section 1, paragraph 3 of Exhibit 7B, provides:

> Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. *Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the state of Idaho, by and through the Governor, for the use and benefit of the users of water for power purposes and of the people of the state of Idaho. The rights held in trust shall be subject to subordination to and depletion by future consumptive upstream beneficial users whose rights are acquired pursuant to state law.*

(emphasis added). Section 1, paragraph 4, provides:

> The user of water for power purposes as *beneficiary of the trust established by Sections 2 and 3* shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

(emphasis added). Section 1, paragraph 5, provides:

> The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, *and to define such rights in excess thereof as being held in trust by the State according to Section 2 above.* Such

> agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

(emphasis added).

This Court holds that Exhibit 7B clearly and unambiguously provides that any portion of Idaho Power's water rights in excess of the minimum flows are held in trust by the State, by and through the Governor, for the use and benefit of Idaho Power for power purposes and of the people of the State of Idaho.[15] It is also unambiguous that the *res* of the trust consists of "water rights" as opposed to "water."

The use of the phrase "water rights" and reference to the legal term "trust" in Exhibit 7B is entirely consistent with the body of the Agreement. As stated previously, Paragraph 4 of the Agreement requires that the State "shall assert the existence of water rights held in trust by the State." Although 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 B.

Idaho Power argues that it would never have entered into an agreement where it assigned or transferred its water rights to the State. See *Affidavit of Greg Panter.*[16] In response, the Court makes the following findings. First, the Agreement was carefully drafted so that Idaho Power would not be directly assigning or transferring its water rights to the State. *See supra* fn 9. 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. In addition to

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[15] The Swan Falls project water rights 02-2032, 02-4000, 02-4001 were recommended being split into A and B portions. The A portions are recommended with legal title in the name of Idaho Power. The B portions were recommended with the legal owner being the State of Idaho. Water right 02-100 was recommended solely in the name of Idaho Power. The cumulative totals for the water rights for the Swan Falls project were recommended by IDWR as providing Idaho Power with 3,900 cfs from 4/01-10/31, and 5,600 cfs from 11/01-3/31. The remainder of the water rights for the Swan Falls project were recommended with legal title in the name of the State of Idaho. As to the hydro-electric projects upstream from Swan falls, the entire right was recommended with legal title in the State of Idaho.

[16] The *Affidavit of Greg Panter* states: " In my opinion, based on my knowledge of and involvement with the negotiations leading to the execution of the Agreement, had it been a requirement of the Agreement that

referring to the State's obligation to assert the existence of Idaho Power's water rights held in trust, paragraph 4 of the Agreement also provides:

> When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.
>
> . . .
>
> State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of the agreement.

This is further supported by the fact that once the initial legislation defining the rights placed in trust was passed, any subsequent changes in the law were not intended to affect the validity of the Agreement. Paragraph 17 of the Agreement provides:

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

As such, if the status of the State's regulatory authority changed in the future, it would not affect the status of Idaho Power's rights as originally agreed. Finally, this Court finds it inconceivable that Idaho Power would enter into a contract with one of the conditions of the contract being that the State pass legislation entirely inconsistent with the body of the contract or the intent of the parties. Paragraph 13B of the Agreement is unequivocal that "in the event any of these conditions are not implemented . . . then this Agreement shall be void." Exhibit 7B clearly and unambiguously reflects the intent of the parties. The Court need not go beyond the four corners of the document to ascertain the unambiguous intent of the parties.

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the Company assign or transfer all or a portion of its water rights to the State, the Company would not have

2. Evidence Beyond the Fours Corners of the Agreement is Consistent.

Even if the Court considers matters outside the four corners of the Agreement, the result is unchanged. There were several legislative committee meetings held on Senate Bill 1008 as well as a series of public informational meetings before the Idaho Water Resource Board. These meeting explained the terms of the Swan Falls Agreement to the public. Tom Nelson, who negotiated the Swan Falls Agreement on behalf of Idaho Power, was present at these meetings and either did not object to or specifically concurred with the representations made regarding the operation of the proposed statute. At the public information meeting held in Twin Falls on October 25, 1984, the three individuals who were principally responsible for negotiating the Swan Falls Agreement (Pat Costello on behalf of the Governor's office, Pat Kole from the Attorney General's Office and Tom Nelson on behalf of Idaho Power) explained the Swan Falls Agreement. Mr. Costello explained:

> The status of the water right in the meantime while its in this transition period from becoming unsubordinated to subordinated is that legal title to the water right will be held in trust by the State of Idaho by and through the governor of the state. But the power company will retain the right to beneficially use that right for the generation of power in the meantime.

Orr Aff., Exh. 44, Tr. p. 7. At a subsequent public informational meeting held in Boise on November 1, 1984, in which all three principle negotiators were presenters, Mr. Costello again stated:

> In other words, you would use the minimum stream flow concept as the primary mechanism for protecting in-stream uses, and that any hydropower rights that exist in excess of that minimum stream flow would be held in trust by the state, legal title to that water right in excess of a minimum flow being in the state, for the benefit of the power right holder and also for the benefit of the people to allocate it to up-stream uses only which meet the public interest criteria.

Orr Aff., Exh. 46, Tr. pp. 19-20. He then explained the purpose for holding the water right in trust:

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entered into the Agreement." *Panter Aff.* at 2.

> In doing that you are using the hydropower right to say that the river has, in essence, been fully appropriated, because that right exists, and it's the right to – basically all the flow that gets down there.

Orr Aff., Exh. 46, Tr. p. 20. During that same hearing a question was asked of Pat Kole by Sheryl Chapman of the Idaho Water Users Association:

> Mr. Chairman, I've got three questions: one is for Pat [Kole], one is for Tom [Nelson], and then one for the panel, whoever wants to answer it.
>
> Pat, in a meeting that you and the attorney general and I had sometime back, the attorney general's office was adamantly opposed to the language that is now [Exhibit] 7B. They were supporting the language that said 'subordinated' but with opposed language that referred to 'water rights shall be subordinated.'
>
> My question to you is why the abrupt turnaround?
>
> Mr. Kole: Well, every time you're in negotiations, you end up having to give up on some points. 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 subordinateable water right.
>
> Mr. Chapman: So the attorney general's office feels that that is protected as the earlier language, the subordinated language, since the water right is in trust.
>
> Mr. Kole: Yeah. . . .

Orr Aff., Exh. 46, Tr. pp. 45-46. At a Senate Resources and Environment Committee meeting held on Senate Bill 1008 on January 18, 1985, in response to a question from Chairman Senator Laird Noh regarding the Governor's powers as trustee, Mr. Costello stated:

> 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 is some immediate change in position of the parties, that as soon as the agreement becomes binding and this statute takes effect, legal title to the water will go to the state, and the company retains beneficial use of the water as long as the trust lasts.
>
> Chairman Noh: Mr. Kole and Mr. Nelson, do you concur with that interpretation?

Mr. Kole: Chairman, I do. . . .

Mr. Nelson: Mr. Chairman, members of the committee, that's correct. . . .

Orr Aff., Exh. 37, Tr. pp. 52-54. In this statement Mr. Costello refers to "water" instead of "water rights." It is unequivocal that he is referring to "water rights" because he is discussing the trust arrangement under SB 1008, which specifically refers to water rights. Moreover, for purposes of splitting ownership between equitable and legal title, Idaho Power's only interest or title was with respect to its own water rights.

On January 25, 1985, Idaho Power presented the Senate Resources and Environment Committee with a *Statement of Idaho Power in Support of Senate Bill 1008,* which provided in relevant part:

> As a preliminary explanation, the combining of certain exhibits to the Swan Falls Agreement into SB 1008 has made it somewhat awkward to define the Company's position on parts of the bill. Idaho Power Company is not required by the Swan Falls Agreement to support Section 2 of SB 1008, found on pages 2 and 3 of the printed bill, because its support of that Section could raise implications of a voluntary transfer of its water rights. In fact, the basis for Section 2 is the state's power to 'regulate and limit' the use of water for hydropower purposes.
>
> The application of Section 2 to the Idaho Power Company's rights deserves some discussion. Under the agreement of October 25, 1984, the Company's rights in excess of the seasonal minimal flows of 3900 cfs and 5600 cfs at the Murphy gage are unsubordinated but subject to reallocation pursuant to state law. The trust provisions of Section 2 do not change that status. The rights are still unsubordinated and still protectable from uses not in conformance with state law. The state, as trustee, can protect those rights, and so also can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated right.

Orr Aff., Exh.10, attachment, p.1. Nowhere did Idaho Power take a position contrary to its water rights being held in trust, albeit through the state's regulatory authority.

At a January 25, 1985, hearing before the Senate Resources and Environment Committee on SB 1008, in which all three primary negotiators were present, then Senator Mike Crapo suggested that a statement of legislative intent be drafted so as to provide guidance in the future in the event of any litigation.

> Mr. Chairman, it's my concern that, when I first read the legislation, I really didn't understand for sure what the intent was. And we've had three good hearings now. And I think that I pretty well understand the intent. . . . But I think in the future, if this ever gets to court, or if the department of water resources need guidance on how to interpret different aspects of this, that it would be very beneficial that we, as a committee, develop a statement of intent or legislative purpose that accompanied this that said what we really intend to happen. Maybe even use some examples like they do in the Federal Register. . . .

Orr Aff., Exh. 39, Tr. pp. 36-37. As a result, a Statement of Legislative Intent for SB 1008 was prepared by the Senate Resources and Environment Committee on February 1, 1985, which provided a section by section analysis. The Statement provided in relevant part:

> To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. . . . The amount of water or water rights held in trust is thus keyed to the maintenance of the established minimum stream flows rather than the estimates of how much water may be available above such minimum flows. Any portion of such water rights above the established minimum flow will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by upstream beneficial users.

Orr Aff., Exh. 11, attachment, p. 3.

At a February 11, 1985, meeting before the House Resources and Conservation Committee, in which all three negotiators were present, Mr. Costello explained, "Hydropower rights in excess of such flows will be held in trust by the state and are subject to subordination and depletion by lawful beneficial uses." *Orr Aff.*, Exh. 20, p. 2. In the same meeting, Representative Little asked: "[I]f the bills are passed as written and fulfill the agreement made between the power company and then decide 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." Mr. Nelson responded:

> [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.

Orr Aff., Exh. 20, p. 1. All of these discussions held before the Idaho Water Resource Board and the House and Senate Committees are consistent with the plain language of Exhibit 7B to the Agreement and the language contained in SB 1008.

Greg Panter, then employed by Idaho Power as Director of Governmental Affairs, states in his affidavit that he was responsible for explaining the Swan Falls Agreement at the time SB 1008 was under consideration:

> I also worked with counsel and management, for the Company in the development of the proposed legislation appended to the final Swan Falls Agreement, and together with Mr. Nelson, was responsible for explaining the substance and intent of the Swan Falls Agreement to legislators during the 1985 legislative session.

Panter Aff., at 2. Furthermore, Mr. Panter concedes that the terms "water" and "water rights" were used interchangeably during these discussions:

> I attended most, if not all, meetings of the resource and environment committees of the House and Senate where the Swan Falls legislation was being discussed. To the best of my knowledge, I was the only representative of any of the parties to the Swan Falls Agreement and resulting legislation were discussed. Again, during these meetings with legislators and during legislative committee meetings, the terms water and water rights were generally used interchangeably and I recall no discussions to the effect that the Company was expected to or would be required to assign or transfer all or any portion of its water rights to the state in order to implement the trust component of the Swan Falls Agreement.

Panter Aff., at 6. Mr. Panter was also involved in drafting the Statement of Legislative Intent:

> I was involved with the Statement of Legislative Intent for SB 1008, which was drafted by Senator Crapo and read into the record in the Idaho Senate on February 6, 1985. . . While the Company was privy to the development of the Statement of Intent by Senator Crapo, it did not place a great deal of significance on its provisions. All of my discussions with legislators, both house and Senate, in 1985 relating to the intent of the Agreement and the legislation were in the context of that the trust component was developed for the purpose of holding and distributing the "block of water", approximately 600 c.f.s, that was presumed to be

> available over and above the minimum flows established by the Agreement. There was no discussion of the necessity to transfer or assign any portion of the Company's water rights to the state.

Panter Aff., at 6-7.

Mr. Panter's affidavit does not create a genuine issue of material fact. First, Mr. Panter's understanding is consistent with the express terms of Exhibit 7B to the Agreement and SB 1008. 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. Mr. Panter states that he attended most of the committee hearings on SB 1008. Contrary to Mr. Panter's recollection, the discussions of the participants at the meetings refer to water rights being held in trust as well as a split in ownership between legal and equitable title. Mr. Panter also states that he was involved with the Statement of Legislative Intent for SB 1008 and that Idaho Power was aware of the statement but did not place any great deal of significance on its provisions. If Idaho Power's intent was that its water rights or at least portions of its rights would not be held in trust, then that intent must have been subjective. Alternatively, Idaho Power perhaps lacked an appreciation for the plain meaning of the language which it not only agreed to, but helped to draft.

The deposition testimony of Tom Nelson taken in 1990 is also consistent with the representations made at the various committee hearings and public meetings.

> Q. What was the purpose of establishing those minimum flows?
>
> A. One of the matters that had to be addressed was the general question of how to define the company's water rights at Swan Falls. And at that time the existing low flow, historical low flow was approximately, 4,500 c.f.s. The state water plan called for 3,300 c.f.s. So you had 1,200 c.f.s still in the river, if you will. The question was where in that 1,200 c.f.s. would you establish the company's water rights. . . . So the decision was made to divide the 1,200 c.f.s for purposes of the agreement. That's one of the places where IDWR came in and told the committee that if the river were reduced to 3,900 c.f.s in the summer, the same development that took it down to 3,900 in the summer, plus some winter pumping off stream in the winter, would reduce the winter flow to 5,600. So 5,600

was the counterpart wintertime flow to the 3,900 summertime flow at full development. . . .

Q. Now, you stated the historic low flow at that point in time was 4,500 c.f.s., is that correct?

A. Yes.

Q. Then you agreed to a 3,900 c.f.s. minimum flow in the Swan Falls agreement?

A. That's correct.

Q. If my calculations are correct, then that means there were 600 c.f.s. of water that was not being currently used by existing water development?

A. That's correct.

Q. How does the agreement address that 600 c.f.s?

A. The agreement basically says in shorthand that the water rights up to 3,900 and 5,600 are unsubordinated and unsubordinatable. That the Company can defend it, and the state will recognize those rights in administering the river. Above 3,900 and 5,600, the company's water rights remain intact, but they are subject to subordination to later approved uses which meet the criteria . . . .

. . .

Q. Is there a name that they use to refer to those waters now, that 600 c.f.s?

A. Yes, now they are referred to as trust water.

Q. *And why do they use the term "trust water"?*

A. *Well, the mechanism that was finally developed by the negotiators and accepted by the parties was to have the state place those rights in trust, and the beneficiaries, the power company would be a beneficiary of the trust up to the point where the state approved new uses, which met the statutory criteria, and that seemed to solve the problem of how you actually manage that block of water.*

Supplemental Affidavit of Shelly M. Davis, Exh. O., Tr. pp. 50-53 (emphasis added).

The 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." Exhibit 7B to the Agreement and I.C. § 42-203B do not refer to the creation of a new or separate water right to be placed in trust. Rather, both clearly state "Any portion of the *water rights for power purposes* in excess of the level so established *shall be held in trust* . . . ."

Next, in 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. Previously, the river was fully (or over) appropriated based on Idaho Power's unsubordinated water rights. 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.[17] A straight subordination of Idaho Power's

[17] Exhibit 1 to the Agreement included the proposed legislation defining the criteria for the public interest determination.

> 42-203C. PUBLIC INTEREST DETERMINATION – CRITERIA – WEIGHT – BURDEN OF PROOF
>
> (1) If any applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.
>
> (2)(a) The director in making such determination for purposes of this section shall consider:
>
> (i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;
>
> (ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, forseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy;
>
> (iii) the promotion of the family farming tradition;
>
> (iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho;
>
> (v) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,00 acres in any four-year period in the Snake River Basin above the Murphy gauge.
>
> No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

rights would not accomplish the same result as the river would not have been fully appropriated. Creating a new or separate right in the name of the State for the purpose of imposing public interest criteria on future appropriations also would not resolve the Article 15 § 3 concerns.

The Agreement made Idaho Power's rights "subordinatable" to future uses. Paragraph 7B to the Agreement provides that Idaho Power has the right to use the entire flow of the river at its various facilities up to the amounts stated in the water licenses for the facilities, but the right to use the flows is subordinate to subsequent future uses as those uses are approved by the State. However, the State was required to apply the public interest criteria in conjunction with approving any new rights. Idaho Power also retained the right to contest any new appropriations. The somewhat confusing part is that the new appropriators were not receiving a transfer of an actual portion of Idaho Power's water right 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. Mr. Panter acknowledges in his affidavit that "[d]uring the discussions and development of this trust water component, the terms water and water rights were used interchangeably." *Panter Aff.*, at 5.

In sum, even going outside the four corners of the Agreement, and taking into account the discussions held at the various meetings on the explanation of the Swan Falls Agreement and Senate Bill 1008, as well as the concerns the Agreement was structured to address, the result is consistent with the plain language of the Swan Falls Agreement.

(b) The burden of proof under this section shall be on the protestant.

The public interest criteria was codified at I.C. § 42-203C subject to some revisions.

3. The Subsequent Conduct of the State is not contrary to Idaho Power's Equitable Interest.

Idaho Power argues that the State's conduct and representations are inconsistent with the State having legal title to its water rights. Idaho Power points to the State's administration of the trust by granting new water rights instead of transferring portions of Idaho Power's rights with Idaho Power's priority; representations made in proceedings before FERC and Congress; the Consent Judgments entered between the State and Idaho Power; and the State's admissions in the SRBA by recommending Idaho Power's rights in Basin 36 exclusively in the name of Idaho Power.

The Court previously discussed the underlying purpose for the trust arrangement. The granting of new water rights was consistent with the mechanics of the trust as agreed by the parties. The fact that water rights were issued with new priorities as opposed to transferring Idaho Power's priority is consistent with the purpose of the trust. Pursuant to the Agreement, Idaho Power subordinated its water rights to then existing rights. The trust established a mechanism for reallocating, as opposed to transferring, portions of its water rights to future appropriations. For obvious reasons, allowing future appropriations to supersede the priorities of existing users by assuming Idaho Power's senior priority would result in injury to existing users.

In regards to the representations made in proceedings before FERC and Congress, the representations made are not inconsistent with Idaho Power holding an equitable interest. Idaho Power still holds an interest in its water rights.

The legal affect of the two Consent Judgments is discussed in the context of Idaho Power's *Cross-Motion for Summary judgment.*

The issuance of Idaho Power's partial decrees in Idaho Power's name was an oversight in uncontested subcases. The recommendations were based on former licenses and were made without addressing the Swan Falls Agreement. The claims were uncontested and were decreed as recommended. The claims should have been withheld from decree until the rest of Idaho Power's claims covered by the Swan Falls Agreement were reported. *See* I.C. § 42-1412 (7). The Swan Falls Agreement addresses the minimum flows for the claims cumulatively. The rate of flow for all claims is a

cumulative rate measured at the Murphy gauge. The Agreement did not provide for a minimum rate of flow at Idaho Power's individual upstream facilities. Accordingly, 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.

B. Idaho Power's Cross-Motion for Summary Judgment

Idaho Power asserts in its *Cross-Motion for Summary Judgment* that the Consent Judgments entered in Ada County case *Idaho Power Company v. State of Idaho, et al.*, Idaho Fourth Judicial District, Case no. 62237 (entered Mar. 7, 1990), and Ada County case *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case no. 81375 (entered Feb. 12, 1990) define its rights. The Company argues that principles of *res judicata* and collateral estoppel prevent the determination from being re-litigated or collaterally attacked in these (SRBA) subsequent proceedings. The better reasoning is that the Consent Judgments define Idaho Power's right(s) consistently with paragraphs 7A through E to the Agreement.[18] The State of Idaho argues that the Ada County District Court was divested of jurisdiction once the SRBA was commenced. This Court need not address the issue of jurisdiction because the result is the same whether or not the Ada County Court had jurisdiction.

Once the SRBA was commenced, all water users were required to re-file claims in the SRBA, whether the claims were previously adjudicated or not. The effect of a prior decree offered as evidence in the SRBA is binding on its parties and privies and constitutes *prima facie* weight of the elements of the water right. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740-41, 947 P.2d 409, 413-14 (1997). However, in adjudicating Idaho Power's hydropower rights, the Court cannot ignore the application of I.C. § 42-203B. 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

[18] Paragraph 7E of the Agreement provides that "Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

around the application of the statute. Therefore, just because the Consent Judgments do not refer to I.C. § 42-203B does not mean that Idaho Power's water rights are insulated from its application. Idaho Power did not challenge the application of I.C. § 42-203B in the Ada County proceedings. In fact, just the opposite is true. The Consent Judgments were entered based in part on the enactment of I.C. § 42-203B. The purpose of the SRBA is to accurately describe Idaho Power's water rights in a partial decree or decrees in a manner that allows the rights to be administered by IDWR and that avoids future ambiguity or uncertainty. The Court has several options in issuing these partial decrees. The Court could decree the rights solely in the name of Idaho Power and the rights would still be subject to the terms of I.C. § 42-203B. That process creates the potential for an ambiguity in the future over the application of I.C.§ 42-203B. In administering the rights, IDWR would have to take into account not only the rights as described by the Consent Judgments but also the application of I.C. § 42-203B. The Court could also issue a partial decree solely in the name of Idaho Power with a remark stating that the right is subject to the provisions of I.C. § 42-203B. Finally, the Court could issue decrees which accurately reflect the application of I.C. § 42-203B so as to avoid any uncertainty or ambiguity in the future. Under any of the three approaches, this Court would not be collaterally attacking the Consent Judgments, but simply incorporating all of the components which define Idaho Power's water right into one partial decree or decrees.

Further, both Consent Judgments contain non-merger clauses which state: "The Swan Falls Agreement, dated October 25, 1984, shall not be merged into nor integrated with this Judgment, but shall remain in full force and effect." As such, the Court can take into account the underlying Agreement on which the two Consent Judgments were based. To the extent there is an inconsistency between the Consent Judgments and the underlying Agreement, this Court can address that inconsistency. In this case, the Consent Judgments are wholly consistent with the Agreement. The Consent Judgemments 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. Once the rights have been defined, the next step is to give effect to the statute. As discussed above the Court need not address any potential infirmities with the State's regulatory authority because Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings.

C. The Equitable Doctrines of Reformation, Mutual Mistake of Fact, Estoppel, Waiver, and Laches.

The State argues that the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches cannot be invoked in a manner contrary to the provisions of I.C. § 42-203B. As discussed above the State's conduct after the implementation of the Swan Falls Agreement was consistent with Idaho Power having an equitable interest for purposes of invoking the equitable doctrines of estoppel, waiver, and laches. Furthermore, I.C. § 42-203B was enacted and in force and Idaho Power was fully aware its rights were subject to its provisions despite whatever perception Idaho Power has with respect to the State's subsequent conduct or representations.

This Court ruled previously in its July 26, 2006, ***Order*** that it has jurisdiction to hear Idaho Power's claim of mutual mistake to the extent the Agreement does not accurately reflect the physical conditions on the ground, making the definition or administration of the right impossible or unclear. As discussed previously in the July 26, 2006, ***Order,*** in cases where ownership of a water right turns on an underlying determination of the interpretation of a contract, probate of a will or similar action, the Court's practice has been to segregate the cause of action and transfer it to a Court of appropriate jurisdiction for a determination on the underlying issue. That being said there is a certain degree of overlap in the jurisdiction of the SRBA. The SRBA Court frequently interprets deeds and former decrees which define water rights. The very purpose of the Swan Falls Agreement is to define Idaho Power's water rights. To the extent there are issues regarding how the Agreement was intended to define Idaho Power's water rights, this Court has jurisdiction to address those issues. Furthermore,

even if there is some overlap in jurisdiction between the SRBA and another jurisdiction, this Court declines to transfer the issue to a different jurisdiction.

In these summary judgment proceedings, the basis of the State's position has been that Idaho Power's rights are defined pursuant to the State's regulatory authority as established by I.C. § 42-203B. Idaho Power's position is that its rights are defined by contract and the intent of the parties. For reasons discussed, this Court determined that the matter could be decided based on contract and the intent of the parties and holding that as a term of the contract Idaho Power agreed to the State's regulatory authority. In deciding the issue based on contract this Court determined that there was no "genuine issue of material fact" with respect to the intent of the parties, based on the four corners of the Agreement, which is consistent with evidence outside of the Agreement. Based on this determination, the Court finds it can rule on the issue of mutual mistake in the scope of these proceedings.

The State of Idaho's argument is that the remedy of reformation is unavailable to reform the provisions of I.C. § 42-203B. This Court reads Idaho Power's request for relief as a request to reform the Swan Falls Agreement to conform to the alleged erroneous assumption that there was water available for future appropriations. In other words, Idaho Power argues that there is no trust *res* and as a consequence no trust exists. "Idaho Power seeks reformation of the Swan Falls Agreement based on a mutual mistake of fact with regard to whether there is, or ever was, any water available that was subject to the trust provisions of the Agreement." *Idaho Power Company's Response to State of Idaho's Motion for Partial Summary Judgment* at 64. In *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006), the Idaho Supreme Court set forth the standard for mutual mistake and reformation of an instrument, as follows:

> In interpreting an [instrument], the Court's goal is to carry out the real intention of the parties. If an instrument does not reflect the true intent of the parties due to mutual mistake, then reformation of that instrument may be the proper remedy. 'A mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based." The Court acts properly in reforming the instrument to reflect the agreement the parties would have made but for the mistake. What the parties actually intended is a question of fact. The party alleging the mutual mistake has the burden of proving it by clear and convincing evidence.

Id. at 482, 129 P.3d at 1231 (internal citations omitted).

Although mutual mistake is normally an issue of fact, in this case the Court holds that as a matter of law under the terms of the Agreement it does not matter whether erroneous assumptions were made regarding the availability of water for future appropriations. This Court holds that pursuant to the Agreement the *res* of the trust is the portions of Idaho Power's right(s) exceeding the agreed upon minimum flow as opposed to an undefined block of water. The trust arrangement is therefore not defeated for the want of a *res*. The trust *res* consists of water rights, not water. Whether or not sufficient water existed at the time to fulfill the water rights of subsequent appropriators is a separate issue and one that changes over time with the fluctuations in the water supply. However, there are no assurances that there will always be sufficient water available to satisfy a water right.

Further, 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. Rather, Idaho Power's right is defined in terms of unsubordinated minimum flows at the Murphy Gauge. Idaho Power can use the subordinated flows up to its licensed amounts at its individual facilities and the State will apply the public interest criteria in conjunction with reallocating the water available, if any, under the right(s) to future appropriators. As discussed above, based on the underlying purpose of the Agreement, Idaho Power did not have an expectation that water above the minimum flows would be available for its use for an indefinite period.

Finally, the Agreement has been in effect since October 25, 1984. Based on the trust arrangement, new water right permit applications have been processed and approved, some limited to twenty-year terms. *Complaint and Petition* at 13,¶ 35-37. The State has been meeting the minimum flow obligation at the Murphy Gauge during that time except for the allegation of one day on or about July 12, 2003. *Complaint* and *Petition* at 12, ¶ 33. To the extent the State is not meeting the minimum flows or if it is anticipated that the minimum flows will not be met, then under the terms of the Agreement, 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. However, this is 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.

D. Remaining Causes of Action.

Idaho Power's remaining claims not decided by the outcome of this decision include the following:

1. **Groundwater Recharge**: A declaration that Idaho Power's water rights for hydropower generation are not subordinate to the use of water for ground water recharge. This issue is properly before the SRBA Court as it defines the scope of the subject hydropower rights. The Court will hold a status conference on the remaining issues to determine how to proceed on this issue and the other remaining issues prior to certifying this decision as final. Parties should be prepared to discuss whether the issue can be decided in the context of a summary judgment proceeding.

2. **Declaration on Administration of Water Rights**: A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for multiple-year impacts of groundwater pumping. This issue pertains solely to the administration of water rights. Parties should be prepared to discuss why this matter should not be addressed via an administrative action in light of this decision and the holding in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007).

3. **Injunctive Relief**:

(i) Enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights. It is unclear as to what particular action by the State, Idaho Power is referring. To the extent

resolution of this issue requires a preliminary determination of the scope of the subject water rights relative to the respective rights and duties of the State and Idaho Power under the trust arrangement, the SRBA Court has jurisdiction to entertain the preliminary issue.

(ii) Ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20-year terms of previously granted permits for new appropriations of Trust Water. This issue pertains solely to the administration of water rights. Parties should be prepared to discuss that in light of this decision and the holding in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007), why this matter should not be addressed via an administrative action.

(iii) Ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore 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 ESPA. This issue also pertains solely to the administration of water rights. Parties should be prepared to discuss in light of this decision and the holding in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007), why this matter should not be addressed via an administrative action.

E. Further Proceedings and Discovery Schedule:

The Court will notice up the above-referenced hearing for the purpose of addressing remaining issues in light of the instant decision. Discovery is presently stayed pursuant to the Court's April 15, 2007, ***Order.*** The Court acknowledges that the outcome of this decision may affect how the parties intend to proceed with discovery and/or result in further delays occasioned by post-decision motions. The Court will adjust the scheduling order accordingly to account for the delays which have already occurred as well as any future delays.

IT IS SO ORDERED

Dated April 15, 2008

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

AGREEMENT

This Agreement is made and entered into among the State of Idaho, by and through the Governor, hereinafter referred to as "State"; John V. Evans, in his official capacity as Governor of the State of Idaho; Jim Jones, in his official capacity as Attorney General of the State of Idaho; and Idaho Power Company, a corporation hereinafter referred to as "Company".

1. Effective Date

This Agreement shall take effect upon execution, except as to paragraphs 7, 8, and 11.

2. Executive Commitment

When the parties agree on certain actions to be taken by State, it is their intent to commit the executive branch of Idaho state government, subject to constitutional and statutory limitations, to take those actions.

3. Attorney General

Jim Jones is a party to this Agreement solely by reason of his official position as counsel for the State of Idaho and its agencies in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 62237 and Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 81375.

4. Good Faith

When the parties agree to jointly recommend a particular piece of legislation or action by another entity, each party agrees to actively and in good faith support such legislation or action.

The State shall enforce the State Water Plan and shall assert the existence of water rights held in trust by the State and that the Snake River is fully appropriated as needed to enforce the State Water Plan. State and Company shall not take any position before the legislature or any court, board or agency which is inconsistent with the terms of this agreement.

5. Stay Of Current Court And Regulatory Action

A. The parties shall file a motion with the court in Ada County Civil Case Numbers 81375 and 62237, seeking a

The foregoing is a true and certified copy of the document on file at the department of Water Resources.
Signed this 4th day of January 20 08

EXHIBIT
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stay of further proceedings until seven days following the adjournment of the First Regular Session of the 48th Idaho Legislature, except as to preservation of testimony pursuant to the Idaho Rules of Civil Procedure, completion of designated discovery filed by the State of Idaho and dismissal of various defendants by Company. The State shall designate in writing, within fifteen (15) days from the execution of this Agreement, those items of its discovery that must be responded to by Company. The Company shall respond to those items of discovery designated by the State within ninety (90) days from execution of this Agreement.

B. The parties shall request the Federal Energy Regulatory Commission (FERC) to stay any subordination-related decisions in any Company project listed in paragraph 7 licensing or relicensing proceeding pending implementation of this Agreement except as contemplated in paragraph 12 of this Agreement. The parties acknowledge, however, that FERC could independently take action prejudicial to their interests and, in such event, the parties may take reasonable actions necessary to protect their interests. Further, the State shall not file any motions to intervene in Project Numbers 2777 (Upper Salmon) and 2778 (Shoshone Falls); however, by agreeing to this provision, the Company in return waives any defense to the timeliness of a motion to intervene caused by this Agreement in the event this Agreement is not implemented. Company is not agreeing, however, that a motion to intervene would be timely if filed now.

C. The parties shall not attempt to influence any executive agency of the United States to take a particular position regarding subordination in any Company FERC licensing or relicensing proceeding pending implementation of this Agreement.

6. <u>Legislative Program</u>

The parties agree to propose and support the following legislation to implement this Agreement:

A. Enactment of Public Interest Criteria as set forth in Exhibit 1 attached hereto.

B. Funding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.

C. Establishment of an effective water marketing system.

D. Funding for hydrologic and economic studies, as set forth in Exhibit 3 attached hereto.

E. Allocation of gains upon sale of utility property as set forth in Exhibit 4 attached hereto.

F. Limitations on IPUC jurisdiction as set forth in Exhibit 5 attached hereto.

G. Rulemaking and moratorium authority for Idaho Department of Water Resources generally as set forth in Exhibit 8 attached hereto.

7. Company's Water Right

State and Company agree that Company's water right shall be as follows (Bracketed names used below refer to Company projects):

A. State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion. The Murphy gauging station is located at latitude 43° 17' 31", Longitude 116° 25' 12", in NW1/4NE1/4SE1/4 of Section 35 in Township 1 South, Range 1 West, Boise Meridian, Ada County Hydrologic Unit 17050103, on right bank 4.2 miles downstream from Swan Falls Power plant, 7.5 miles NE of Murphy, at river mile 453.5.

B. The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad),

37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs),02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon), 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001, and Decree Number 02-0100 (Swan Falls), but such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein. This paragraph shall constitute a subordination condition.

C. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. The Company's rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

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

F. Upon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that describe the Company's water right as provided in paragraphs 7(A) through 7(E).

8. Damages Waiver

Company waives any claim against the State or its agencies for compensation or damages it may have or that may arise from any diminution in water available to Company at its facilities as a result of this Agreement. Company waives any claim for compensation or damages from any use approved by the state in accordance with paragraph 7B. Company retains its right to seek injunctions, compensation, damages, or other relief from any future appropriator, as defined in paragraph 7(B), whose use of water violates or will violate the Company's water right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, as measured at the Murphy gauging station, and also retains its rights against the state and its agencies as set out in paragraph 7(B).

9. Proposed 1180 Contract

The parties acknowledge that the Governor and the Company have finalized the terms of a contract that would implement the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, presently codified as §§ 61-539 and 61-540, Idaho Code which is being executed on this date.

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and 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.

11. Status of State Water Plan

State and Company agree that the resolution of Company's water rights and recognition thereof by State together with the Idaho State Water Plan provide a sound comprehensive plan for the management of the Snake River watershed. Thus, the parties acknowledge that this Agreement provides a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest. Upon implementation of this agreement, State and Company will present the Idaho State Water Plan and this document to FERC as a comprehensive plan for the management of the Snake River Watershed.

12. Regulatory Approvals

A. Within 45 days of the execution of this Agreement, Company shall file appropriate pleadings or other documents with the Idaho Public Utilities Commission (IPUC), to obtain an order determining that the execution and implementation of this Agreement is in the public interest, and does not constitute an abandonment, relinquishment or transfer of utility property. Such pleadings or other documents shall also provide that the order shall state that any effect upon the Company's hydro generation resulting from execution and implementation of this Agreement shall not be grounds now or in the future for a finding or an order that the Company's rate base or any part thereof is overstated or that any portion of its electrical plant in service is no longer used and useful or not devoted to public service, nor will such effect upon the Company's hydro generation be grounds for a finding or an order reducing the Company's present or future revenue requirement or any present or future rate, tariff, schedule or charge.

In the event the IPUC does not issue an order acceptable to the parties, the parties will seek appropriate remedial legislation.

B. i. Within forty-five (45) days of the execution of this Agreement, the Company shall file with FERC a request for a declaratory ruling that the implementation of this agreement assures a sufficient supply of water for Project Numbers 1975 (Bliss), 2061 (Lower Salmon), 2777 (Upper Salmon), 2055 (C.J. Strike), 2778 (Shoshone Falls), 18 (Twin Falls), 2726 (Upper and Lower Malad), and 503 (Swan Falls).

ii. Within forty-five (45) days of implementation of this Agreement, the Company shall submit this Agreement and the consent decree to FERC in the proceedings for relicensing of Project Numbers 18 (Twin Falls), and 503 (Swan Falls) and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water rights in those proceedings.

iii. When any project listed in (i) hereof is hereafter due for relicensing proceeding, Company

shall submit this Agreement to FERC in the relicensing proceeding, and the State and Company shall request that FERC recognize this Agreement as a definition of the Company's water right in those proceedings.

C. The Governor and Attorney General on behalf of the State and its agencies shall seek intervention in support of the Company's efforts before the IPUC and FERC, and shall actively support the issuance of acceptable orders by both Commissions, and shall provide authorized witnesses to testify in the proceedings at the request of Company.

D. Company shall, if necessary, file appropriate pleadings or other documents with the Public Utility Commissioner of Oregon for an order similar to that stated in paragraph 12(A). Such filing, if necessary, shall be done within forty-five (45) days of the execution of this Agreement.

13. Conditions on Effectiveness

A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:

i. Amendment of the State Water Plan to implement the provisions of Exhibit 6;

ii. Enactment of the legislative program outlined in paragraph 6;

iii. Issuance of an appropriate order by IPUC as set forth in paragraph 12(A), or enactment of appropriate legislation by the State of Idaho, as set forth in Exhibit 5;

iv. Issuance of an appropriate order by FERC in a form acceptable to the parties as set out in paragraph 12(B)(i);

v. Dismissal with prejudice of the proceeding pending before the IPUC in Case No. U-1006-124;

vi. Issuance of an appropriate order by the Public Utility Commissioner of Oregon if Company has requested one; and

vii. Enactment by the State of Idaho of subordination legislation, as set forth in Exhibits 7A and 7B attached to this Agreement.

B. In the event any of these conditions are not implemented, or should this Agreement be terminated as provided in paragraph 16, then this Agreement shall be void.

14. Authority of Department of Water Resources and Idaho Water Resource Board Not Affected

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.

15. Waiver, Modification or Amendment

No waiver, modification, or amendment of this Agreement or of any covenants, conditions, or limitations herein contained shall be valid unless in writing duly executed by the parties and the parties further agree that the provisions of this section may not be waived, modified, or amended except as herein set forth.

16. Termination of Contract

This Agreement shall terminate upon the failure to satisfy any of the conditions stated in paragraph 13. The parties shall meet on May 15, 1985, to determine if the contract shall be continued or terminated.

17. Subsequent Changes In Law

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

18. Successors

The provisions of this Agreement shall bind and inure to the benefit of the respective successors and assigns of the parties.

19. Entire Agreement

This Agreement sets forth all the covenants, promises, provisions, agreements, conditions, and understandings between the parties and there are no covenants, provisions, promises, agreements, conditions, or understandings, either oral or written between them other than are herein set forth.

20. Effect of Section Headings

The section headings appearing in this Agreement are not to be construed as interpretations of the text but are inserted for convenience and reference only.

21. Multiple Originals

This Agreement is executed in quadruplicate. Each of the four (4) Agreements with an original signature of each party shall be an original.

IN WITNESS WHEREOF, the parties have executed this Agreement at Boise, Idaho, this 25th day of October, 1984.

STATE OF IDAHO

By: _____
JOHN V. EVANS
Governor of the
State of Idaho

IDAHO POWER COMPANY

By: _____
JAMES E. BRUCE
Chairman of the Board
and Chief Executive
Officer

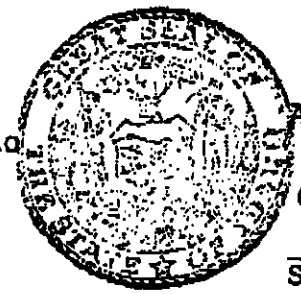
By: _____
JIM JONES
Attorney General of the
State of Idaho

ATTEST:

PETE T. CENARRUSA
Secretary of State

(Seal of the State of Idaho)

(Corporate Seal of Idaho Power Company)



ATTEST:

Secretary of Idaho Power

CERTIFICATE OF SECRETARY

Paul L. Jauregui, as secretary of Idaho Power Company, a Maine Corporation, hereby certifies as follows:

(1) That the corporate seal, or facsimile thereof, affixed to the instrument is in fact the seal of the corporation, or a true facsimile thereof, as the case may be; and

(2) That any officer of the corporation executing the instrument does in fact occupy the official position indicated, that one in such position is duly authorized to execute such instrument on behalf of the corporation, and that the signature of such officer subscribed thereunto is genuine; and

(3) That the execution of the instrument on behalf of the corporation has been duly authorized.

In witness whereof, I, PAUL L. JAUREGUI, as the secretary of Idaho Power Company, a Maine corporation, have executed this certificate and affixed the seal of Idaho Power Company, a Maine Corporation, on this 25th day of October, 1984.

Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE

OF THE STATE OF IDAHO

PETE T. CENARRUSA, as Secretary of State of the State of Idaho, hereby certifies as follows:

1. That the State of Idaho seal, or facsimile thereof, affixed to the instrument is in fact the seal of the State of Idaho, or a true facsimile thereof, as the case may be; and

2. That the officials of the State of Idaho executing the instrument do in fact occupy the official positions indicated, that they are duly authorized to execute such instrument on behalf of the State of Idaho, and that the signatures of such officials of the State of Idaho subscribed thereunto are genuine; and

3. That the execution of the instrument on behalf of the State has been duly authorized.

IN WITNESS WHEREOF, I, Pete T. Cenarrusa, Secretary of State of the State of Idaho, have executed this Certificate and affixed the seal of the State of Idaho on this 25th day of October, 1984.

PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JAMES E. BRUCE, and PAUL L. JAUREGUI, known or

identified to me to be the President and Secretary, respectively, of Idaho Power Company, the corporation that executed the foregoing instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

On this 25th day of October, 1984, before me, a Notary Public, in and for said County and State, personally appeared JOHN V. EVANS, known or identified to me to be the Governor of the State of Idaho; JIM JONES, known or identified to me to be the Attorney General of the State of Idaho; and PETE T. CENARRUSA, known to me to be the Secretary of the State of Idaho; and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

Exhibit 1

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, BY MAKING CERTAIN ORGANIZATIONAL CHANGES AND BY PROVIDING FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER PUBLIC INTEREST CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AND AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THIS ACT'S EFFECTIVE DATE.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-203, Idaho Code be, and the same is hereby amended to read as follows:

42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. ~~On and after the passage/ approval and effective date of this section/~~ (1) Upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying: (a) the number of the application; ~~and~~ (b) the

date of filing thereof/; (c) the name and post-office address of the applicant/ (d) the source of the water supply/; (e) the amount of water to be appropriated/ (f) in general the nature of the proposed use/ (g) the approximate location of the point of diversion/ (h) and the point of use/. The department shall also stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice.

(2) The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. When the application proposes a diversion in excess of 20 c.f.s. or 2,000 acre feet, the director shall cause the notice to be published in the newspaper(s) sufficient to achieve statewide circulation. This notice shall be published at least once a week for two (2) successive weeks.

(3) The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by departmental regulation.

(4) Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the name and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a1) that it will reduce the quantity of water under existing water rights, or (b2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c3) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use/; tThe director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller l@$$ quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

(6) Any person or corporation who has formally appeared at the hearing, l@@l!#g aggrieved by the judgment of the director of the department of water resources, may seek judicial review thereof in accordance with section 42-1071A(4), Idaho Code.

SECTION 2. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203C, Idaho Code, and to read as follows:

42-203C. PUBLIC INTEREST DETERMINATION -- CRITERIA -- WEIGHT -- BURDEN OF PROOF.

(1) If an applicant intends to appropriate water which is or may be available for appropriation by reason of a subordination condition applicable to a water right for power purposes, then the director shall consider, prior to approving the application, the criteria established in section 42-203A, and whether the proposed use would significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right used for power production and, if so, whether the proposed use is in the public interest.

(2)(a) The director in making such determinations for purposes of this section shall consider:

(i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy;

(ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and cost of alternative energy sources to ameliorate such impact, to the state and local economy;

(iii) the promotion of the family farming tradition;

(iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho;

(v) whether the proposed development conforms to a staged development policy of up to 20,000 acres per year or 80,000 acres in any four-year period in the Snake River Basin above the Murphy gauge.

No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination.

(b) The burden of proof under this section shall be on the protestant.

SECTION 3. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION to be known and designated as Section 42-203D, Idaho Code, and to read as follows:

42-203D. REVIEW OF PERMITS -- OPPORTUNITY FOR HEARING. The department shall review all permits issued prior to the effective date of this section, except to the extent a permit has been put to beneficial use prior to July 1, 1985, to determine whether they comply with the provisions of chapter 2, title 42, Idaho Code. If the department finds that the proposed use does not satisfy the criteria of chapter 2, title 42, Idaho Code, then the department shall either cancel the permit or impose the conditions required to bring the permit into compliance with chapter 2, title 42, Idaho Code. If the department finds that the permit satisfies the criteria established by chapter 2, title 42, Idaho Code, then the department shall enter an order continuing the permit.

The department shall provide an opportunity for hearing in accordance with section 1701A, title 42, Idaho Code and sections 5209 through 5215, title 67, Idaho Code, for each holder of a permit that is either cancelled or made subject to new conditions.

Exhibit 2

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

RELATING TO THE ADJUDICATION OF WATER RIGHTS, AMENDING CHAPTER 14, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1406A PROVIDING FOR THE COMMENCEMENT OF AN ADJUDICATION OF THE WATER RIGHTS OF THE SNAKE RIVER BASIN; AMENDING SECTION 42-1414, IDAHO CODE, TO MODIFY THE SCHEDULE OF FEES FOR FILING A NOTICE OF CLAIM IN A WATER RIGHTS ADJUDICATION PROCEEDING AND PROVIDING A PROCEDURE FOR COLLECTION OF THE FEES; AMENDING CHAPTER 17, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-1777 PROVIDING FOR THE CREATION OF THE WATER RESOURCES ADJUDICATION ACCOUNT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF IDAHO:

SECTION 1. That Chapter 14, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1406A, Idaho Code, and to read as follows:

42-1406A. SNAKE RIVER BASIN ADJUDICATION - COMMENCEMENT. (1) Effective management in the public interest of the waters of the Snake River Basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water from that system be determined. Therefore, the director of the department of water resources on or after July 1, 1985 shall petition the district court of Ada County to commence an adjudication of the water rights of the Snake River Basin either through initiation of a new proceeding or the enlargement of an ongoing adjudication proceeding. The petition shall describe:

(a) the boundaries of the entire system within the state to be adjudicated;

(b) the boundaries of any hydrologic sub-basins within the system for which the director intends to proceed separately with respect to the actions required or authorized to be taken pursuant to sections 42-1408 through 42-1413, Idaho Code; and

(c) the uses of water, if any, within the system that are recommended to be excluded from the adjudication proceeding.

(2) Upon issuance of an order by the district court which:

(a) authorizes the director to commence an investigation and determination of the various water rights existing within the system;

(b) defines the system boundaries;

(c) defines the boundaries of any hydrologic sub-basins within the system for which proceedings may advance separately pursuant to sections 42-1408 through 42-1412, Idaho Code; and

(d) defines any uses of water excluded from the adjudication proceeding;

the adjudication shall proceed in the manner provided by the provisions of chapter 14, title 42, Idaho Code, with the exception of sections 42-1406 and 42-1407.

SECTION 2. That section 42-1414, Idaho Code, be, and the same is hereby amended to read as follows:

42-1414. FEES FOR FILING NOTICE OF CLAIM - In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights The department of water resources shall accept no notice of claim required under the provisions of section 42-4109, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the quantity of water claimed which shall be determined on the same basis as the fee for filing an application for a permit to appropriate the public waters of this state as provided in section 42-221/ Idaho Code/ except that where such claim is in connection with a water right established pursuant to a valid permit or license previously issued by the department of water administration or a water right which has previously been adjudicated by a state or federal court/ the claimant shall pay a filing fee of only

~~ten dollars ($10/00)~~ fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. ~~Provided/ however/ that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act/ Chapter 153/ Laws of 1971/ was enacted/~~ The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

1. Claims for domestic and/or stock-watering rights $25.00

2. Claims for all other rights. $50.00

B. Additional variable water use fee for each claim filed:

1.	Irrigation use:	$ 1.00 per acre.
2.	Power:	$ 25.00 per c.f.s.
3.	Aquaculture:	$ 10.00 per c.f.s.
4.	Municipal, Industrial, Commercial, Mining, Heating, Cooling:	$100.00 per c.f.s.
5.	Public:	$100.00 per c.f.s.
6.	Miscellaneous:	flat fee only.

C. Payment of a variable water use fee of more than $1,000.00 may be spread out over as many as five annual equal payments with 10 percent interest accruing on the unpaid balance. All fees collected by the department pursuant to this section shall be placed in the water resources adjudication account established by section 42-1777, Idaho Code.

SECTION 3. That Chapter 17, Title 42, Idaho Code, be, and the same is hereby amended by the addition of a NEW SECTION, to be known and designated as Section 42-1777, Idaho Code, and to read as follows:

42-1777. WATER RESOURCES ADJUDICATION ACCOUNT. - A water resource adjudication account is hereby created and established in the agency asset fund. Fee moneys in the account

are to be utilized by the department of water resources, upon appropriation by the legislature, to pay the costs of the department attributable to the Snake River Basin adjudication provided for by section 42-7406A, Idaho Code.

The state treasurer is directed to invest all moneys in the account. All interest or other income accruing from such investment shall accrue to the account.

Exhibit 3

- -

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

APPROPRIATING MONEYS TO THE OFFICE OF THE GOVERNOR FOR THE DIVISION OF FINANCIAL MANAGEMENT, FOR FISCAL YEAR 1986.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. There is hereby appropriated to the Office of the Governor from the general account the amount of $200,000 to be used for the purpose of conducting hydrologic and economic studies of the Snake River Basin. A technical advisory committee named by the Governor shall oversee the studies.

Exhibit 4

- -

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-502B TO PROVIDE THAT GAIN UPON SALE OF A PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1 - That Chapter 5, Title 61, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 61-502B, Idaho Code, and to read as follows:

61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT.

The gain upon sale of a public utility's water right used for the generation of electricity shall accrue to the benefit of the ratepayers.

MEMORANDUM

SUBJECT: PROPOSED LEGISLATION RELATING TO UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENT AND OTHER REGULATORY IMPLICATIONS OF SWAN FALLS COMPROMISE.

SECTION 1 -- FINDINGS AND STATEMENT OF PURPOSE.--After hearing testimony from the Office of the Governor, the Office of the Attorney General, the Idaho Public Utilities Commission, the Idaho Department of Water Resources, the Idaho Water Resources Board, the Idaho Department of Fish and Game, other governmental entities and other interested groups and individuals of the State of Idaho, the legislature hereby finds that while portions of the testimony differ, the [describe the settlement and stipulation] is in the public interest for all purposes, including but not limited to, all purposes under the Public Utilities Law, as amended. Implementation of the settlement will resolve continuing controversy over electric utility water rights in the Snake River Basin above Murphy U.S.G.S gaging station. That controversy has rendered the amount of the water available for hydropower uncertain, thus placing at risk both the availability of low-cost hydropower to the ratepayers and the state's ability to manage an increasingly scarce resource. This settlement balances all of the parties' concerns and insures that existing hydropower-generating facilities will remain useful, that ratepayers will not be burdened with excessive costs, and that availability of water for additional domestic, manufacturing, and agricultural uses will judiciously expand.

SECTION 2 -- PUBLIC UTILITIES COMMISSION--JURISDICTION.--The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights and hydroelectric generation in a manner inconsistent with [describe the settlement and stipulation].

SECTION 3 -- IPUC--EFFECT OF AGREEMENT.--In any proceeding before the Idaho Public Utilities Commission, including but not limited to a proceeding in which the commission is setting or reviewing the revenue requirement of any electric utility (including Idaho Power Company), the commission shall accept as reasonable and in the public interest for all purposes, the [describe the settlement and stipulation], including without limitation the effects of implementation of such [describe the settlement and stipulation] on the utility's revenue requirements and hydroelectric generation.

SECTION 4 -- EXEMPTION.--Implementation of the [ ] shall not constitute a sale, assignment, conveyance or transfer within the meaning of §§61-327, 61-328, 61-329, 61-330, and 61-331, I.C., to the extent any of those sections may apply.

EXHIBIT 6

The executive branch of the State of Idaho and the Idaho Power Company agree to recommend that the following positions be incorporated into policy 32 of the state water plan.

1. The minimum daily flow at the Murphy gauging station should be increased to 3,900 c.f.s. from April 1 through October 31 and to 5,600 c.f.s from November 1 to March 31.

2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.

3. New storage projects upstream from the Murphy gauge should only be approved after it is determined that existing storage above Murphy is fully utilized.

4. The Idaho Water Resource Board should consider reserving a block of water for future DCMI purposes.

5. There should be an express recognition of the adverse effects of diversions for storage from the mainstream of the Snake River between Milner and Murphy on hydropower production from November 1 to March 31. In this regard, approval of any new storage projects that contemplate the diversion of water during the November 1 to March 31 period from the mainstream of the Snake River between Milner Dam and Murphy Gauge should be coupled with provisions that mitigate the impact such depletions would have on the generation of hydropower.

[The parties are proposing a policy which is neutral on the question of which Company facilities should be considered in mitigation decisions. At any later time the Board considers that question, the parties reserve the right to take any position they deem appropriate.]

Exhibit 7A

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Chapter 2, Title 42, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 42-203B, Idaho Code, and to read as follows:

42-203B. AUTHORITY TO SUBORDINATE RIGHTS -- NATURE OF SUBORDINATED WATER RIGHT AND AUTHORITY TO ESTABLISH A SUBORDINATION CONDITION -- AUTHORITY TO LIMIT TERM OF PERMIT OR LICENSE. The director shall have the authority to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses. A subordinated water right for power use does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law. The director shall also have the authority to limit a permit or license for power purposes to a specific term.

SECTION 2. This Act does not apply to licenses which have already been issued as of the effective date of this Act.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Section 1:

1. The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by Sections 2 and 3 of this act are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses. [Further findings will be added]

2. A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

3. Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in excess of such minimum stream flow shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the users of water for power purposes and of the people of the State of Idaho. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law.

4. The user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights to the use of the water as provided by state law against depletions or claims not in accordance with state law.

5. The Governor or his designee is hereby authorized and empowered to enter into agreements with holders of water rights for power purposes to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions, and to define such rights in excess thereof as

being held in trust by the State according to Section 2 above. Such agreements shall be subject to ratification by law. The contract entered into by the Governor and the Idaho Power Company on October 24, 1984, is hereby found and declared to be such an agreement, and the legislature hereby ratifies the Governor's authority and power to enter into this agreement.

Section 2: This Act shall not be construed as modifying, amending, or repealing any interstate compact.

Section 3: The provisions of this Act are hereby declared to be severable. If any provision of this Act or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this Act.

Section 4: An emergency existing therefor, which emergency is hereby declared to exist, this Act shall be in full force and effect on and after its passage and approval.

Exhibit 8

LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO ESTABLISH RULES AND REGULATIONS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-1805. be, and the same is hereby amended to read as follows:

42-1805. ADDITIONAL DUTIES -- In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:

(1) To represent the state in all matters pertaining to interstate and international water rights affecting Idaho water resources; and to cooperate with all agencies, now existing or hereafter to be formed, within the state or within other jurisdictions, in matters affecting the development of the water resources of this state.

(2) To prepare a present and continuing inventory of the water resources of this state, ascertain means and methods of conserving and augmenting these and determine as accurately as possible the most effective means by which these water resources may be applied for the benefit of the people of this state.

(3) To conduct surveys, tests, investigations, research, examinations, studies, and estimates of cost relating to availability of unappropriated water, effective use of existing supply, conservation, storage, distribution and use of water.

(4) To prepare and compile information and data obtained and to make the same available to interested individuals or agencies.

(5) To cooperate with and coordinate activities with the administrator of the division of environmental protection of the department of health and welfare as such activities relate to the functions of either or both departments concerning water quality. Such cooperation and coordination shall specifically require that:

(a) The director meet at least quarterly with the administrator and his staff to discuss water quality programs. A copy of the minutes of such meeting shall be transmitted to the governor.

(b) The director transmit to the administrator, reports and information prepared by him pertaining to water quality programs, and proposed rules and regulations pertaining to water quality programs.

(c) The director shall make available to the administrator and the administrator shall make available to the director all notices of hearings relating to the promulgation of rules and regulations relating to water quality, waste discharge permits, and stream channel alteration, as such directly affect water quality, and notice of any other hearings and meetings which relate to water quality.

(6) To perform administrative duties and such other functions as the board may from time to time assign to the director to enable the board to carry out its powers and duties.

(7) To suspend the issuance of licenses or permits of a defined class or in a defined geographic area, as necessary to protect existing uses, ensure compliance with state law or implement the State Water Plan.

(8) To promulgate, adopt, modify, repeal and enforce rules and regulations implementing or effectuating the powers and duties of the department.

The foregoing is a true and certified copy of the document on file at the department of Water Resources
Signed this 4th day of January 20 08

ADDENDUM C

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; AND NOTICE OF SCHEDULING CONFERENCE

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

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED
2007 JUL 24 PM 4:42

In Re SRBA	)	**Consolidated Subcase: 92-23**
Case No. 39576	)	**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; AND NOTICE OF SCHEDULING CONFERENCE**

Summary of Ruling: Holding jurisdiction to preside over declaratory relief pertaining to *Swan Falls Agreement* is properly in SRBA District Court; dismissing cause of action for preliminary injunction ordering Attorney General to repeal Idaho Attorney General Opinion 06-2; holding too premature in proceedings to dismiss cause of action for reformation of trust provision; issuing order separating and staying causes of action against the Director of the Idaho Department of Water Resources and the Idaho Department of Water Resources since neither can be parties to the SRBA; issuing order separating and consolidating objections and issues pertaining to *Swan Falls Agreement* for resolution by Presiding Judge; staying consolidated matter, except discovery, until objection period runs in Basin 02.

I.
APPEARANCES

James S. Lochhead, Michael A. Gheleta of Brownstein Hyatt Farber Schreck, PC, Denver, Colorado; John K. Simpson, Barker Rosholt & Simpson LLP, Boise, Idaho; James Tucker, Idaho Power Company, Boise, Idaho, Attorneys for Idaho Power Company, Boise, Idaho;

Lawrence G. Wasden, Attorney General, State of Idaho; Steven L. Olsen, Karl T. Klein, Michael C. Orr, Deputy Attorneys General of the State of Idaho, Boise, Idaho;

Dave Hensley, Counsel to the Governor, Boise, Idaho;

Josephine Beeman, Beeman & Associates, LLC, Boise, Idaho, Attorney for City of Pocatello.

II.
PROCEDURAL BACKGROUND

1. At issue are twenty-one (21) water right claims filed by Idaho Power Company (Idaho Power), which include thirteen (13) claims in Basin 02[1], three (3) claims in Basin 36 and five (5) claims in Basin 37. The claims are for water rights for hydropower and are subject to the terms of the *Swan Falls Agreement*.[2] Because the claims are located in three different administrative sub-basins, the subcases are proceeding at different stages.

2. The *Director's Report for Basin 36, Reporting Area 3, Irrigation and Other Rights* was filed November 2, 1992, and included recommendations for hydropower claims 36-02013, 36-02018 and 36-02026. The recommendations were uncontested and the claims were decreed as recommended. ***Partial Decrees*** were issued for the three claims in the name of Idaho Power Co. on November 11, 1997. The ***Partial Decrees*** did not refer to the *Swan Falls Agreement*. Interim Administration, pursuant to I.C. § 42-1417 for water rights in Basin 36, was ordered December 13, 2005.

3. The *Director's Report for Irrigation and Other Uses Surface Water, Reporting Area 16,. IDWR Basin 37, Part I* (Surface Water) was filed November 4, 2005, and included recommendations for hydropower claims 37-02128, 37-02471, 37-02472, 37-20709 and 37-

[1] Three of the claims (02-02032, 02-04000, 02-04001) were reported under A & B designations to reflect the issue of split ownership as between Idaho Power and the State of Idaho.

[2] The *Swan Falls Agreement* includes the implementation of a legislation program, the execution of two agreements and the entry of two consent judgments: (1) "Legislative Program" implemented with rules, regulations and administrative practices (*See* 6 A-G, Legislative Program, and Exhibits 1-4 and 8, *Swan Falls Agreement*, "Agreement," October 25, 1984); (2) "Contract to Implement" Chapter 259 Sess. Laws, 1983, entered on October 25, 1984 (commonly referred to as the "S.B. 1180 Agreement" or the "1180 Contract," which implemented the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, subsequently codified as §§ 61-539 and 61-540); (3) the "Agreement" dated October 25, 1984 that provided for the commencement of the Snake River Basin Adjudication (SRBA); (4) the Swan Falls Consent Judgment in *Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990);* and (5) the Swan Falls Consent Judgment in *Idaho Power Co. v. State of Idaho, Case No. 62237 (Fourth Judicial Dist. Mar. 9, 1990).*

20710. Idaho Power timely objected to the *Director's Recommendation* regarding the remarks pertaining to the *Swan Falls Agreement* included under "Other Provisions Necessary for the Definition or Administration of Water Right." On February 20, 2007, a *Notice of Completed Administrative Proceeding* and *Amended Director's Report* was filed, which recommended a split in the ownership of the three water right claims into legal and equitable title with the State of Idaho holding legal title and Idaho Power and the State of Idaho, in and for the people of the State of Idaho, holding equitable title. The State of Idaho filed late objections to the *Amended Director's Recommendation.* The three subcases are currently pending before Special Master Bilyeu. Interim Administration pursuant to I.C. § 42-1417 for water rights in Basin 37 Part 1 Surface Water was ordered December 13, 2005.

4. The *Director's Report for Irrigation and Other Uses, Reporting Area Basin 02* was filed December 28, 2006, and includes recommendations for hydropower claims 02-02057, 02-02001A, 02-02001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032A & B, 02-04000A & B, 02-04001A & B and 02-00100. To date, no objections have been filed. The objection period for Basin 02 does not close until December 5, 2007. Interim administration has not been ordered for the water rights in Basin 02.

5. On May 10, 2007, Idaho Power filed a *Complaint and Petition for Declaratory and Injunctive Relief* (hereinafter "*Complaint and Petition*"), designated as Subcase 92-23, naming the State of Idaho, the Governor, the Attorney General and the Director of the Idaho Department of Water Resources (hereinafter "IDWR") as parties, seeking the following relief:

> A. A declaration that there was no "Trust Water" available when the Swan Falls Agreement was executed in 1984, and therefore no trust *res* and no valid trust established under the Swan Falls Settlement.
>
> B. A reformation of the Swan Falls Settlement based on mutual mistake of fact regarding the existence of Trust Water, eliminating any asserted trust while retaining provisions unrelated to the purported trust.
>
> C. A declaration that to the extent there is a valid trust, the trust *res* is water and not water rights, the State of Idaho does not hold legal title to Idaho Power's

water rights, and title to the water rights referenced in the Swan Falls Settlement is quieted in Idaho Power.

D. A declaration that the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.

E. A declaration that Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to the use of water for ground water recharge.

F. A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for the multiple year impacts of ground water pumping.

G. Preliminary and permanent injunctions: (a) enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights; (b) ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20 year terms of previously granted permits for new appropriations of Trust Water; (c) ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement; and (d) ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and the therefore 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 ESPA.

6. Idaho Power also included the same allegations in its *Responses* filed in subcases 37-02128, 37-02472, 37-02471, 37-20709 and 37-20710 and styled them as a *Counterclaim.*

7. On May 10, 2007, Idaho Power also filed a *Motion for Stay of Proceedings on Idaho Power Company Water Rights in Basins 2, 36, and 37 or Alternatively to Consolidate Proceedings and Request for Expedited Hearing* (hereinafter "*Motion to Stay or Consolidate*"). The same *Motion* was also filed with respect to Basin-Wide Issue 13 (designated as SRBA subcase 92-13).

8. On May 30, 2007, the State of Idaho filed a *Motion to Strike or Alternatively Dismiss Complaint and Petition for Declaratory and Injunctive Relief*, together with a memorandum in support.

9. A hearing was held on Idaho Power's *Motion to Stay or Consolidate* and on the State's *Motion to Strike or Dismiss* on June 25, 2007. The matters were then taken under advisement.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in these matters on June 25, 2007. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, these matters are deemed fully submitted for decision the next business day, or June 26, 2007.

IV.

BACKGROUND AND CURRENT STATUS OF BASIN-WIDE ISSUE 13

On August 23, 2004, this Court issued an *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?* The issue arose as a result of objections filed to 346 recommendations to groundwater claims reported in the *Basin 37, Part 1 (Ground Water) Director's Report.* The *Objections* sought to include language regarding the *Swan Falls Agreement* in either a remark included in the individual partial decrees or alternatively decreed as a general provision.[3] Because the *Objections* represented the only objection filed in most of the 346 subcases, the Court separated and consolidated the issue to avoid further delay in issuing partial decrees for each of the 346 claims.[4] Further, because of the large number of affected water rights and the potential for more objections once all of Idaho Power's water rights were reported, the Court

[3] The objections to all 346 rights stated:

> This water right must be decreed with the appropriate remarks and/or general provisions necessary to incorporate the protections accorded by the October 25, 1984 *Swan Falls Agreement*, the October 25, 1984 Swan Falls Contract, the 1982 State Water Plan as amended in 1985 (hereinafter jointly referred to as the *Swan Falls Agreement*), and other related law. Such remarks and/or general provisions are necessary to define the right, and or clarify the elements of the right, and/or administer the right.

[4] The Court concluded that any necessary remark could be incorporated into the individual partial decrees *via* a general provision and the savings language contained in the face of the partial decree.

designated the matter as a Basin-Wide Issue and stayed the matter pending the reporting of the remainder of Idaho Power's rights covered under the *Swan Falls Agreement* and the reporting of any other water rights alleged to be effected by the terms of the *Swan Falls Agreement*. The Court's rationale for staying the matter, in part, was to see how the *Swan Falls Agreement* was reported by IDWR in the recommendations for Idaho Power's hydropower rights. The Court's reasoning was that the *Director's Report* recommendations may potentially resolve the concerns raised in the *Objections* consolidated into Basin-Wide Issue 13.

V.
DISCUSSION

1. MOTION TO STRIKE, OR IN THE ALTERNATIVE, TO DISMISS

The State of Idaho asked the Court to strike or alternatively to dismiss the *Complaint and Petition* based on the following grounds: 1) That the *Complaint* is an unauthorized, immaterial and redundant pleading that should be stricken; 2) that the *Complaint* and the private quiet title action it purports to initiate are not authorized in the SRBA under the applicable procedural rules and statutes; 3) that the underlying claims raised in the *Complaint* are already at issue in the conventional subcase proceedings; 4) that the SRBA Court lacks authority to judicially reform the *Swan Falls Agreement* to eliminate the "trust" provisions; 5) that the Director of the Idaho Department of Water Resources and the Idaho Department of Water Resources cannot be parties to the SRBA; and 6) that the Court lacks authority and jurisdiction to grant the declaratory and injunctive relief sought.

A. The State of Idaho's Motion to Dismiss on the Grounds that Idaho Power's *Complaint and Petition* do not follow SRBA Procedure is Denied.

The State of Idaho's first three asserted grounds for dismissal are essentially that the filing of a *Complaint and Petition* in the SRBA is not authorized by, and is inconsistent with, the established procedural process for adjudicating water rights as set forth in ***SRBA Administrative Order 1 (AO1).*** Further, that the issue over which the SRBA Court has jurisdiction can be

addressed through the conventional objection and response process. Idaho Power argues that given the complexity of the issues it should not be limited to "checking boxes" contained in the standard form pleadings authorized by ***AOI.*** Idaho Power further argues that through the *Complaint and Petition* it is not only responding to the director's recommendation, but also to the Attorney General's interpretation of the State's obligations under the terms of the *Swan Falls Agreement.*

This Court agrees with the State of Idaho that the filing of a *Complaint and Petition* separate from the standard forms is not specifically authorized under ***AOI***. However, the Court disagrees that dismissal solely on that basis is appropriate. The SRBA Court has entertained a number of separate actions seeking declaratory and/or injunctive relief. The case of *Riley v. Rowen*, 131 Idaho 831, 965 P.2d 191(1998) (SRBA subcase 94-00012) originated as a declaratory judgment action filed in the SRBA to determine the ownership of a water right. *See also, State ex rel. Higginson v. Dickon,* SRBA Subcase 92-0006 (1991) (petition for preliminary injunction); *Rim View Trout Co. v. Idaho Dept. of Fish and Game*, SRBA Subcase 92-0002 (1992) (motion for preliminary or permanent injunction); *Jones v. Naf Irrigation Co.*, SRBA Subcase 92-0014 (1995) (complaint for preliminary injunctive relief); and *Big Lost River Water Users Assn. v. Idaho Dept. of Water Resources*, SRBA Subcase 92-00013 (1995) (petition for declaratory relief).

Usually the basis for an action which does not conform with ***AOI*** is that the dispute involves a water right claim that is not scheduled to be investigated and reported until sometime in the future. Where immediate relief is sought alternative pleadings have long been recognized. The situation has also arisen when the SRBA Court did not have jurisdiction over all of the causes of action alleged in the pleading but where the cause of action nonetheless involved the preliminary determination of the validity or elements of a water right. Such actions are filed in the SRBA because the SRBA has exclusive jurisdiction over adjudicating the elements or validity of the water right. The SRBA Court in such cases must decide the preliminary issue. *Walker v. Big Lost Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993) (defining scope of jurisdiction of SRBA). For example, a cause of action for trespass or breach of contract may turn on the preliminary issue of an element such as place of use or the existence of a water right. The SRBA Court's practice, consistent with existing case law, has been to determine the issues that require definition of the elements of a water right. The SRBA Court has exclusive jurisdiction of these

issues. Other issues that do not involve the elements of a water right but nonetheless turn on the outcome of the SRBA proceedings are also determined by the SRBA Court which then transfers those remaining portions of the case to a district court of appropriate jurisdiction.

The case of *O'Crowley v. Olivas*, (SRBA subcase 94-00013) is illustrative of this separation of issues. The case originated with the filing of a complaint involving a dispute over a water right claim which also included causes of action in tort such as trespass, nuisance and damage claims. The SRBA Court resolved the issues over which it had exclusive jurisdiction such as ownership, validity and scope of the disputed water right and then transferred the remainder of the causes of action to the district court in the county where the tort causes of action originated. *See Order Transferring SRBA Subcase to the District Court for Owyhee County for Disposition of Remaining Issues,* subcase 94-00013 (July 30, 2002). The Idaho Supreme Court has also acknowledged that portions of a lawsuit involving both water and other issues may have to be segregated. In *Bischoff v. Salem Union Canal Co.*, 130 Idaho 455, 943 P.2d 45 (1997), the Idaho Supreme Court stated:

> In *Walker* [*Walker v. Big Lost Irr. Dist.*], this Court held that '[t]hus, once SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only. Jurisdiction remains with the SRBA district court until it issues a final order concerning the particular water right at issue.'
>
> Until all of the underlying issues of fraud and self-dealing are determined by the trial court, there is no determination necessary of any essential element of a water right in the present action. If we held otherwise, the SRBA would be swamped with innumerable divorce, real estate transactions and other litigation that might, dependent on the outcome of the underlying litigation, require a subsequent determination of or transfer of water rights.

Bischoff, 130 Idaho at 456, 943 P.2d at 46 (citing *Walker*, 124 Idaho at 81, 856 P.2d at 868). *See also, Riley v. Rowan,* 131 Idaho 831, 965 P.2d 191 (1998).

For purposes of fashioning temporary relief pending the filing of the director's report, the Court has been reluctant to adjudicate water rights at issue in advance of the filing of the *Director's Reports* for the entire basin. Adjudicating a single water right in advance of the basin requires IDWR to investigate and report the right in advance of the rest of the basin. Aside from logistical concerns, this also raises notice problems for other claimants in the SRBA. As such, the Court has often focused on preliminary relief pending the filing of the *Director's Report* for

the disputed claim. Once the *Director's Report* is filed, most if not all of the issues raised in the complaint or petition are ultimately addressed and subsumed through established SRBA procedures. After the elements of the right are determined and a partial decree issued, any remaining causes of action (such as damages for trespass, breach of contract, etc.) are then transferred to a Court of appropriate jurisdiction. However, in deciding the remaining causes of action, the prerequisite determination of the water right made in the SRBA is binding. Many times the ruling on the scope of water right by the SRBA is dispositive of the remaining causes of action. The Court has handled a number of these types of cases on a case-by-case and step-by-step basis. Accordingly, dismissal of the *Complaint and Petition* on the basis that the procedure is not authorized by ***AOI*** or that the issues can be addressed through conventional SRBA procedures is inappropriate. Rather, the Court will 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. Following resolution of the scope of Idaho Power's water rights any remaining issues over which the Court concludes it does not have jurisdiction can be dealt with accordingly.

Irrespective of whether Idaho Power's twenty-one (21) claims proceed as individual subcases, a consolidated subcase, or through the *Complaint and Petition* in subcase 92-23, Idaho Power and the other parties will be provided a full and complete opportunity to litigate all issues resolvable in the SRBA. Any decision by the Court to deviate from the standard subcase procedures- through consolidation or otherwise- will be made with due regard to such factors as judicial economy, the convenience to the parties, and due process considerations for both the current parties to the subcases, and other parties to the SRBA.

The State's motion to dismiss on the grounds that the *Complaint and Petition* do not follow SRBA procedure is Denied.

B. The Court has Jurisdiction over Idaho Power's Causes of Action for Declaratory Relief.

The State of Idaho next asserts that the SRBA Court lacks jurisdiction to entertain the declaratory relief sought by Idaho Power. This Court disagrees in part. The jurisdictional boundaries of the SRBA are not entirely "black and white." There are some gray areas. Frequently, provisions or conditions dealing with the administration of a particular water right are recommended to be included in a partial decree for a variety of reasons, including recognition

of prior agreements or consent decrees. Such provisions or conditions may expressly affect how the right is to be administered relative to other rights on a given source which very well may differ from a simple tabulation of priorities. For example, the remark may state under what conditions a right is immune from a delivery call as against other rights. A "rotation for credit" provision authorized by a former decree is another example. *See Order of Partial Decree for General Provisions in Administrative Basin 34* (subcase no. 91-00005-34) (May 9, 2001) (dispute over validity of general provisions affecting administration originating in *Utah Construction Decree*). Although arguably the provisions pertain solely to how water rights are to be administered, they can also be integral to the nature and extent of the water right and they may impact the tabulation of priorities on the same source. Frequently, disputes over water rights are settled by the incorporation of an agreement into a decree specifying how the respective rights are to be administered. The argument that the remark or conditions go solely to the issue of administration and are therefore outside the scope of the jurisdiction of the SRBA oversimplifies the issue. There can be a significant amount of overlap between an administrative provision and the definition of a water right. Furthermore, simply including a provision from a former decree or referencing an agreement into a partial decree and requiring the parties to litigate its meaning, operation or validity in another forum results in the Court issuing unsettled partial decrees and ultimately not performing its essential function. Additionally, any Court other than the SRBA which would otherwise rule on the dispute would lack jurisdiction to amend the elements of the affected water rights in the event it becomes necessary as a result of the outcome of the proceedings.

The *Swan Falls Agreement* in part defines the ownership, nature and extent of the subject hydropower rights and how they are to be administered relative to other rights on the same or connected sources. Accordingly, to the extent there is a dispute over the meaning, operation or validity of the *Swan Falls Agreement*, the dispute, at least in part, is properly under the jurisdiction of the SRBA Court. Simply incorporating by reference the *Swan Falls Agreement* into the partial decrees for the affected water rights or through a general provision as contemplated by Basin-Wide Issue 13, would leave unresolved a number of issues pertaining to the nature and extent of the subject hydropower claims.

A significant number of claims in the SRBA based on prior consent decrees or stipulated agreements contain provisions which have resulted in disputes over their interpretation, meaning,

and validity. Frequently, the intended meaning or interpretation of a provision in a former consent decree gets clouded over time or conditions change which may call into question the operation of a particular provision. *See Memorandum Decision and Order on Challenge*, subcase Nos. 36-00003A *et. al.* (Nov. 23, 1999) (dispute over intended meaning of "other purposes" language contained in former decree issued in *New International Mortgage Bank v. Idaho Power Co.*, In Equity No. 1602 (D. Idaho March 22, 1932)(unpublished opinion). The Court has been unable to issue partial decrees for such claims without first resolving the underlying dispute. The procedure has not been to transfer the former decree back to another court for resolution or to include the provision in the partial decree and require the parties to litigate its meaning administratively before IDWR.

Recently, in ***Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference***, consolidated subcase 91-63, (Ownership of Water Rights Between Irrigation Entities and Bureau of Reclamation) (Sept. 2, 2004), a case involving the ownership of the water rights associated with certain Bureau of Reclamation projects, it was argued that the ownership of the water rights should be divided between equitable and legal title, similar to the recommendations for the subject water rights where the Director recommended split ownership. One of the arguments raised was this Court's lack of jurisdiction over the issue because the matter was a dispute over the meaning of a federal contract and should be resolved in the federal court of claims. Ultimately, this Court rejected the argument holding that ownership was an element of a water right over which the SRBA has jurisdiction. On appeal the Supreme Court did not dismiss the case for lack of jurisdiction. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

Finally, the Court acknowledges that, in its *Order Designating Basin-Wide Issue 13*, it preliminarily determined:

> [B]ecause the *Agreement* deals with the administration of water rights, any disagreement over the interpretation or application of the *Swan Falls Agreement* should first be decided administratively if and when an issue arises, based on the attendant facts at the time enforcement of a term of the *Agreement* is being sought.

Order at 7.

In the *Order*, the Court was making the general assumption in the absence of attendant facts and specific objection. Now, upon review of Idaho Power's allegations, it is clear that the

dispute goes beyond the administration or enforcement of the *Swan Falls Agreement*. Issues exist over fundamental terms, which define the nature, scope and extent of Idaho Power's hydropower rights and should be decided in the SRBA. For example, whether the subordinated portions of Idaho Power's hydropower rights are also subordinated to recharge? As stated previously, the jurisdiction of the SRBA is not always easy to specifically define. To the extent this ruling is inconsistent with the Court's prior ruling, the prior ruling is hereby superseded.

For the foregoing reasons, this Court holds that jurisdiction to preside over the declaratory relief being sought by Idaho Power resides with the SRBA.

C. **Reformation of the *Swan Falls Agreement***

Aside from the declaratory and injunctive relief sought, Idaho Power has also alleged a cause of action for mutual mistake and reformation of the portions of the *Swan Falls Agreement* pertaining to the "trust water" provision. Idaho Power is thus seeking reformation of the *Swan Falls Agreement* regarding the existence of trust water. The State of Idaho argues that the SRBA Court lacks jurisdiction to reform portions of the *Swan Falls Agreement*. The Court agrees in part. To the extent an agreement inaccurately reflects actual conditions on the ground making definition or administration of the right impossible or unclear, this Court may reform the agreement. An example of such a situation would be a case involving is a series of mense conveyances of land with appurtenant water rights where the land has been repeatedly split into smaller parcels where some of the instruments of conveyance expressly address water rights and others are silent. Ultimately, the sum of the quantity of the claims appurtenant to the individual parcels cannot exceed the original parent right from which the rights were split. Often the aggregate SRBA claims exceed the total quantity granted in the original right, requiring the Court to trace the chains of title determine what was decreed. The essence of the agreement is critical to determine how the right is decreed in each case. However, reformation of an agreement having nothing to do with the definition or administration of a water right or other defenses to the validity of a contract may be outside of the jurisdiction of the SRBA. *See Bischoff*, 130 Idaho at 456, 943 P.2d at 46. At this early stage of the proceeding, it is too early for the Court to determine how the disputed "trust" provision may affect the definition or

administration of Idaho Power's water rights. **Therefore dismissal or transfer of the reformation cause of action would be premature.**

D. **The Director of IDWR or IDWR cannot be parties to the SRBA.**

Idaho Power has sought preliminary and permanent injunctive relief against the Director of IDWR and IDWR. The State of Idaho asserts as a basis for its *Motion to Dismiss* that the Director or the Idaho Department of Water Resources cannot be a party to the SRBA. Idaho Power argues that in addition to filing the matter in the SRBA, this Judge also has the capacity to hear the matter in his capacity as district judge. Whether or not this Court can hear the case in its capacity as a district judge, the *Complaint and Petition* were filed in the SRBA and this Court agrees with the State that IDWR cannot be a party to the SRBA. I.C. § 42-1401A(3) (defining role of director and department in SRBA); *see also In Re SRBA Case No. 39576, Twin Falls Canal Co. v. IDWR*, 127 Idaho 688 (1995) (declaratory judgment action against IDWR may not be brought in the SRBA). This Court does however, have jurisdiction to decide the preliminary issues involving the meaning of the *Swan Falls Agreement* which defines the scope and administration of Idaho Power's hydropower rights. These issues must first be resolved before any determination on the issues of compliance and enforcement of the decree can be made by this Court or any other court or administrative body. Except for the hydropower rights in basin 36, no partial decrees have been issued which define the elements and scope of Idaho Power's water rights. 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.

The Court recognizes, however, that one of Idaho Power's causes of action could require resolution before adjudication of the water right claims in question. Specifically, Idaho Power seeks a preliminary injunction "ordering IDWR to 'take reasonable steps in its administration of water rights in the Snake River basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows . . . .'" *Complaint* p.26, ¶.G. One reading of this cause of action is a request for immediate relief if flows at the Murphy Gauge are expected to be less than 3,900 cfs at some point in the summer. Should this be the case the Court will revisit the issue

upon appropriate motion.[5] The Court notes that interim administration has not been ordered for Basin 02 and so a motion for temporary relief pending interim administration may be brought before the SRBA Court. However, IDWR need not be named a party in order for the Court to fashion such temporary relief.

Accordingly, pursuant to ***AOI*** § 11 and I.R.C.P. 42, **the causes of action for preliminary and permanent injunctive relief brought specifically against the Director of IDWR and IDWR are separated from the remaining causes of action and stayed pending resolution of the remaining issues or until further order of the Court.**

E. The Court cannot order the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2.

As part the injunctive relief sought, Idaho Power also seeks an order from this Court repealing Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the *Swan Falls Agreement*. Attorney General Opinion 06-2 addresses the issue of whether under the terms of the *Swan Falls Agreement*, Idaho Power subordinated its hydropower rights to recharge. The Attorney General opinion may represent the State's position on interpretation of the *Swan Falls Agreement* but it is not an adjudication or judicial determination of Idaho Power's hydropower rights. Once the scope of Idaho Power's water rights, including subordination to recharge, has been fully litigated, all parties will be obligated to abide by the terms of the decrees ultimately issued, whatever those terms may be.

The Attorney General performs legal services and provides legal advice to the State and its departments, agencies, offices and officers. One of the duties of the Attorney General is: "To give an opinion in writing, without fee, to the legislature or either house thereof, or any senator or representative . . . when requested, upon any question of law relating to their respective offices." I.C. § 67-1401(6). Attorney General's Opinions are not binding on the court but they are entitled to consideration. *Echo Ranch, Inc. v. State of Idaho ex rel. Evans*, 107 Idaho 808,

[5] For reasons of judicial economy, if any portion of the case requires transfer to a district court of appropriate jurisdiction, the Court intends to transfer those portions of the case to the District Court for the Fifth Judicial District in Twin falls County and request that the administrative Judge assign the case to the undersigned.

811, 693 P.2d 454, 457 (1984), *see also State v. Bennett*, 142 Idaho 166, 173, 125 P.3d 522, 529 (2005) (Jones, J., concurring in part and dissenting in part). In a case such as this one, where the State and its officers and agencies are named as parties, and the Attorney General's Opinion deals with the subject matter and merits of the case, the Court would tend to give the Attorney General's Opinion the same weight as any other argument of counsel. The Court, if requested to do so, would consider the Opinion (subject to admissibility) but only in the same way that it considers the arguments raised by the attorneys representing all of the parties in the case. The Court can 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. 06-02 nor is the Court persuaded that there is any reason to do so as a matter of law. Idaho Power has failed to state a claim upon which relief can be granted. I.R.C.P. 12(b)(6).

Therefore, Idaho Power's cause of action for a preliminary injunction ordering the Attorney General to repeal Opinion No. 06-02 shall be dismissed.

2. ORDER ON MOTION TO STAY OR CONSOLIDATE

Idaho Power filed a motion to stay the proceedings on Idaho Power's hydropower water right in Basin 02, 36, and 37 pending the outcome of the proceedings on Idaho Power's *Complaint and Petition* or alternatively to have the subcases consolidated and heard in a single proceeding. Idaho Power filed a motion to stay the proceedings in Basin-Wide Issue 13. The Court finds that the issues raised in the *Complaint and Petition* and the *Counterclaim*, which are in the jurisdiction of the SRBA, can be resolved in conjunction with the objection and response resolution process set forth in ***AO1*** and therefore a special proceeding on the *Complaint and Petition* is unnecessary because the *Director's Report's* have been filed for all of the subject hydropower claims. The Court also finds that consolidation is appropriate because 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. For purposes of judicial economy the issues should be resolved in a common proceeding rather than in three separate proceedings before the different special masters.

In Basins 36 and 37, the time for filing objections has expired. The *Director's Report for Irrigation and Other Uses, Reporting Area Basin 02* was filed on December 28, 2006. The objection period closes on December 5, 2007. The Court has considered moving the objection period to an earlier date for the claims in Basin 02 in order to expedite hearing all of Idaho Power's hydropower claims together. As a practical matter, the notice requirements of such a change would result in a relatively short time-savings and may not entirely eliminate the potential for a due process challenge by a party trying to later enter the consolidated subcase. Furthermore, it is likely that the parties will need to conduct discovery and that they will need adequate time to prepare for trial. The court has determined that a more practical approach would be to stay the proceedings, except discovery, until the close of the objection period in Basin 02. The issues shall then be set for trial thereafter.

Therefore, **THE FOLLOWING ARE HEREBY ORDERED:**

A. **Separation and Consolidation of Issues:** Pursuant to ***AOI*** §11 and I.R.C.P 42, in order to avoid unnecessary costs or delay, issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement* in subcases 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472, 37-20709, 37-20710 and with respect to claims for which no objections have yet been filed, including 02-02057, 02-02001A, 02-2001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032 A & B, 02-04000 A & B, 02-04001 A & B and 02-00100, shall be separated and consolidated with subcase 92-23 into a single consolidated subcase for purposes of resolution.

B. **Designation of Consolidated Subcase**: The consolidated subcase shall be designated as Consolidated Subcase 92-23. Future pleadings addressed to the issues of ownership and interpretation and/or application of the *Swan Falls Agreement* should be filed in said consolidated subcase.

C. **Limited Order Rescinding *Orders of Reference*:** The ***Orders of Reference*** for the above named subcases are hereby rescinded as to issues of ownership and interpretation and/or application of the *Swan Falls Agreement* only. The consolidated subcase shall proceed before the SRBA Presiding Judge. Matters other than ownership of the water rights and interpretation

and/or application of the *Swan Falls Agreement* shall remain with the assigned special master and may proceed as determined by the special master.

D. **Stay of Proceedings Other than Discovery:** The proceedings in Consolidated Subcase 92-23, with the exception of discovery, are stayed pending the close of the objection period for Basin 02 on December 5, 2007. However, the parties may commence discovery.

E. **Notice of Scheduling and Status Conference:** A scheduling and status conference is set **for 3 p.m. on Tuesday, December 17, 2007**, at the Snake River Basin Adjudication Courthouse, 253 – 3rd Avenue North, Twin Falls. **Parties may participate by telephone by dialing the number 1-918-583-3445 and when prompted entering code 406128.**

F. **Status of Basin Wide Issue 13:** The Court views the proceedings in Basin-Wide Issue 13 as being stayed also pending the close of the objection period in Basin 02. The Court will set a status conference by separate notice to also be held on December 17, 2007, for purposes of determining whether the issues in Consolidated Subcase 92-23 need to be resolved before the Court can address Basin-Wide Issue 13.

Dated: July 23, 2007

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER GRANTING IN PART, DENYING IN PART MOTION TO DISMISS; CONSOLIDATING COMMON ISSUES INTO CONSOLIDATED SUBCASE; AND PERMITTING DISCOVERY PENDING OBJECTION PERIOD IN BASIN 01; AND NOTICE OF SCHEDULING CONFERENCE** were mailed on July 24, 2007, by first-class mail to the following:

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Deputy Clerk

ADDENDUM D

STATE OF IDAHO'S AND IDAHO POWER COMPANY'S STIPULATION AND JOINT MOTION TO DISMISS COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

ORIGINAL

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED
2009 JUN 25 PM 12 28

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

In Re SRBA	)	Consolidated Subcase No. 00-92023 (92-23)
Case No. 39576	)	**STATE OF IDAHO'S AND IDAHO POWER COMPANY'S STIPULATION AND JOINT MOTION TO DISMISS COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE**

) **RELIEF**
)

STIPULATION

The State of Idaho and Idaho Power Company ("the Parties"), by and through their counsel of record, hereby stipulate and agree to the following:

1. Dismissal without prejudice of the "First Claim for Relief" alleged in the "*Complaint And Petition For Declaratory And Injunctive Relief*" filed by Idaho Power Company in this Consolidated Subcase on May 10, 2007 ("Complaint") to the extent it seeks a factual declaration that when the Swan Falls Agreement was executed in 1984, the Snake River tributary to the Murphy Gage, including surface and ground water in the Eastern Snake Plain Aquifer ("ESPA"), was over appropriated; and also to the extent it seeks a factual declaration that when the Swan Falls Agreement was executed in 1984, there was no unappropriated water available on a firm, average daily basis in the Snake River Basin tributary to the Murphy Gage, including surface and ground water in the ESPA.

2. Dismissal with prejudice of the remainder of the "First Claim for Relief" alleged in the Complaint.

3. Dismissal with prejudice of the "Second Claim for Relief" alleged in the Complaint.

4. Dismissal with prejudice of the "Third Claim for Relief" alleged in the Complaint.

5. Dismissal with prejudice of the "Fourth Claim for Relief" alleged in the Complaint.

6. Dismissal with prejudice of the "Fifth Claim for Relief" alleged in the Complaint to the extent it seeks declarations that water rights 36-02013, 37-02128, 37-02472, 37-02471, 37-20709, 37-20710, 36-02018, 36-02026, 02-02057, 02-02001A, 02-02001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032A, 02-02032B, 02-04000A, 02-04000B, 02-04001A, 02-04001B, 02-00100 and 02-10135 are not subordinate or may not be subordinated, through the Swan Falls Settlement or otherwise, to the use of water for ground water recharge.

7. Dismissal without prejudice of the "Fifth Claim for Relief" alleged in the Complaint with regard to any other water rights held by Idaho Power Company.

8. Dismissal without prejudice of the "Sixth Claim for Relief" alleged in the Complaint.

9. Dismissal with prejudice of the "Seventh Claim for Relief" alleged in the Complaint to the extent it seeks injunctions ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2.

10. Dismissal with prejudice of the "Seventh Claim for Relief" alleged in the Complaint to the extent of any challenge to the State of Idaho's claim of legal title to the hydropower water rights held in trust by the State pursuant to the Swan Falls Settlement.

11. Dismissal without prejudice of the remainder of the "Seventh Claim for Relief" alleged in the Complaint.

12. Each of the Parties will bear its own costs and fees for this Consolidated Subcase.

13. Any remaining claims in the Complaint are dismissed with prejudice.

14. The proposed "*Order Dismissing Complaint And Petition For Declaratory And Injunctive Relief*" attached hereto is consistent with this Stipulation.

15. Neither party will appeal any part of the "*Memorandum Decision And Order On Cross-Motions For Summary Judgment*" entered in this Consolidated Subcase on April 18, 2008. The "Memorandum Decision And Order On Cross-Motions For Summary Judgment" is a final decision that is binding between the Parties and their respective successors and assigns.

14. This Stipulation is contingent upon entry of partial decrees for the hydropower water rights at issue in this Consolidated Subcase in the form proposed by the Parties, and will become effective and binding only upon entry of such partial decrees. If the SRBA District Court does not enter such partial decrees within ninety (90) days of the filing of this Stipulation, or if the SRBA District Court enters partial decrees different from those proposed by the Parties, then either Party shall have the option in its sole and absolute discretion to declare this Stipulation void and without any effect.

JOINT MOTION TO DISMISS COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

The State of Idaho and Idaho Power Company, by and through their counsel of record, hereby jointly move this Court to dismiss the *Complaint And Petition For Declaratory And Injunctive Relief* pursuant to the Parties' "*Stipulation*," above. Attached hereto is the Parties' proposed form of dismissal order.

The State and Idaho Power further request that the Court set a status conference to determine whether there is any opposition to this joint motion. Should there be opposition, the State and Idaho Power request oral argument on this joint motion and that

this Court set a briefing and hearing schedule. The State and Idaho Power further request that this joint motion be heard and considered together with the *State of Idaho's and Idaho Power Company's Joint Motion for Entry of Partial Decrees Re: Water Rights in Basin 02 and Basin 37*, the *State Of Idaho's And Idaho Power Company's Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026*, and the *State of Idaho's and Idaho Power Company's Joint Motion to Consolidate Water Right 02-10135 Into Consolidated Subcase 00-92023*, all of which are filed herewith.

Respectfully submitted this 25th day of June 2009.

STATE OF IDAHO

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June 2009, I caused a true and correct copy of the STATE OF IDAHO'S AND IDAHO POWER COMPANY'S STIPULATION AND MOTION TO DISMISS COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF to be served on the following parties by the indicated methods:

Clerk of the SRBA Court
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
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- ☐ Facsimile: 208.344.6034
- ☒ E-mail: smd@idahowaters.com

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

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83720-4449

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: _____
- ☒ Not Applicable

United States Department of Justice
Environment & Natural Resources Division
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MSC 033
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- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
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ADDENDUM E

RESOURCES AND ENVIRONMENT COMMITTEE PUBLIC HEARING MINUTES, DATED JANUARY 21, 1985

RESOURCES AND ENVIRONMENT COMMITTEE

PUBLIC HEARING

MINUTES

TIME: January 21, 1985, 7:00 P.M.

PLACE: Room 420, Statehouse, Boise, Idaho

SUBJECT: SB 1006 and SB 1008 RELATING TO SWAN FALLS AGREEMENT

PRESENT: All members of the Senate Resources Committee except Senator Kiebert. Fourteen members of the House Resources Committee were also present.

The hearing was chaired by Senator Laird Noh who explained the hearing was for the purpose of hearing testimony on the multi package agreement dealing with Swan Falls. The main two bills for consideration tonight are SB 1006 and SB 1008. Briefly SB 1008 would implement the state's authority under the 1928 amendment to the Idaho Constitution to limit and regulate the use of water for power purposes. It would also add notice and publication requirements when the Department of Water Resources receives a water right application and sets out the nature and extent of water rights for power purposes.

SB 1006 is to provide statutory authority to the Director of the Department of Water Resources to suspend issuance of water right permits or other action on permits or permit applications when necessary. The bill would also give the Director the authority to promulgate rules and regulations.

There were nine people who signed up to testify before the meeting with two more asking to testify at the meeting. There were approximately 75 people in attendance. The three parties who worked on the agreement were also represented; Pat Kole from the Attorney General's office, Tom Nelson, representing Idaho Power and Pat Costello from the Governor's office.

PAT COSTELLO, the Governor's chief legal advisor, explained the bills are part of a larger compromise package that was arrived at between the Governor and Idaho Power and Attorney Jim Jones this summer and late fall. The agreement came about from a controversey over hydroelectic assets and other beneficial uses, especially agriculture. In the past several years interests have been at odds at how we should allocate the water of Snake River. After years of struggling over this issue the Governor concluded it was essential at this point to end this controversey if possible and to try and come up with a fair compromise that balanced the interests. The five pieces of legislation that have been introduced so far in the legislature as well as one that will be introduced in the next week or so, are the core of the agreement thatwas entered into. In order to implement the agreement, all of these pieces of this legislation need to pass. Mr. Costello at this point briefly went over the legislation pointing out the various features of the agreement and the reasoning behind them. A final

benefit in this agreement is that hopefully agreement can be reached without enormous litigation costs to the state and power company and ultimately to the ratepayers and without an inordinate delay. If the legislation is adopted, the Water Resources Department by the end of the year will be able to begin processing applications for water uses on the Snake under the new management criteria we have proposed.

PAT KOLE, from the Attorney General's office, said three results were attempted in the negotiations. The first, to give effect to the philosophy that Idaho water belongs primarily in the state of Idaho and used here. Secondly, that decisions as to the use and allocations of Idaho water must be made here by Idaho public officials and third in the future in order to protect Idaho from potential threats not only from the federal government but from our downstream sister states, we needed to get this issue resolved and present a united front to protect our water users. I believe the agreement that we have arrived at achieves all three of these goals. The important thing is that where the line is drawn is not magic, but what has been achieved is if the line has been drawn in the wrong spot, the legislators will be able to come back and redraw the line in the future at a different spot. Believe that is an important element of this package. It restores control over Idaho water to members of the legislature.

TOM NELSON, attorney for Idaho Power, believes there is one thing to keep in mind on this. The approval of this package is necessarily chopped up, so you only see pieces of it now and then in the legislature. Remember it was negotiated by us and approved by the principles as a package and should be accepted or rejected as a package. For your information as to where the rest of the conditions for implementation are, a petition has been filed with the Idaho PUC by the Power Company. The PUC has deferred action on that petition until the legislature has acted. A petition has been filed with the FERC and the time for intervention has run and to my knowledge there has been one intervention by the National Marine Fishery Service at the Federal Energy Regulatory Commission. The bill on adjudication was introduced for printing today in the House and a bill on PUC is in the Senate State Affairs. The Company determined that no filing was needed with the PUC of Oregon so none has been made. The amendments to the state water place have been proposed to the Water Resource Board and they will be going to public hearings beginning next week. It is recognized there are pieces of this agreement no one loves, but as a package, it is a rational, well balanced, resolution of the litigation that fostered the negotiations.

MARJORIE G. HAYES, Idaho Consumer Affairs, spoke against the legislation and would like to see the Swan Falls water continue completely unsubordinated. (A copy of the testimony is attached)

SHERL CHAPMAN, Director of Idaho Water Users Association, Inc., spoke in favor of the legislation. In a recent convention of water users here in Boise, after much discussion, the members voted with the except of a few members, to support this package. It is the feeling it is time to settle this issue which he had fought long and hard, but now feels this agreement is a fair way to settle it. They urge favorable consideration of the bills.

HAROLD C. MILES, speaking for the Golden Eagle Audubon Society and the Idaho Wildlife Federation, was not in favor of the legislation as believes it does not serve the public interest of most Idahoans nor take steps to preserve its fisheries, recreation, riparian, water fowl and raptor values. Also the low electrical rates in the state due principally to the Company's large hydro generating capacity is an economic value to Idaho's economy. (A copy of the testimony is attached).

BEN CAVANESS, attorney from American Falls, speaking for himself, said SB 1006 is relatively non-controversial. Water users have no objections to this but hope that the Director of Water Resources would not keep a moritorium indefinitely but make some decisions on permits. As a water user and an attorney who works extensively in the water area, he felt that the overall package is a fair one for all concerned and as fairly as possible reconcils the conflicting uses for the limited resource of water in this state. He commended both bills and asked for a favorable consideration.

FRED STEWART, a water user, spoke against this agreement, as he believes it sets up a vehicle to give our water to California. Mr. Stewart's testimony covered a "wide" range; from the bills in question to the history of how this problem came about. He strongly opposes the agreement. (Some supporting information he handed out is attached).

FORREST HYMAS, speaking for the Idaho Water Rights Defense Group, made up of business people, agricultural interest, recreational interests, professional interests and domestic interests, spoke in support of the two pieces of legislation. He said not all the people in the lawsuit were released by Idaho Power, but they realize they will have to live by this agreement. When the people of the state look at this agreement, it would seem this is the best agreement for the people of the state.

SENATOR HORSCH, I am sure your group has analyzed this legislation. Do you see holes in this legislation that would give our water to California?

MR. HYMAS We do not see this as a problem as the public interest criteria would cover that.

JOHN HATCH, Director, Public Affairs for the Farm Bureau, said as a whole the Farm Bureau does support the agreement. The Bureau has been involved in this issue since its inception. It has been a very difficult issue for the farm community and it has been difficult for them to accept the package. It is a compromise and I would urge the Committee not to tamper with it. The following policy was adopted at our convention in December: "We support a state of Idaho negotiated settlement with Idaho Power as a solution to the Swan Falls issue. This should include a contractual agreement by Idaho Power to allow state appropriation of water for upstream development down to the statutory minimum flow of 3900 cfs in the summer and 5700 cfs in the winter at Murphy. This also should include complete adjudication of the Snake River and its tributaries above Lewiston to be paid for by an equitable distribution of the costs among all said parties."

JOHN RUNFT, attorney, representing the Salmon River Hydro Company. This company consists of 27 small hydropower projects. All of these projects are located on

the main reaches of the main Salmon and the Little Salmon, all well above Swan Falls. All of these projects have received preliminary permits from FERC or exemptions or have licenses pending. All are bonda fide projects that are under way. He is not here tonight to attack the agreement, but rather here to make some comments on the bills that he feels would add to the overall agreement and addressing concerns of the small hydropower projects. Mr. Runft felt several provisions affecting small hydros should be clarified or changed. He expressed concern about their water permits which might be too short to allow economic development. (Statement attached)

PAT FORD, speaking for himself, expressed support for SB 1006 and directed his comments toward SB 1008, looking at that bill from the point of fish and wildlife and recreation; specifically at the public interest criteria. He expressed that this was a fragile package and hoped his comments would be taken in the spirit of helping to make this bill a better one. His comments were directed toward the five criteria for public interest with regard to fish and wildlife and recreation which he feels have not been dealt with adequately and feels they can be dealt with without destroying the entire package. He urged the consideration of adding the criteria that does mention fish and wildlife and recreation in the same way hydropower is mentioned.

AL FOTERGILL, Director of Idaho Coalition, felt the electrical consumers would be paying a very high price for the benefit of new irrigation development and the agreement could be made fair with an amendment requiring other consumers to be fully compensated for the cost of reducing the Snake River's flow and for the cost of serving new irrigation or other major additions to energy demand created by reducing the river's flow. The PUC could determine what the costs are and impose charges on the new loads to recover the cost. In summary, the interest of consumers was ignored when this agreement was put together.

ART MARTINS, representing the Little Pilgrim Irrigation Company, believes this agreement is a job well done and the answer to a situation that has been unresolved for too many years. (Testimony attached)

There being no more people wishing to testify, the meeting was adjourned at 9:30 P.M.

Laird Noh, Chairman

Bev Millins, Secretary



IDAHO CONSUMER AFFAIRS, INC.

AFFILIATE OF CONSUMER FEDERATION OF AMERICA

OLD BOISE / 106 NORTH 6TH / SUITE 3 / BOISE, IDAHO 83702

TELEPHONE: 208 / 343-3554

HEARING BEFORE THE LEGISLATURE ON THE SWAN FALLS ISSUE
January 21, 1955

Mr. Chairman... Gentlemen,

I appeared before you last year on this issue and was the next to the last to be heard... This gave me time to hear Mr Perry Swisher of the Idaho Public Utilities Commission as he gave his impassioned appeal to this body not to get into this Pandoras box because of the legal ramifications that would ensue from a "taking" of a water right from The Idaho Power Company . He warned that a Circuit Court Judge in San-Francisco would be making a determination upon a subject about which he had very little knowledge... That Judge would be determining the future of our water in Idaho... After he left, a lawyer, who had earlier identified himself as the legal counsel for a group of Irrigators, called out that Mr. Swisher did not know anything about water and this was picked up and repeated all around the room. I couldn't believe my ears, for water is the base of our hydro-electric system in Idaho and Mr. Swisher is one of our three Commissioners on Energy...To show his ability to assess a problem we now only have to look at a case that is on file at the Public Utilities Commission . A Declaratory Order there is awaiting the outcome of this Legislative Session. It states " Regarding Agreement Dated October 25, 1984, among the State of Idaho, by and through the Governor, John V. Evans, in his official capacity as Governor, Jim Jones in Official Capacity as Attorney General of the State of Idaho, and the Idaho Power Company... It would appear that the Idaho Power Company Officials are putting on public notice that any effect upon the Idaho Power Company's hydro generation by this taking process will not be grounds for a finding or an order reducing Idaho Power Company's present or future revenue requirement or any future rate, tariff, schedule or charge... One cannot help but admire Idaho Power Company's percipiency, for they are a business and must keep financially healthy, but I tremble for the rate payers in the Idaho Power territory, for we may very likely be paying for a dead horse, if this madness of dividing up another's resource continues.

Another aspect to this case is again in the legal area... If the Governor and the Attorney General of this State can take a water right that has been declared by the Supreme Court of the State (opinion # 49, 1983) as being unsubordinated to upstream diversion and consumptive use, what is going to stop them or any future Governor and Attorney General from doing the same to you, and you, and you? This is a dangerous precedent, both for now and for future generations.

There is another road that we can choose to follow... One which would maintain the 6,065 cfs, which has been the average minimum daily discharge at Murphy for the past twenty three (23) years(records of the United States Geological Survey) and let it work for us to help replace the very scarce capital that is the root of our struggle to meet the economic needs of our schools, our social programs, our build- industries, and our Service Organizations in Idaho.

For there is a very exciting movement taking place in the Northwest... Our own Peter Johnson, who as you know is the Director of the Bonneville Power Administration, is returning the cheaper preference power to the public to whom it was, by law, originally intended (see chp 720, 75th Congress, 1st Session, Aug 20, 1927). He is doing this through the Investor Owned Utilities of which Idaho Power Company, is one.

This is the essence of the plan that is being proposed:
" The Firm Displacement Power Concept was first proposed as a rate in BPA's 1985 Rate Case. The concept would allow utilities to buy power from BPA to serve their Pacific Northwest loads, displacing power from their own generating resources currently used to meet regional loads. This would increase the amount of power the utilities would have to sell to California on a firm basis."

The key to this concept is firm power; for the Northwest Utilities have been selling their surplus non-firm energy to California for years at unbelievably cheap rates... My husband and I attended an Energy Conference in Seattle, Washington where this concept was under discussion. We were told by one of California's Energy Commissioners that they were buying non-firm power for "mills", but would be willing to pay anywhere from five (5¢) to nine (9¢) a kw hr. (depending upon our skill in bargaining)for firm power... With firm power, a power upon which they could depend, they could moth-ball their costly oil fired plants... At the minimal five cent (5¢) per kw hr we could superinsulate every home and mobil home in the Pacific Northwest Utilities Service Areas. (thus generating an additional source of energy)... This should be done without cost to the Consumer, for they have initially paid, through their taxes, for the development of the preference power which will be sold by the BPA to make this plan possible.

A Bureau of Reclamation Water Report for Brownlee shows that over a fifty (50) year period there have been seven (7) dry years which leaves forty three (43) years with average or better water... In order for the Investor Owned Utilities to protect their own Concumers from rate increases during those short fall years a sum should be set aside to purchase power. The true interest, adjusted to inflation, could go to the Investor Owned Utilities for collecting, handling, and bookkeeping costs for this operation.

One more point... There is very likely a possibility that the Investor Owned Utilities will really get involved in going after energy to market. A very negative conotation would be a shift to the development of low head hydro in the anadromous fish spawning streams... These fish require pristine water for spawning and rearing purposes ... We should consider putting in place the following:

(1) A moratorium on any development in the anadromous fish spawning areas of our State for we are going to need to restore that high grade protien source for a rapidly expanding National and World Population.

(2) We are going to need stiff building codes to protect the integrity of a super-insulation program. It is my understanding from talking to some of the people at the Hood River Project that the States of Oregon and Washington already have these in place in anticipation of an early start.

In summary it would appear that we have the following choices to make, ie:

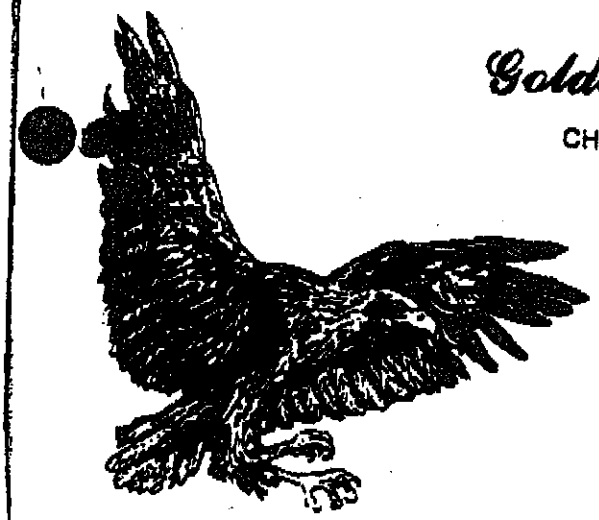
(1) To continue the subordination of the Swan Falls water, which by Court Decree has been determined to belong to another... A taking process.

(2) Leave this decision to a lower court, where it belongs, hoping that they will sustain the Supreme Court Decision for now ... letting this water stay in the Snake to help generate capital for our schools, our social programs, our building industries, and our service organizations... If, in fifteen (15) years or so, the vast agricultural surpluses have been reduced and we would not be further jeapordizing the price for farmers by over-production, we might take another look at this issue... for if the water is left in the Snake for the production of energy, it is not going anywhere... There is another very important factor to consider here... California is becoming desparate for water. If our hydro system is working to produce energy for them, they are not likely to cut their own throats to get at our water.

Marjorie G. Hayes

Marjorie G. Hayes
Idaho Consumer Affairs, Inc.

WE CARE ABOUT YOU.



Golden Eagle Audubon Society

CHAPTER OF THE NATIONAL AUDUBON SOCIETY
P.O. BOX 8261, BOISE, ID 83707

January 19, 1985

TESTIMONY OF THE GOLDEN EAGLE AUDUBON SOCIETY & THE IDAHO WILDLIFE FEDERATION submitted to the Idaho Senate Resources and Environment Committee on Monday, January 21, 1985 in Boise, Idaho., by:

Mr. Harold C. Miles, Authorized spokesperson for both organizations.

Chairman Noh and members of the Committee.

My name is Harold C. Miles, residing at 316 Fifteenth Ave. South, Nampa, Idaho 83651, and I am representing the Golden Eagle Chapter of the National Audubon Society, and the Idaho Wildlife Federation affilliate of the National Wildlife Federation at this hearing concerning S.B. 1006 and S.B. 1008 in particular, consequently we wish to submit the following changes and comments to these proposed pieces of legislation; first, thanking the Committee for allowing us to present testimony concerning our views regarding the Swan Falls controversy.

Relative to S.B. 1006, we request that at the end of the sentence in Section 1 (3) instead of the period after the word "water" a comma be inserted and the following words be added, "to insure an adequate supply of water, at all times, in all major streams to support the game fish fishery."

As previously stated, we have grave concern regarding S.B. 1008, consequently, we propose the following additions and deletions to this bill's language.

Section 1 (5)(d) lines 30-32, we feel limiting water to only those with sufficient financial resources, as the language implies, will preclude small irrigators from further irrigation development.

Section 1 (5)(e) line 34, after the word use, a comma instead of a period, adding,"and maintaining the sport fishery in the local streams in accordance with the recommendations of the Idaho Department of Fish & Game".

Section 2 (1) line 5 after the words"minimum flow" insert a comma instead of a period and adding, "providing Idaho Power Co's (IPCo) water rights for its Swan Falls Dam are maintained in accordance with the 1983 opinion No. 49 of the Idaho Supreme Court."

Section 2 (2) line 16, after the word "Idaho." strike the following sentence which ends on line 18.

Section 2 (3) line 24, after the word "Idaho." strike the following sentence which ends on line 26.

Section 2 (5 & 6) strike these two subsections beginning on line 32 and ending on line 48.

Section 3 (2)(a) line 13 after words, "shall consider" remove ":" and add, "maintaining adequate stream flows to maintain the sport fishery in accordance with the latest stream survey of stream's reaches, or the recommendation of the Idaho Department of Fish & Game in the absence of a survey for that stream or its affected reaches;"

Section 3 (2)(a)(i) line 15 after word "economy" remove ";" and add "including fishery and recreational values;"

Section 3 (2)(a)(ii) line 19 after word "impact ;" remove ";) and add "such costs shall be fully born by the holders of any newly acquired water right;"

Section 3 (2)(a)(iii) line 20 after word"tradition;" remove ";" and add "to be defined as those persons living on the family farm or within 100 miles adjacent, thereto;"

Section 3 (2)(a)(v) line23 after the word"Murphy gauge" strike the remaining words of the sentence and the next sentence through line line 28 and insert the following "no additional water permits will be issued by the Director for new irrigated land development until such a time as all the agricultural acreage removed from agricultural production under any of the U.S. Department's acreage limitation programs are put back into agricultural production and the value of the crops raised thereon shall equal parity, based on the U.S.D.A's definition of parity."

Section 4(1) line 37 change "1985" to "1961".

We hold this proposed S.B. 1008 violates the "Public Trust Doctrine" relied upon by the Idaho Supreme Court in its 1983 Opinion No. 49, regarding the subordination of IPCo's water rights at Swan Falls. In this connection, we respectfully call the committee's attention to the fact that the U.S. Circuit Court for the District of Idaho decreed in 1907 that the Trade Dollar Mining Co. had a 10,000 CFS water right for their Swan Falls Dam, which IPCo acquired when it purchased Swan Falls Dam from the Trade Dollar Mining Co. In addition, IPCo acquired a 4,000 CFS water right, License No. 14,362, on July 29, 1919, which was 9 years before the Constitutional Ammendment to the Idaho Constitution was adopted in 1928, which Governor Evans referred to in his January 8, 1985, "State of the State" address to the Idaho Legislature.

The "Public Trust Doctrine" should not be violated by the Idaho Legislature. If it does, such action is tatamount to stealing navigable water, with its many beneficial uses, from All the people of the State of Idaho, in our view.

The Idaho Legislature does not have the Legal, let alone the MORAL right, to reduce the flow of the Snake River to the extent that such reduction seriously harms the Snake River fishery below Swan Falls Dam, in our opinion, and should take note of the 1976 survey made by the Idaho Fish & Game Department that a minimum average of 5,500 CFS is required in the Snake's reaches from Swan Falls to Brownlee Reservoir. In addition, we call the committee's attention to the fact that the average minimum daily flows of the Snake at Murphy from 1961 through 1983, was 6,065 CFS and the average instantaneo flow for this same time period was 5,616 CFS, according to USGS records. Thus, reducing the flow at Murphy will be catastrophic to not only the fishery below Swan Falls, but the hydroelectric generating capacity of IPCo's major generating facilitie since Brownlee requires 33,000 CFS to operate all 5 of its generators at full capacit and 20,400 to operate the 4 smaller units at full generating capacity. Also, on July 1, 1977 the inflow into Brownlee Reservoir would have been only 3,111 CFS if the flow at Murphy was 3,900 CFS. In addition, we would like to point out that on December 31, 1984, IPCo had 252,592 customers in Idaho, of which only 10,383 were irrigation customers, or 4% of IPCo's total Idaho customers. Furthermore, it is our view, any

IPCo irrigation customer, who does not intend to expand his irrigated land farming operation and where electrical rates affect his farm's profitability, is at great financial risk, if the Snake's flows are reduced to 3,900 CFS, for most assuredly IPCo's irrigation rates will dramatically increase, as will the rates to all of the other classes of IPCo's customers, if S.B. No. 1008 is enacted into law in its present form. Furthermore, the commodity prices irrigation farmers will receive, most likely will be less if additional acreage is put into irrigated production, especially in light of the proposed reduction in Federal price supports in the upcoming Federal farm bil

We again call the committee's attention, based on the required minimum flow for Brownlee Reservoir of 4,750 CFS, the minimum flow at Weiser Gauge, the active storag of Brownlee Reservoir can be drawn down in 17.4 days with all 5 generators operati at full hydraulic capacity, or in 31.5 days with only the 4 smaller units operating at full capacity. Will the upstream developers be willing to pay for the imported power IPCo will require to serve its customers during the rest of the summer season?

We regard it as the duty of the Legislature to protect ALL of Idaho's citizens' rights to adequate Snake River Water for preserving its fishery, recreation, riparia water fowl, and adjacent raptor values. In addition, the committee and legislature should take note that maintaining IPCo's low electrical rates, due principally to it large hydro generating capacity, is of as great an economic value to Idaho as is the raising of surplus agricultural crops, on which Idahoans as well as all U.S. citizen who pay Federal income taxes, are being taxed in the form of Federal Crop Subsidy payments, or other farm set aside programs, (see our exhibit No. 1), and noting further that in 1984, 677,948 acres in Idaho were held in the Federal PIK or ACR or ACP programs. Furthermore, the Zilog Company of Nampa recently has stated publicly that one of the reasons their plant was located there was due to the low rates of IPCo. Thus, low electrical rates for industry are beneficial for Idaho's economy.

Idaho's electrical ratepayers should not be made the sacrificial lambs of agricultural land developers. Therefore, Mr. Chairman and Committee members, we implore you to hold S.B. 1008 in committee, for by no stretch of the imagination can it be determined its passage will serve the "Public Interest" of most Idahoans. Thank You!

Respectfully submitted, Harold C. Miles

Harold C. Miles
Golden Eagle Audubon Society/Idaho Wildlife Federation testimony (4)

From: Frel R Stewart
Rt. 4, Box 4825
Jerome, Idaho 83338

To: Members of the first regular session of the 48th Idaho Legislature.

Date: Jan. 14, 1985

Subject: Implementation of Governor John V. Evans & Jim Jones Agreement with Idaho Power Company. Do not Implement.

Greetings:

As a defendant in Idaho Power Company v. State of Idaho, Ada County Civil Case No. 42237 (Swan Falls # 1) and in Idaho Power Company v. Idaho Department of Water Resources, Ada County Civil Case No. 91375(Swan Falls # 2) I say to you----

DO NOT IMPLEMENT THIS AGREEMENT

If you do you will place 200,000 holders of Idaho water rights in jeopardy. I refer you to page 41 State Water Plan Part Two. "About 215,000 or 85 percent of the existing uses of water are not on record and are subject to some future determination." This Water Plan was adopted by the Idaho Water Resource Board in December 1976 and declared to be the law by the Idaho Supreme Court in Swan Falls # 1. In 1978 the Legislature passed Senate Bill no. 1622 , Idaho code 42-245(see enclosure) "Failure to file claim waives and relinquishes right". The cutoff date for fileing was set at 6-30-1983 then extended to 6-30-1984 then extended to 6-30-1985. To date only 9,000 have filed. If 6,000 more files by 6-30-1985 that leaves the 200,000 up for grabs to any claim jumper. Ken Dunn, State Water Resources Director, has testified that if this AGREEMENT is implemented that he will start adjudication on July 1, 1985, the day after the cut off date for fileing. At this date claim Jumping can commence.

I refer you to the AGREEMENT, page 4 Part E."Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities." What a stranglehold Idaho Power will have on the people of Idaho. All they will have to do on July 1st is obtain a up to date computer read out from Ken Dunn on those that have filed and those that have not filed. You dont think they would do it??? Just considered the 7,000 water permit holders that they filed suit against in Swan Falls # 2. Ninety per cent of who had a superior right to their Dec. 1982 (their license expired in 1970 after 50 years and they were not issued a new one till 1984) They have held these 90% as hostage to try to force this AGREEMENT.

I refer you to Exhibit 4 of the AGREEMENT"AN ACT 61-502B. ALLOCATION OF GAIN UPON SALE OF WATER RIGHT." What SALE???? I also refer you to Exhibit 5 of the AGREEMENT SECTION 2 "The Idaho Public Utilities Commission shall have no jurisdiction to consider in any proceeding, whether instituted before or after the effective date of this act, any issue as to whether any electric utility, (including Idaho Power Company), should have or could have preserved, maintained or protected its water rights"

WHY SWAN FALLS ONE and SWAN FALLS TWO and this AGREEMENT???????

Answer---TO TAKE SNAKE RIVER WATER TO CALIFORNIA AND ARIZONA

Consider the following facts--

In 1963 after 20 years of litigation the U.S. Supreme Court awarded Arizona half of California's adjuticated right in the Colorado River. These waters will be taken at the completion of the CAP(Central Arizona Project) in the next two years.

cont

In 1964 a substantial number of massive interbasin water transfer schemes were spawned attempting to provide a solution for the water problems of the Pacific Southwest. See enclosure.

Aug. 29, 1964 Governor Robert E. Smylie called a extraordinary session of the thirty-seventh legislature. He, Governor Smylie, explained to the legislature that he had called the session primarily to discuss the outside threat to Idaho's waters and the means to combat this threat. As a result of this extraordinary session the Idaho Water Resource Board was created by Constitution amendment (Artivle XV, Section 7) They, the Board, was to formulate and implement a state water plan to protect Idaho's water.

Dec. 29, 197[illegible] the State Water plan - Part Two was presented to the Citizens of Idaho.

Jan. 1977 the Legislative bodies of the First Regular Session Forty-fourth Legislature received and rejected the State Water plan. Senator Reed Budge echoed their feelings when he said "ten years Ago I helpd create the Water Resource Board and charged them to protect Idaho's waters and now they have done diametrically opposite." The feelings of Senator Budge were so prevalant with the members of both the House and the Senate that they passed H.B. 14 (Section 42-1736, Idaho Code), which provide that the State Water Plan should not become effective untill approved by the Legislature.

Jan. 1978 the Second Regular Session of the forty-fourth Legislature passed House Concurrent Resolution N. 48 (42-1736A Idaho Code) The Resolution No. 48 addressed each of the 37 policies of the State Water Plan makeing the necessary changes to protect Idaho waters and thusly all of Idaho. OR SO THE [illegible] OF THE LEGISLATIVE THOUGHT.

1977 Senator John Peavey filed a complaint against IPUC(Idaho public Utilities Commission) to force Idaho Power Co. to protect their Hydro Base from being depletated. Ida o Power then filed a Complaint (Case No. 42237, commonly known as SWAN FALLS ONE) against Joh Peavey and all his petition signatories, the State of Idaho, the Water Resource Board, the IPUC a number Canal Companys, a number of individuals and JOHN DOE. This was a two part complaint. The first part addresed the water that the defendants supposedly was taxeing from Idaho Power's hydro base. The second part contested the constitutionality of H.B. 14 that gave the legislature the overview of the State Water Plan. Both parts came before the District Court, Jesse R. Walter presiding, as separate entities. On the first part the Judge granted summary judgment holding, in essence, that the Plaintiff's Swan Falls water rights were subordinated to upstream depletion by the holders of junior water rights. Cross-appeals were thereafter filed to the Supreme Court of the State of Idaho who reversed the lower court, holding that Idaho Power's Swan Falls water rights had not previously been subordinated to upstream depletion and remanding the case for a factual determination as to whether those water rights although fully vested and not subordinated, had nevertheless been abandoned or forfeited, and, if so, to what degree. This action has now been put on a stay of motion until 7 days after this legislative session Both courts ruled that indeed H.B. 14 was unconstitutional and therefore everything that the legislature had done to protect Idaho waters was 'thrown out the window'. I ask you-- Why was Idaho Power Concerned about haveing these protections in the Water Plan???? Take water to California. How??? Consider the following--

Items allready outlined in the first part of this letter as pertaining to the AGREEMENT

cont

the second part of

1982 In his opinion on SWAN FALLS ONE Judge Allen Shepard goes to great length to show that FPC (Federal Power Comm. forerunner FERC) had insisted on subordination of the Idaho Power's three Wells Canyon dams. But when the FERC issued the 40 years Swan F license in 1982 they would not subordinate it. HOW NICE FOR CALIFORNIA. Force the water past Swan Falls but it does not have to go past the three large dams except for the minimum stream flow. (refer to plat)

Dec. 15, 1982 Tom Nelson, lawyer for Idaho power, sent a letter(copy enclosed) to all the defendants counsels in SWAN FALLS ONE in which he says that none of the defendants are going to appeal the courts ruling on the subordination of the three lakes (why should the defendants? why not Idaho Power appeal?)dar then they, Idaho Power would like to hook up some irrigation pumps between Swan Falls Damm and the three lower dams. What he does not say is if it is some farmer that wants to hook up a hundred horse power pump or California to hook up enough pumps to convey five to fifteen million acre feet of water to California as shown by the enclosed Modified Snake-Colorado Project plan.

Dec. 28, 1983 Idaho Power filed SWAN FALLS TWO (Case No. 81375) against 7,000 defendants. As stated earlier in this letter 90 percent of them should never been included. Any one with filings before Idaho Power received their 40 year licience in Dec. 1982 should never been included.

1948 a ten year moratorium on water diversion studies was put through the U.S. Congress. In 1978 this moratorium was extended for another ten years to run untill 1988.

1983 Rep Robert Lagomarsino, R-California introduced a bill to lift the rest of the moratorium.

1930's Powers from the Los Angles area legally stole the water from from the Owen River Valley. These are the same Powers that are after our waters.

I ask--Who has been in 'cahoots' with these Powers from California and Arizona to legally steal our waters. They should be apparent to anyone who will take the blinders off and look.

Is it too late to save our water??? Almost but not quite.

What to do???

1. Throw this John Evans, Jim Jones Idaho Power Company AGREEMENT in the trash can where it belongs.
2. ~~Appeal~~ Amend Senate Bill no. 1422 Idaho code 42-245(see enclosure) and thus preventing Idaho Power or any other 'high-binder' from claim jumping 200,000 Idaho water rights.
3. ~~Allow SWAN FALLS ONE to go back to the district court to see if whether or not Idaho Power has lost their rights.~~
4. ~~If the courts find that Idaho Power has not lost their rights~~ then the State should exercise its powers of eminent domain and buy the Swan Falls Dam from Idaho Power and thus put the State back in the drivers seat instead of Idaho Power. (I would like to point out that there is a world of difference in takeing through the powers of eminent domain and takeing through the subordination).

LETS SAVE IDAHO'S WATER FOR IDAHO

Fred M Stewart

filed shall be forwarded to the claimant by the department of water resources. Such claims may be corrected by the claimant only by filing of an amended claim in the same form as the original, which shall be recorded and numbered by the department the same as the original, and for which no additional filing fees shall be required. [I.C., § 42-225b, as added by 1967, ch. 338, § 3, p. 974; I.C., § 42-244, as changed and amended by 1978, ch. 345, § 7, p. 884.]

Compiler's notes. This section was formerly compiled as § 42-225b and was redesignated as § 42-244 by § 6 of S.L. 1978, ch. 345.

42-245. Failure to file claim waives and relinquishes right. — Any person claiming the right to divert or withdraw and use waters of the state who fails to file a claim as provided in section 42-243, Idaho Code, shall be conclusively deemed to have waived and relinquished any right, title or interest in said right. [I.C., § 42-245, as added by 1978, ch. 345, § 8, p. 884.]

42-246. Filing of claim not deemed adjudication of right — Evidence. — The filing of a claim does not constitute an adjudication of any claim to the right to use of waters as between the water use claimant and the state, or as between one (1) or more water use claimants and another or others. A statement of claim filed pursuant to section 42-243, Idaho Code, shall be admissible in a general adjudication of water rights as evidence of the times of use and the quantity of water the claimant was withdrawing or diverting as of the year of the filing, if, but only if, the quantities of water in use and the time of use when a controversy is mooted are substantially in accord with the times of use and quantity of water claimed in the claim. A claim shall not otherwise be evidence of the priority of the claimed water right. [I.C., § 42-246, as added by 1978, ch. 345, § 9, p. 884.]

42-247. Notice of chapter provisions — How given — Requirements. — To ensure that all persons referred to in sections 42-242 and 42-243, Idaho Code, are notified of the provisions of this chapter, the department of water resources is directed to give notice of the provisions of this chapter as follows:

(1) It shall cause a notice in writing to be placed in a prominent and conspicuous place in at least one (1) newspaper published and of general circulation in each county of the state, if there is such newspaper, otherwise in a newspaper of general circulation in the county, at least once each year for five (5) consecutive years.

(2) It shall cause a notice substantially the same as a notice in writing to be broadcast by each commercial television station operating in the state, and by at least one (1) commercial radio station operating from each county of the state having such a station, regularly, at six (6) month intervals for five (5) consecutive years.

(3) It shall cause a notice in writing to be placed in a prominent and conspicuous location in each county courthouse in the state.

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December 15, 1982

To All Counsel

Re: Idaho Power Co. vs. State

Gentlemen:

The potential for an appeal on the question of the validity of the Hells Canyon FPC license subordination gives rise to a problem for Idaho Power Company. As you know, in December of 1977, the company placed a moratorium on new hook-ups which would deplete flows in the Snake River below Milner and above Hells Canyon.

Given the Supreme Court's decision upholding the validity of the FPC subordination, the basis for the moratorium below Swan Falls disappears, except insofar as it might remain in place while a party appeals on that issue.

The company does have a few requests for irrigation pumping service in that reach of the river. If no one is going to appeal on that issue, then there appears to be no reason not to hook-up those applicants. In fairness to them, I would like to avoid a several month delay in letting them know the company's intentions.

I would appreciate hearing from each of you concerning your intention to seek review of the Idaho Supreme Court's decision affirming the validity of the FPC license subordination of the Hells Canyon project. I am not seeking, by this letter, any statement concerning intentions to seek review on other issues.

Yours very truly,

Thomas G. Nelson

THOMAS G. NELSON

TGN:cw

REVISED AND SUPPLEMENTED TESTIMONY BY JOHN L. RUNFT
BEFORE THE IDAHO SENATE COMMITTEE ON RESOURCES AND ENVIRONMENT
January 21, 1985

Subject: Testimony regarding Senate Bills 1008 and 1006; Gold Room, Statehouse; 7:00 p.m. - January 21, 1985

Mr. Chairman and members of the committee, for the record my name is John L. Runft and I am an attorney practicing here in Boise, Idaho. This evening I come before you representing Salmon River Hydro Company, Inc., which consists of a group of developers of small hydroelectric facilities under the Public Utility Regulatory Practices Act (PURPA). My clients are presently developing 27 small hydro power projects, all of which are located on the reaches of the little and main Salmon Rivers, and all of which would be directly and materially impacted by the legislation proposed in Senate Bill 1008 and Senate Bill 1006. Let me emphasize for the purposes of this evening's hearing that these projects are located far downstream from the Swan Falls Dam and on a different river system.

In order to lay a proper foundation for the perspective from which my clients view the proposed legislation contained in Senate Bills 1008 and 1006, let me briefly review with you the status of their small hydro power projects. My clients have, every one of them, expended substantial money and time in an effort to develop their hydro electric projects as envisioned under PURPA. All 27 projects have been granted preliminary permits, or exemptions, or have licenses pending under the Federal Energy Regulatory Commission (FERC). Applications for water permits have either been accepted or have been granted on all of the projects by the Idaho Department of Water Resources. In summary, these are serious projects in which considerable engineering and development work has been done and in which citizens of Idaho have expended substantial sums of money and time.

We come before you with no claim of expertise on the subject legislation. We took no part in the ligitation or in the protracted negotiations for settlement of what has come to be called the Swan Falls controversy. Able counsel and technical experts have spent untold hours hammering out not only the settlement between the State of Idaho and Idaho Power Company on the question of subordinative water rights, but also many more hours in an effort to recognize and account for other interests and the rights of the public at large in working out the language of the two bills before this committee. As the witnesses on behalf of the parties to the controversy have made clear, the proposed legislation constitutes the last chapter of the settlement of that controversy, and they have urged that the subject legislation be considered as a "package" with that settlement.

We do not come to attack the fabric of the agreement that has been woven. Frequently, however, a fresh perspective on a "final rough draft" has value. It is, then, in this context of constructive criticism and recommendations for change that we address this committee with regard to Senate Bills 1008 and 1006. I will endeavor to limit my comments to the principal concerns of my clients by making one general observation and seven specific recommendations for change.

My general observation is that one is left with the impression that we have in Senate Bill 1008 a hybrid that may have been better left in two parts:

(a) A bill ratifying the agreements reached in the "Swan Falls" settlement and addressing the issues involved in that controversy;

(b) A bill relating to water rights for hydro power purposes generally and providing for true statewide criteria, standards and procedures for treating those rights.

An example of this dichotomy is the apparent failure of the bill to address those situations where the prospect of depletionary use of water does not exist upstream from water rights granted for power purposes. There are many such areas in our state. My clients with their mountain stream hydro projects fall into that category. The bill provides in Section 42-203B(5) that the Governor or his designee is authorized to enter into water rights agreements for power purposes "to define that portion of their water rights at or below the level of the applicable minimum stream flow as being unsubordinated to upstream beneficial uses and depletions." The effect of this provision is that all water above the level of minimum stream flow in <u>all</u> rivers and streams in this state must be placed in the trust provided for in subsections (2) and (3) of this section. However, the purposes of the trust are expressly limited to be those of assuring "an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes to continue using the water pending approval of depletionary future beneficial uses." (See Section 42-203B(1)) Clearly, in stream reaches where use for power purposes is the only reasonable beneficiary use available, there is no need to place in trust that portion of the water above minimum stream flow. Such "protection" is not needed nor is it desired by hydro power developers in such circumstances. We submit that water users for power purposes should not be subjected to the provisions of this statute if their water rights are reasonably free from the possibility of upstream depletionary uses.

<u>We recommend</u> that authority be vested in the Governor or his designee to exempt such water rights granted for power purposes from subordination and from the authority of the director to limit such permits or licenses to a specific term. Exemptions for such hydro power water rights could be granted

after an appropriate investigation and hearing by the Department of Water Resources. Provision for such exemptions would properly limit the function of the water trust and the authority of the director to subordinate power water rights and to impose time terms on such rights to the real purposes of this legislation: i.e. to establish a means for handling conflicting depletionary (irrigation) and non-depletionary (power) uses of water in this state.

Let me turn now to some specific observations and recommendations regarding the proposed bills, beginning with Sentate Bill 1008:

1. **Section 42-203B(3).** With regard to setting minimum stream flows in the first sentence of subsection (3), the words "state action" would appear to be too broad.

We recommend that such state action should be specifically defined to mean approval by the Department of Water Resources (or the board) with legislative ratification.

2. **Section 42-203B(6).** We submit that the language granting the director "the authority to subordinate the rights" of license and permit holders is too broad. Even though the 1928 amendment to the Idaho Constitution vested in the state the power to regulate and limit the use of water for power purposes, water rights once granted still constitute property rights. Even though water rights for power purposes are subject to regulation and limitation by the state, such regulation and limitation must be made part of the right at the time it is granted or otherwise the exercise of such authority by the director could face the constitutional objection of taking of property without due process of law.

We recommend that the description of this authority be statutorily set forth so as to provide a guide for the promulgation of subsequent regulations.

3. **Section 42-203B(6).** Vesting authority in the director to limit a permit or license for power purposes to a specific term without any apparent limitation or guidelines is of the greatest concern to my clients. As mentioned above, where the issue of subordination of water rights for power purposes is not an issue, there should be an exemption for holders of water rights for power purposes. The mere existence of this broad statutory "authority to limit a permit or license for power purposes to a specific term" will have severe impact on the capability of small hydro developers to obtain financing. The primary economic reality regarding the small power projects is that the financing is based principally upon the viability of the project and not upon the financial well being of the developer. Central to the financial strength and viability of the project is the unconditional water right. Lenders and investors will simply not invest in a project where the underlying water right is subject to delimitation at any time by act of the director. Short term water rights (around 5 years) to cover the

period of return of capital or pay-off of the development loan will likewise not suffice. Frequently in these projects there are second levels of financing by the developers and their partners which must be taken care of after the institutional lenders have been paid. Such developmental partners cannot be acquired on the basis of short-term power rights.

Also, there are the terms of the power contracts to be considered. Virtually all of the contracts for sale of power with the major power companies necessarily contain severe recapture provisions if there is a default in the supply of power during the term of the contract, which is generally 35 years in length. To put it bluntly, time limitations on the water rights for power purposes will reek havoc on the projects of small hydro developers.

As above stated, we recommend that an exemption procedure be established for power water rights associated with projects on stream reaches were subordination to subsequent upstream beneficial depletionary uses will not be a factor. Such exempted water rights would not be subject to subordination or time limitation. This exemption process would also serve to properly limit the resolution of the Swan Falls controversy to the issues and circumstances actually involved therein.

We recommend that the statutory language be amended to require that limitation of a permit or license for power purposes shall not be for a term less than the term of the standard power purchase contract of the utility designated by the water right holder as the utility with which it will seek a power purchase contract. In the event there be no standard power purchase contract or standard contract term available as regards the designated utility, then, in the alternative, the water rights should be for 35 years, which term appears to be the industry standard.

We strongly urge the committee, at the very least, to provide that limitations of permits or licenses for power purposes to specific terms be for a period not less than 35 years. The impact of shorter terms on the economic viability has been discussed above. These economic ramifications not only negatively affect lenders, co-developers and the ability to perform under the power purchase contract, but also would have a deleterious effect on the ability of the developer to obtain a license from the Federal Energy Regulatory Commission (FERC). Economic viability of projects is one of the primary considerations of license grants by FERC. Moreover, imposition of terms shorter than 35 years on water rights for power purposes would clearly constitute state action severely curtailing the incentive for the development of small hydro power as a renewable resource, encouragement of which development is a primary purpose of the Public Utility Regulatory Policies Act of 1978. 16 U.S.C. 2601. See Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982).

4. **Section 42-203B(6).** The last sentence of this subsection provides that it "shall not apply to licenses which have already been issued as of the effective date of this act."

We recommend that permits should be so grandfathered as well as licenses. Water permits are a defeasible property right which may be terminated if the permit holder does not prove up on the development for which the right was granted. Permittees, such as my clients, have spent considerable sums of money in reliance upon their right to prove up on the permit and eventually secure a license. Likewise, other investors, lenders and governmental agencies (FERC) have acted in reliance upon the viability of these permits. We submit a serious issue of taking without due process of law could be raised by this ex post facto imposition of the provisions of subsection 6 on permits.

5. **Section 42-203C(1).** For clarification purposes, we recommend that the words "for upstream depletionary use" be inserted following the words "appropriate water" in the first line of subparagraph (1).

6. **Section 42-203C(2).** The criteria to be considered by the director in making a water reallocation decision present a problem from the standpoint of what weight to give to each of the listed criteria. The statutory language provides that no single factor "shall be entitled to greater weight." Yet at least two of the five criteria would never be applicable to hydro projects such as those of my clients in the mountain reaches of the Salmon River. Furthermore, the language of the statute would allow the director to give greater weight to factors not listed in his determination of the public interest.

We recommend deletion of the provision limiting the director from giving greater weight to any of the enumerated factors. A public interest determination made by the director under this section must include consideration of the listed factors as well as other matters brought up by the parties which are relevant to the statutory purposes.

7. **Section 42-203D.** This section provides that all permits presently in effect, except for those put to beneficial use prior to January 1, 1985, shall be reviewed for compliance with this new legislation.

As stated above, we recommend that permits already issued should be grandfathered along with licenses. In any event, if these issued permits are to be reviewed, they should all be subject to exemption from the provisions of the proposed legislation in all cases where no subordination issues are reasonably applicable to the uses involved.

The provisions of this section effectively grandfather all permits which can be put to beneficial use prior to July 1, 1985. One assumes the reason for this grandfathering is founded

upon the logic that those permit holders who have spent substantial sums on proving up their permit would be in a position of putting the permit to beneficial use by July 1, 1985. Such presumptions fail badly in the circumstances of small hydro developers, where the beneficial use of the water right cannot be accomplished until final approval by FERC and final agreement with the power company. As discussed above, after-the-fact impositions of restrictions and limitations upon a property right already granted, especially where considerable sums have been expended in reliance upon that right as granted, will most likely raise serious issues of taking property without due process of law.

It is our recommendation that the language of 42-203D be stricten and replaced with a section providing for procedures and standards whereby the director can exercise his authority to subordinate water rights in the future and for the granting of exemptions under appropriate circumstances.

8. Section 1006; Section 42-1805(7). We recommend that the director's authority to suspend the issuance or further action on permits or applications in order to ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code, be limited to certain geographical areas faced with subordination problems (e.g. upstream from the Swan Falls Dam on the Snake River), and limited two certain type of permits or applications (e.g. old irrigation applications).

We recommend that this subsection 7 should be divided into two subsections, one of which would deal with suspension to ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code (which would be limited as above recommended), and the other subsection to provide for suspension on a more broad basis to protect existing, vested water rights and to prevent violation of minimum flow provisions of the state water plan. These latter concerns are of statewide concern and application. The subordination issues contained in Chapter 2, Title 42 are of limited application and should be dealt with differently.

RESPECTFULLY SUBMITTED.

JOHN L. RUNFT, Legal Counsel to
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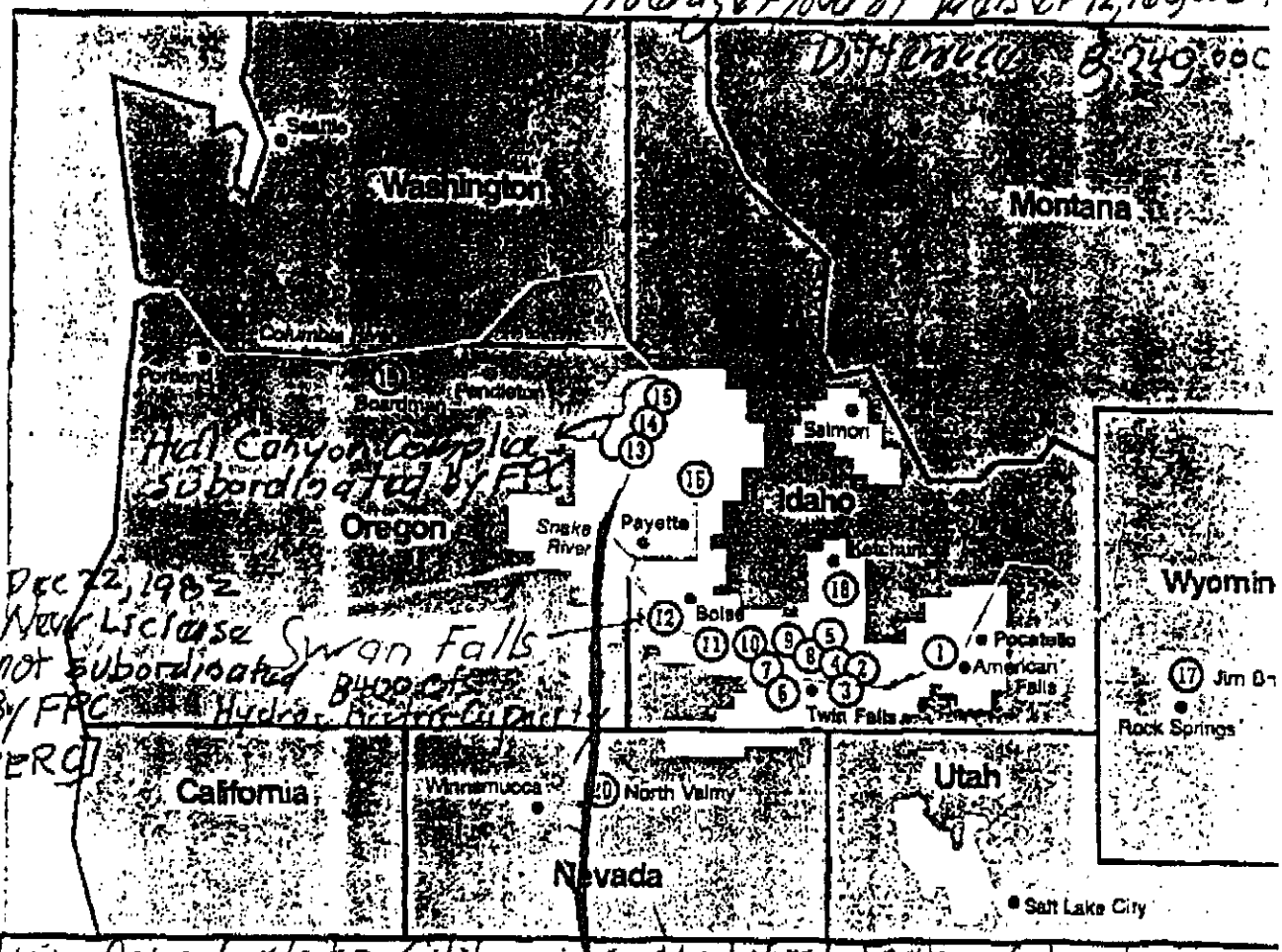
Idaho Power Company

Service Area and Electric Generating Facilities

Min. Stream Flow at Weiser 4750 c Fs
or 3,429,000 Acre Feet

Lines in service: Transmission, 4,712 miles;
overhead distribution, 16,843 miles;
underground distribution, 1,128 miles; total, 22,683 miles.

Average Flow at Weiser 12,160,000
Difference 8,240,000



Hell Canyon Complex Subordinated by FPC

Dec 72, 1982 New License Swan Falls not subordinated By FPC [FERC] 8400 cfs Hydro, Base-Load Plant

5 million Acre feet to California ← Modified Snake-Colorado project [Dunn Plan]

Hydro Estimated Capacity

(1)	American Falls	92,340 Kw	(9)	Lower Malad	15,000 Kw
(2)	Twin Falls	10,000 Kw	(10)	Bliss	80,000 Kw
(3)	Shoshone Falls	12,500 Kw	(11)	C. J. Strike	89,000 Kw
(4)	Clear Lake	2,400 Kw	(12)	Swan Falls	12,000 Kw
(5)	Thousand Springs	8,000 Kw	(13)	Brownlee	675,000 Kw
(6)	Upper Salmon	39,000 Kw	(14)	Oxbow	220,000 Kw
(7)	Lower Salmon	70,000 Kw	(15)	Hells Canyon	450,000 Kw
(8)	Upper Malad	9,000 Kw	(16)	Cascade (under construction)	12,800 Kw

Thermal Capacity

(17)	Jim Bridger	678,077 Kw
(18)	Combustion Turbine	50,000 Kw
(19)	Boardman	53,000 Kw
(20)	North Valmy (second unit under construction)	126,960 Kw

Central Division • Boise, Idaho
Western Division • Payette, Idaho
Southern Division • Twin Falls, Idaho
Eastern Division • Pocatello, Idaho

Idaho Power Hells Canyon Hydro Capacity 1,345,000 Kw
All others 446,000 Kw

$500 in any one case) caused by the negligent operation of motor vehicles under such appropriations.
(June 25, 1946, ch 472, § 2, 60 Stat. 306.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:
This section formerly appeared as 31 USCS § 693, prior to the enactment of Title 31 into positive law by Act Sept. 13, 1982, P. L. 97-258, § 1, 96 Stat. 877.

CHAPTER 32. COLORADO RIVER BASIN PROJECT

§ 1511. Reconnaissance investigations by Secretary of the Interior; reports; 10 year moratorium on water importation studies

Pursuant to the authority set out in the Reclamation Act of June 17, 1902, 32 Stat. 388 and Acts amendatory thereof or supplementary thereto, and the provisions of the Water Resources Planning Act of July 22, 1965, 79 Stat. 244, as amended, with respect to the coordination of studies, investigations and assessments, the Secretary of the Interior shall conduct full and complete reconnaissance investigations for the purpose of developing a general plan to meet the future water needs of the Western United States. Such investigations shall include the long-range water supply available and the long-range water requirements in each water resource region of the Western United States. Progress reports in connection with these investigations shall be submitted to the President, the National Water Commission (while it is in existence), the Water Resources Council, and to the Congress every two years. The first of such reports shall be submitted on or before June 30, 1971, and a final reconnaissance report shall be submitted not later than June 30, 1977: Provided, That for a period of ten years from the date of the enactment of the Reclamation Safety of Dams Act of 1978 [enacted Nov. 2, 1978], any Federal official shall not undertake reconnaissance studies of any plan for the importation of water into the Colorado River Basin from any other natural river drainage basin lying outside the States of Arizona, California, Colorado, New Mexico, and those portions of Nevada, Utah, and Wyoming which are in the natural drainage basin of the Colorado River.
(As amended Oct. 3, 1980, P. L. 96-375, § 10, 94 Stat. 1507.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:
1980. Act Oct. 3, 1980, substituted "any Federal official" for "the Secretary".

§ 1528. Authorization of appropriations

(a) [Unchanged]

(b) There is also authorized to be appropriated $100,000,000 for construction of distribution and drainage facilities for non-Indian lands plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering and cost indices applicable to the types of construction involved therein from the date of the Colorado River Basin Project Act [enacted Sept. 30, 1968]: Provided, That the Secretary shall enter into agreements with non-Federal interests to provide not less than 20 per centum of the (ots) cost of such facilities during the construction of such facilities. Notwithstanding the provisions of section 403 of this Act [43 USCS § 1543], neither appropriations made pursuant to the authorization contained in this subsection (b) nor revenues collected in connection with the operation of such facilities shall be credited to the Lower Colorado River Basin Development Fund and payments shall not be made from that fund to the general fund of the Treasury to return any part of the costs of construction, operation, and maintenance of such facilities.
(As amended Dec. 20, 1982, P. L. 97-373, § 1, 96 Stat. 1817.)

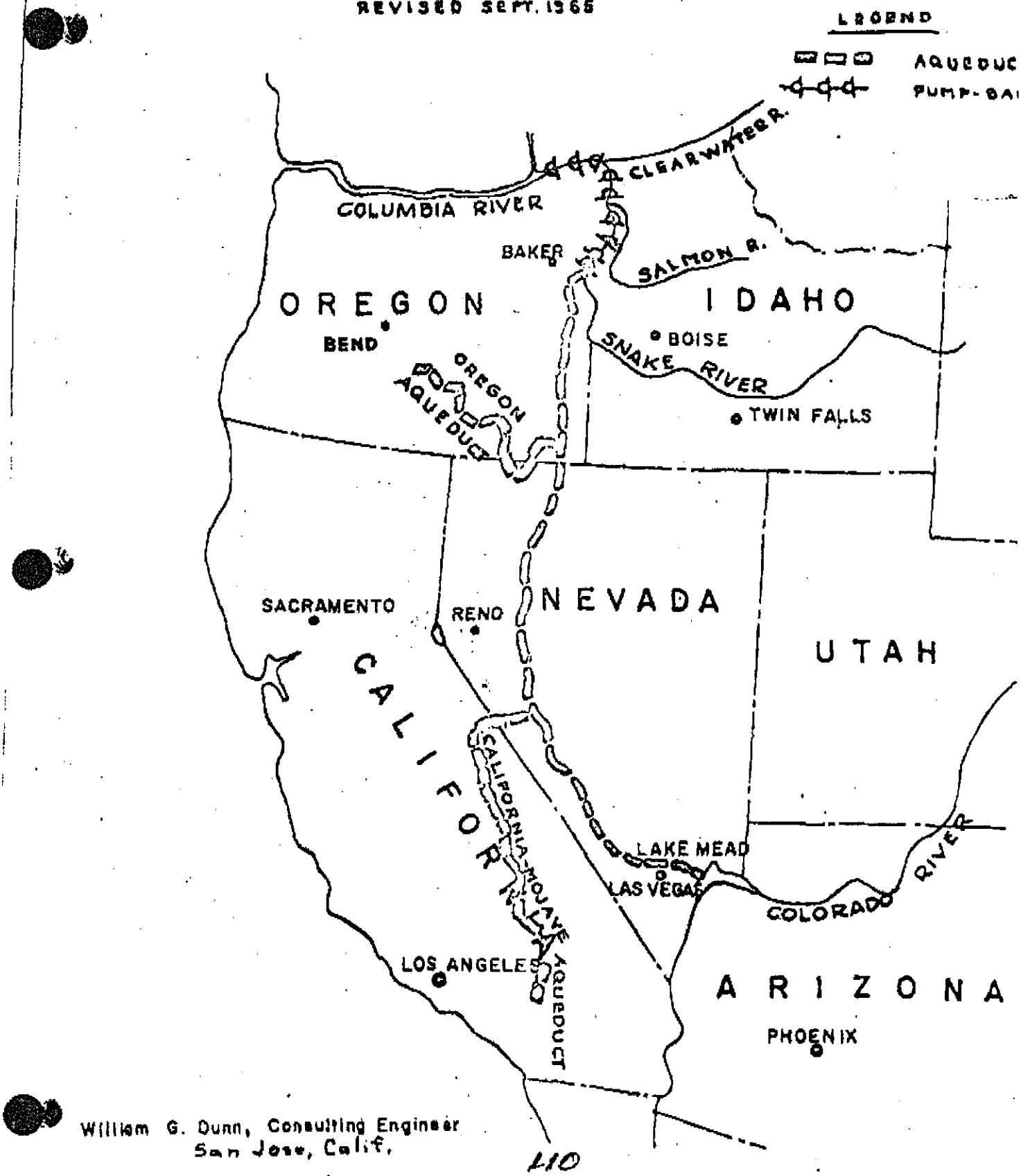
HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:
1982. Act Dec. 20, 1982, in subsec. (b), substituted the sentence beginning "There is also authorized. . . ." for one which read: "There is also authorized to be appropriated $100,000,000 for construction of distribution and drainage facilities for non-Indian lands.".

MODIFIED

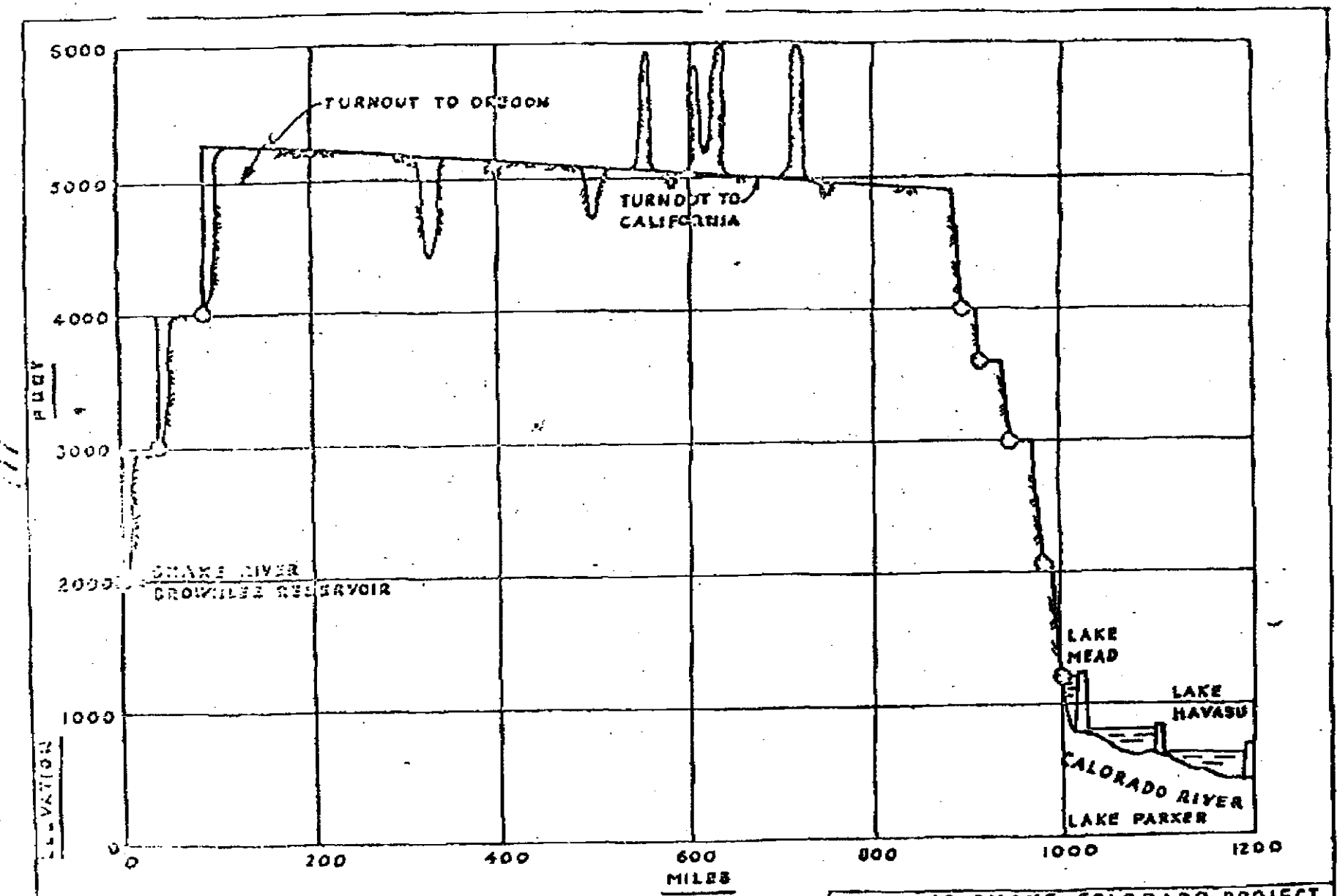
SNAKE - COLORADO PROJECT

REVISED SEPT. 1965



William G. Dunn, Consulting Engineer
San Jose, Calif.

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MODIFIED SNAKE COLORADO PROJECT
PROFILE - BROWNLEE RES. TO COLORADO R.

WILLIAM G. DUNN
CONSULTING ENGINEER

SAN JOSE
SEPT. 1965

Mr. Chairman, Ladies & Gentlemen

I represent Little Pilgrim Irrigation Co, a proposed development laying South & Southeast of the Bell Rapids Project in Elmore, Owyhee & Twin Falls Counties.

~~B~~ the project has been designed to utilize off-stream storage requiring a minimum of 125 CFS pumped from the river on a 12 month basis into a 35,000 acre feet storage reservoir. In addition to the System being totally self-Contained in underground pipe to reduce water losses, a hydro power plant located at the inlet sight of the reservoir would bring a net return of approximately

$1,000,000 Avoid and make the project even more feasible.

Our Company feels that the advantages and benefits derived from a project such as this would far outweigh any increased power costs or other losses if there are to be. Consider:

1. The increased tax base for the County and ~~state~~, making more available for education, ~~etc~~.

2. The increased employment, which would help local businesses, and could help reduce money spent for welfare and increase Sales Tax Collections

3. With more money available, Magic

Valley, the State, & all the people would benefit.

Therefore, we as a Company, are 100% in favor of the Swan Falls Agreement and would like to urge those involved to favorably evaluate all the factors and support.

It is hard to give all the credit due to those individuals, whose time and efforts have made this agreement possible. I think it is a job well done and the answer to a situation that has been unresolved for far too many years.

Thank you

ADDENDUM F

TRANSCRIPT OF PROCEEDINGS HELD ON FEBRUARY 1, 1985 BEFORE CHAIRMAN NOH

RESOURCES AND ENVIRONMENT COMMITTEE

* * * * *

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 hydropower purposes

TRANSCRIPT OF PROCEEDINGS

Held on FEBRUARY 1, 1985, 1:30 p.m.

before Chairman Noh

* * * * *

Transcribed by
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APPEARANCES

PRESENT:

Chairman Noh
Senator Beitelspacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Little
Senator Peavey
Senator Ringert
Senator Sverdstan
Tom Nelson, Idaho Power Company

******

RESOURCES AND ENVIRONMENT COMMITTEE

* * * * *

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 hydropower purposes

TRANSCRIPT OF PROCEEDINGS

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APPEARANCES

PRESENT:
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Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Little
Senator Peavey
Senator Ringert
Senator Sverdsten
Tom Nelson, Idaho Power Company

* * * * * *

FEBRUARY 1, 1985

CHAIRMAN NOH: Senator Crapo, can you give us a little background and explain how the process works and where we stand on the matter.

SENATOR CRAPO: Mr. Chairman, everybody received yesterday a photocopy of the statement of the intent as it existed at that point. Today as you came in, there was another copy at your place at the table. There were some minor changes between the two, so the one on the table today is the final version.

The way that came about is a sample draft of that was prepared by myself. We discussed that between the representatives of Idaho Power, the Governor's office, the Attorney General's office, and Senator Peavey's, and went through another redraft and rewrite at that point.

Then after everybody saw the redraft, we had a few other minor changes and those are the minor changes before you today. And Senator Peavey has not seen the last changes, but I don't think there is anything in there that he would disagree with.

But assuming he does not disagree with

any of the last few changes, we should have something, that if I understand it correctly, all of the negotiators and Senator Peavey and myself have agreed to.

Now, let me just quickly go through what changes were made between the two documents that you have. There were a number of typographical or grammatical corrections made, which I won't go over, which didn't change any of the substantive language.

The statement of purpose had a sentence added to it which said -- it's at the bottom of the first paragraph beginning with "it recognizes" under statement of purpose. "It recognizes that Idaho's population commercial and industrial expansion, as well as Idaho's agricultural needs, will require an insured supply of water."

UNKNOWN SPEAKER: Is that insured supply or amount?

CHAIRMAN NOH: Insured amount of water.

SENATOR CRAPO: It says amount, okay.

UNKNOWN SPEAKER: I'm sorry, Senator Crapo, could you repeat it?

SENATOR CRAPO: It should be on the copy right in front of you. It recognizes --

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CHAIRMAN NOH: The last sentence of the first page.
SENATOR CRAPO: It recognizes that Idaho's population and commercial and industrial expansion, as well as Idaho's agricultural needs, will require an insured amount of water.
Then turning to the next page, again there were some typos, and then we changed Article 15 from Arabic to Roman numerals, little things like that. But the major first change is -- well, let's see, it's ten lines down from section B, section 2, with the sentence beginning with the word "supply." That sentence finished up "supply of water for future beneficial upstream uses."
The word "all" was deleted and the word "upstream" before "uses" was added. So it didn't say "all future uses." It said "for future beneficial upstream uses."
Then going down another seven lines to the sentence that begins with the word "depletion."
CHAIRMAN NOH: Sentence or the line?
SENATOR CRAPO: The line beginning with the word "depletion" where it says, "depletion of the

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amount of the minimum flow," it did say "and shall be," but it should have said "as," so it reads "the minimum flow as defined by any applicable contract."
And then Murphy gauge was clarified to be the Murphy U.S. gauging station.
UNKNOWN SPEAKER: Well, would you back up to that line that says "depletion to the extent of the minimum flow established by state action"? Is that the correction on it?
SENATOR CRAPO: No, the correction that I just told you about was really a grammatical correction, but it clarified that the minimum flow as defined by the applicable contract with the state with regard to this particular discussion of the minimum flow.
The minimum flow is established by state action, but it's also as pertains to Idaho Power established by a contract as well, and that is being clarified.
And page 3, the first full paragraph, nine lines down with the sentence -- or with the line beginning with the word "plan," the "plan by the Idaho Water Board," we changed that to the "Idaho Water Resource Board" just again to

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clarify.
And the next change is on page 5 on the bottom paragraph and the last sentence of that paragraph where it says, "it is the intent that we talked about family farming tradition and jobs," we added the words "otherwise qualified water uses" in the first part of that sentence.
So it says, "It is the intent that otherwise qualified water uses which would promote the family farming tradition or create jobs should be recognized as essential to the economy."
And then in the next -- excuse me -- and the reason for that clarification was that there was a desire to clarify that family farming tradition and items that create jobs are recognized as essential to the economy of the state of Idaho, but it was not intended to state that they receive a greater weighting than any other uses.
So we wanted to clarify that they had to be otherwise qualified in the equal weighting system. Thank you.
And then we had used the phrase "industrial manufacturing and municipal" in the sixth and seventh lines from the first paragraph

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on the top of page 6. We just corrected that to be consistent with the terminology throughout the statement, which is the domestic, commercial, municipal, and industrial.
So we just, again, added the phrase so we are using DCMI throughout the entire statement of intent rather than different types of terminology.
And that is the final change that was made from the drafts that you had yesterday.
CHAIRMAN NOH: What's the committee's pleasure? I would suggest that -- my suggestion, I guess, would be that we consider the legislation and if it goes out at the appropriate time on the floor, we will just ask unanimous consent, or in the absence of unanimous consent, move that this be spread upon the journal.
SENATOR RINGERT: Well, Mr. Chairman.
CHAIRMAN NOH: Senator Ringert.
SENATOR RINGERT: I think if this is to have any weight at all in the future, this statement of legislative intent should have general circulation before the bill is considered on the floor.
CHAIRMAN NOH: Senator Crapo.
SENATOR CRAPO: I had also thought too that

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the other senators should have the opportunity to review it. And I guess, I had also thought that this committee probably ought to vote on it as well (tape inaudible.)

CHAIRMAN NOH: And I might ask Senator Ringert, what do you mean by general circulation?

SENATOR RINGERT: Everybody should receive a copy of it, Mr. Chairman.

CHAIRMAN NOH: You mean handle it like bills and circulate it around the state, or are you just speaking of within the legislature?

SENATOR RINGERT: Just the legislature.

CHAIRMAN NOH: Okay. Yes, absolutely. Correct. Sure. I think that has to be the case. I don't think we can pass anything, can we, that isn't on the senators' desks or circulated in advance?

SENATOR RINGERT: Well, Mr. Chairman, my point would be that, you know, when somebody has a problem, and we haven't passed legislation yet, I don't think, that didn't have a problem somewhere down the line.

And a problem arises and a court looks for legislative intent to explain a particular

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portion of it, we've talked about before, if the legislature doesn't consider this material before they voted on it, then that wouldn't play any role in shaping their intent.

CHAIRMAN NOH: Senator Beitelspacher.

SENATOR BEITELSPACHER: Mr. Chairman, I'd move that the state -- excuse me. I'd move that the chairman of the committee be instructed to distribute the legislative intent that is now before us, the senate bill 1008, to all the members of the senate so that it might be available for them at such time prior to our vote on senate bill 1008.

CHAIRMAN NOH: Is there a second?

Maybe we should vote on this first Senator Beitelspacher on whether or not we want to do it, or I guess the Chair could interpret this as a motion in support of the statement of legislative intent.

I think maybe we are getting the cart before the horse. Maybe we first ought to have a motion, Senator Beitelspacher, if the committee wants, to accept the statement of intent.

MR. BEITELSPACHER: That would be fine with me since there seems to be a reluctance on the

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part of any seconders. The motion is going to die for lack thereof.

UNKNOWN PERSON: Mr. Chairman, only because of the point that you bring up that requires that (tape inaudible).

CHAIRMAN NOH: Yes. Would someone want to make a motion?

SENATOR CRAPO: Mr. Chairman, as a member of the committee that prepared -- or the subcommittee that prepared this statement, legislative intent, I would move that the Senate Resource and Environment Committee adopt or approve -- I'm not sure which word I'm looking for there -- this statement of legislative intent on behalf of the committee.

CHAIRMAN NOH: Is there a second?

SENATOR BEITELSPACHER: I'd second that.

CHAIRMAN NOH: Senator Peavey, you have a frown on your face.

MR. PEAVEY: Well, Mr. Chairman, are there any comments from anybody in the audience?

CHAIRMAN NOH: Senator Peavey, you were absent, tardy, late, and we did go over several changes that were made apparently since you had last seen the draft, however, there was no

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disagreement over any of those.

SENATOR PEAVEY: Well, I just have -- Mr. Chairman --

CHAIRMAN NOH: Yes, Senator Peavey.

SENATOR PEAVEY: I just have a suspicion of what effect the legislative intent is going to have when passed by one body and not the other and if this isn't really just kind of an exercise in futility. The case law pretty well defines what the law means and the statutes.

That's my problem really. I guess there's nothing in the language that I have a problem with or that I know of now, but this is just extra baggage that I don't know is needed.

CHAIRMAN NOH: Is there any further discussion? If not, I guess, all of those in favor of the motion say aye.

(Affirmative response.)

CHAIRMAN NOH: Opposed, no?

UNKNOWN PERSON: No.

CHAIRMAN NOH: (Tape inaudible.) It sounds like the ayes have it.

SENATOR RINGERT: Mr. Chairman.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: I think the record should

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show that passing the motion and acceptance of the statement of intent should not be regarded as addressing anything except for what is specifically set out in this statement of intent.

There could very well be other matters within the bill that are not absolutely crystal clear.

CHAIRMAN NOH: That should be well understood. Okay. What is your pleasure with the legislation? We have before us, then, senate bills 1008 and 1006.

SENATOR CARLSON: Mr. Chairman, I have a question: Now that we have accepted this as being reasonable and understandable, is there something more that needs to be done?

CHAIRMAN NOH: Yes. I would ask unanimous consent that the chairman be allowed to circulate this to all of the members of the senate as soon as possible and make sure it's on the desks of the members of the senate at the time that we vote on the bill, should we put the bills out.

UNKNOWN SPEAKER: Mr. Chairman, there's nothing to prevent you from doing that, if you'd like to, anyway. I don't know how binding that is, but if it makes you feel better, why it may be

Page 14

helpful.

CHAIRMAN NOH: Okay. How about the legislation?

SENATOR PEAVEY: Mr. Chairman, I would vote that we put the 1008 out with a do pass.

CHAIRMAN NOH: Second?

SENATOR BEITELSPACHER: Yes.

CHAIRMAN NOH: Moved to second that we put 1008 out with a do pass. Any discussion? Senator Crapo.

SENATOR CRAPO: Mr. Chairman, I would support the motion, however, first I would like to ask a few questions, if I could, of some of the negotiators that are here on two additional points.

CHAIRMAN NOH: That's fine.

SENATOR CRAPO: Maybe, Mr. Nelson, if I could ask you. It's my understanding that with the date of October or November of 1984, which was the cutoff date for those dismissed from the action that are not -- well, whose rights are -- to whose rights Idaho Power is subordinated, that that situation applies regardless of the status of the minimum stream flow.

Do you understand my question?

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MR. NELSON: Yes.

SENATOR CRAPO: Could you address for me the interplay between those water rights and the minimum stream flow?

MR. NELSON: Mr. Chairman and members of the committee, as I understand your question, Senator, you are right that the contract, the October 25, '84, Agreement, contains a sign-off by the Idaho Power Company that its rights are subordinated to actual use as of October '84.

In other words, that regardless of the status of that water right, relative to state law, to neighbors, to whatever other problems they may have, that the company's rights are subordinated to those rights.

Now, inherent in the discussion to date has been the assumption that the historic flow of 4,500 is the flow. If that assumption is wrong on the down side, that doesn't operate to the detriment of those particular users. In other words, if there isn't 600 cfs there, that does not affect their right.

Likewise, if there is more than 600 in the river, then that -- the agreement doesn't limit the use by other people in that either.

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Those folks are subordinated regardless of what happens ultimately to the stream flow.

SENATOR CRAPO: May I follow?

CHAIRMAN NOH: Yes, Senator Crapo.

SENATOR CRAPO: Would it be fair to say, then, that Idaho Power assumes the risk of a stream flow -- of an actual stream flow below 3,900 as far as priorities on that water?

MR. NELSON: Mr. Chairman, Senator Crapo, that is correct as to existing users.

SENATOR CRAPO: Then, can you tell me what would happen in Idaho law if something happened, say an earthquake or something happened, and the flow actually was less than 3,900 or less than the amount that these water users could use and still leave 3,900 in the river?

What would happen at that point?

MR. NELSON: Mr. Chairman and Senator Crapo, as far as any Idaho Power Company rights would be concerned, those users would be immune from any challenge by the company.

Now, the state may develop in the future or may claim to have now some right relative to those users, but that is not either defined by or limited by the agreement. So in

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that case, the power company would watch the river flow go down, as would everybody else, and there would be -- have no weapons in which to prevent it as to existing users.

I want to make that clear.

CHAIRMAN NOH: Senator Crapo.

SENATOR CRAPO: How would Idaho Power purchase water at the present time if they desired to do so? What would be the procedure it has to go through?

MR. NELSON: Mr. Chairman, Senator Crapo, if it's a one-year lease through the water supply bank, then that is handled -- I think that's been a lateral from the Department of Water Resources to the Committee of Nine. The company leases water on a one year basis.

If it wants a longer term of use than a year under the water supply bank, then it needs to apply for a change in place of use, point of diversion, and nature of use with the Department of Water Resources.

To the extent that that application involves more than 50 cfs or I think it's 5,000 acre feet, then it requires legislative approval. That is the existing law, and of course, this

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agreement and any of the legislation doesn't attempt to change that.

SENATOR CRAPO: With regard to the portion of the contract that says that subsequent legislative changes don't impinge on the contract, would you clarify for me, just a little bit, what subsequent legislative changes would do to the status of Idaho Power's water right with regard to the changes in the minimum flow if the legislature were to do that?

CHAIRMAN NOH: Mr. Nelson.

MR. NELSON: Mr. Chairman, Senator Crapo, as the contract and the statute work together, the state could obviously increase the minimum flow at Murphy at any time they wanted. The company would have no rights involved in that decision.

If the state wanted to reduce that minimum flow below the seasonal 3,900 and 5,600, it certainly is at liberty to do that. However, the contractural recognition of the company's water rights at that level, would remain at those levels. And therefore the company's rights would not follow the minimum flow down in that substance.

The contract would still define it as

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the seasonal 3,900 and 5,600.

SENATOR CRAPO: I just have one more question, Mr. Chairman.

CHAIRMAN NOH: Senator Crapo.

SENATOR CRAPO: I noted in that state water plan -- and this is not particularly related to Idaho Power, but I wanted to see if you or anybody else had a different understanding.

The state water plan used to have a separate block of water set aside for thermal cooling development. And at this point, as I understand it, the state -- the proposed changes to the state water plan, that development would be industrial development under the DCMI block that has been set aside.

Is that your understanding?

MR. NELSON: Mr. Chairman, Senator Crapo, I think clearly a thermal cooling would be an industrial use. That's the -- to me, the common understanding of the word. And that, for example, is the way that the Jim Bridger operators acquired water in Wyoming is under an industrial latitude.

So yes, I think that thermal cooling clearly is an industrial use.

CHAIRMAN NOH: Thank you, Mr. Nelson. Thank

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you, Senator Crapo. Senator Ringert.

SENATOR RINGERT: Mr. Chairman, Tom, I'll start off with you, could you just give us a brief overview of which negotiating party wanted which points included in this legislation?

I mean, you know, we are confirming somebody else's negotiating, and I would like to know what the negotiating blocks were.

MR. NELSON: Mr. Chairman, Senator, that would be, I think, a fairly extensive endeavor if I did it in any detail.

I can -- I can give you an overview and then you can ask me questions, if you have any particular concerns. I think you have been at the hearings where we've discussed how the 3,900 was arrived at. It was very scientific. There is 2,500 in the river now. The water plan says 3,300, halfway is 3,900.

The -- somewhat the same function was followed in winter flows to get to the 5,600, that happened overflows. Look at existing conditions in the winter as best you can estimate them, and then just back out the effect of developing the 600 cfs summer, you come out to an approximate 5,600 winter.

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So that was an attempt to redivide the existing situation, both between the existing water plan and the existing flow. The other --

CHAIRMAN NOH: Senator.

SENATOR RINGERT: Well, excuse me. Who wanted -- while we're at this point now. Who wanted the 39 and 56?

MR. NELSON: The company wanted both numbers higher, and the state wanted them both lower. I won't --

UNKNOWN SPEAKER: If I might interject here, Senator Ringert, it's my understanding that isn't there some element of the agreement that makes even this kind of a discussion somewhat ticklish?

MR. NELSON: Well, Mr. Chairman, I don't know that it's part of the agreement. The negotiators had an informal understanding among themselves that we wouldn't voluntarily, you know, pick the agreement apart and say, "Okay, Nelson got this one, but the Attorney General got this one," simply because we have tried to do it as a whole.

I don't think in the face of what's otherwise an inordinate question from Senator Ringert, I'm in any position myself to

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impose that as our understanding among ourselves.

CHAIRMAN NOH: Well, I don't know why our other negotiators aren't here today either, but --

UNKNOWN SPEAKER: They are in the house.

CHAIRMAN NOH: Okay, fine.

MR. NELSON: So, I mean, that has been our gentlemen's agreement, and I think by and large we have stuck to that. But I don't feel I'm in a position to tell Senator Ringert I won't answer his question.

I can't -- I don't want to be misunderstood as saying that there are major and minor points of that agreement because the whole thing dovetails together, but one of the obvious factors involved was the public interest criteria.

And that was, I think, as I look back on it, both the state and the power company wanted some element of state control over the allocation of that water. That, if the race was to the swift, the swift were already afoot. And in this situation, the price of one man's failure is another man's inability to get started.

So, the way of the -- both the existing undeveloped applications and future uses outside those against some form of public interest

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criteria was, I think, a mutual desire.

The form -- the form each of those criteria went through, I don't know probably 50 drafts, literally, I don't think that is an exaggeration, so to say where any one of those five came from, I'm not prepared to even guess.

It's obvious from just where the parties were located, that the stricter they were, the more opportunity there was to foreclose development, obviously, that is where the company was coming from. But the state wasn't necessarily speaking only for unrestricted development. So it's really hard to say where some of those things came from.

Part of this, obviously, was kind of a put-up or shut-up situation on both sides. The company had said it didn't want to be watermaster, the state says, "Okay, then take yourself totally out of any vestige of control over the rights that you have defined."

We said, "All right, but if you are going to be the watermaster, then you get out and you take care of it." So it's in that context that you find the adjudication requirement of the thought being that it doesn't make a lot of sense

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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.

The scope of the adjudication within the McCarren Amendment was simply an effort to make sure that for planning purposes, the federal government had to get involved. Because you can't plan the river with huge potentially large undefined claims that aren't part of the planning process. So that was, I think, a mutual segment.

The trust provision in section 2 of the 2008 was an idea of -- I think that came from the state. I seized on it with alacrity because it filled what I saw as a major problem the company had in this thing throughout, which was we could get the state to sign up, but how did we get the state to live up to what they said they would do? And that was a major problem from our -- from our side.

The trust provision was suggested to get us around the subordinated versus subordinatable nature of the water above the minimum flow. It remains unsubordinated, but it's held in trust by the state, and that neatly side stepped the problem, but it left us, we think,

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with another club to use against the state if it tries to ignore the standard set by the legislation.

Do you want me to restrict my comments to 2008, Senator, for now?

SENATOR RINGERT: I think we should.

MR. NELSON: Okay. I believe public interest, I think that as I look back, would be the major elements of the particular bill.

SENATOR RINGERT: I have a question Senator -- excuse me, Mr. Chairman, Tom, on page 4 of the bill, in section 42-203D, 2, lines 44 through 47, it specifically names the administrative proceedings, but most of our -- I'm just going on memory now, but it seems to me some of our other code sections that are similar to this, specifically mention the right to judicial review.

Now, would you comment on whether the lack of that statement in this particular sentence would, one, preclude judicial review and, two, if that's the case, is that the intent of it?

MR. NELSON: Mr. Chairman, Senator Ringert, first working backwards. It was not the intent of the section to preclude judicial review, but I

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can't tell you without looking at the rest of 203 where that right to review exists, but I believe either in a part of 203 that we haven't put in -- there it is, subsection 6, on page 2, just ahead of section 2 bill, is in the existing code, a right of review, which would I think apply to the entirety of 203.

1701 is the section of legislature added or changed, I think in 1980, which creates the right of review under the Administrative Procedures Act.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Mr. Chairman, Tom, I think the one on page 2 refers to proceedings under applications, and 203D on page 4 is review of existing permits, so I just wonder if we do have that coverage.

MR. NELSON: Well, Mr. Chairman and Senator Ringert, as I said, it was not intended to exclude it. My thought was section 203 in total already has the right of review in all. And the 1701A is the section that creates the administrative review.

So I think you can incorporate it by reference there, at least, even if subsection 6

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doesn't pick it up.

SENATOR RINGERT: Just a comment I had on this Tom, but it just seems rather strange, and I realize that, at least currently, this section 6 is in the code already, but I wonder why we have to mention in some places that judicial review is available under 1701A and not mention it in others.

And I just see the opportunity for a court to decline jurisdiction of a neat little question sometime because of that.

CHAIRMAN NOH: Mr. Young had some enlightenment to shed on this question.

MR. YOUNG: 421701A, Mr. Chairman, includes a specific allowance for judiciary review. (Tape inaudible).

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Of any adverse order the director (tape inaudible.)

MR. YOUNG: Mr. Chairman, Senator Ringert, that particular section, then, a few years ago clarified any time the director made any decision that was adverse to a water user or citizen on which there hadn't been a previous right for a hearing, that provision would kick in giving the

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right to administrative hearing and judiciary review.

CHAIRMAN NOH: Are there other questions? Senator Tominaga, you indicated you might like to ask a question.

SENATOR TOMINAGA: I have one question, Mr. Chairman, for Tom Nelson.

Now, say in 5 or 10 years the state decides to lower the minimum stream flow from 3,900 to say 3,500, would the state have to compensate Idaho Power for -- because it is a contract or agreement between the state and the Idaho Power for that block of water that we, as a state, recognize is used for hydropower, would the state then need to compensate Idaho Power for the reduction in the minimum stream flow?

MR. NELSON: Chairman, Senator, as I have said, this whole approach is one of planning and the company's position now is to watch the state to make sure its planning is aimed at compliance with the minimum flow in the contract, which presumably are the same to start with.

In your analysis -- in your example, if the state lowers the minimum flow and changed this planning standard to recognize that lower flow

rather than the contract amount, then the company would immediately go to court, as I see it, and attempt to force a change in their planning process to recognize the contractural right. That would be in advance of any -- hopefully, approval of any new uses.

One option in that situation would be for the court or the state through legislature to say, "Well, all right you have a contract, but your remedy is by compensation not by stopping the state in its planning process."

But the initial attempt, as we have explained it to the other negotiators, would be to force compliance with the contract. Only then, if we weren't successful in doing that, would we, I think, be entitled to claim compensation. We would rather have the water than the money frankly.

CHAIRMAN NOH: Yes, Senator Carlson.

SENATOR CARLSON: Mr. Chairman and Mr. Nelson, early on you indicated that senate bill 1008 addresses the public interest, and I wonder if, can you define the public interest for me?

MR. NELSON: Mr. Chairman, Senator, as

section 203 of Title 42 now operates, you find public interest defined in two places. The local public interest standard in A, and the portion of public interest defined by C.

So in that situation, public interest is both -- local public interest as may be applied under 203A and the economic portion of the public interest, if you will, found in 203C.

SENATOR CARLSON: Well, Mr. Chairman, just off the top of your head, would you illuminate for me, is the ratepayer, Idaho Power and others in the state of Idaho, is their interest involved and considered in this legislation as well?

MR. NELSON: Senator, yes. The interest of the ratepayer is addressed in 203C, subsection 2 ii.

SENATOR CARLSON: May I interrupt right there, Mr. Chairman --

CHAIRMAN NOH: Yes you may.

SENATOR CARLSON: Mr. Nelson, is that the part that says if you ever sell those water rights, the proceeds therefore would go to the customer?

CHAIRMAN NOH: No, sir.

MR. NELSON: No. Mr. Chairman, Senator,

under double ii, the analysis there is that you look in i at the benefit of the new use. And under ii you look at the detrimental effects of the new use on electrical rates.

That is the other side of the coin. If it is worth X dollars to have the new use in place to the economy of the state, and it costs Y dollars to have that water taken out of the river, then you have to balance X and Y.

That is where the ratepayer interest is addressed as part of the public interest.

CHAIRMAN NOH: Thank you. Senator Peavey.

SENATOR PEAVEY: Mr. Chairman, Mr. Nelson, why don't you give us the flip side of Senator Tominaga's scenario in case the state wanted to raise the minimum flow? How would that work and would there be any problems?

MR. NELSON: Mr. Chairman, Senator Peavey, in that -- in the situation where the state raised the minimum flow, the company's subordinated rights would remain at 3,900 and 5,600. However, that increase, then, would make the company a beneficiary of that increase flow.

And as I read both what we have and as those minimum flows operate, the company would be

a beneficiary of the higher flow and would be entitled to protect it, or to try to make the state enforce it if it raised the flow but at the same time didn't put mechanisms in place to really make it work.

CHAIRMAN NOH: Senator Peavey.

SENATOR PEAVEY: Mr. Chairman, when you say protect the new higher minimum flow, you are not saying the state, then, couldn't ten years after it had done that come back and relower the 3,900? That would be the state's option, would it not?

MR. NELSON: Mr. Chairman, you would be right, Senator. In other words, anything above the minimum flow, the state is free to do as it likes.

CHAIRMAN NOH: Senator Horsch.

SENATOR HORSCH: Mr. Chairman, Tom, just getting my thinking in the right perspective of maybe I'm not thinking right when you said you would still after the state raised it, had the subordinated right of 3,900, isn't that not the terminology of the unsubordinated right of 3,900?

MR. NELSON: Unsubordinated, I'm sorry.

SENATOR HORSCH: Had me turned around 180 degrees there for a second.

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UNKNOWN SPEAKER: You are going to have to get Tom's paycheck for today.
CHAIRMAN NOH: Senator Ringert.
SENATOR RINGERT: Mr. Chairman, Tom, on page 3, line 43, it says "permit or license." Now, my question there is, I can understand if that's -- if that's a valid premise to start with to see if the condition would be placed in the permit, therefore, that same condition would carry over into the license.
But I am of concern that this language would permit the director to impose subordination on the licensed water right that didn't have that condition when it was a permit.
MR. NELSON: Mr. Chairman, Senator Ringert, that is addressed in the last full sentence of sub 6, "Shall not apply the licenses which have already been issued as of the effective date of this act."
In other words, what the state wanted here --
SENATOR RINGERT: Well Tom, forgive me, but that is not my concern. My concern is the -- is the small hydro operator who received a permit in 1990, and that permit does not have a

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subordination provision in it.
And he builds his plant and gets into operation, and here comes the director and looks at that and says, "I probably should have done this while it was a permit, but I'm going to do it now."
MR. NELSON: Mr. Chairman, Senator Ringert, that interpretation is obviously possible under that language. What the state was wanting, I can tell you, was that there are existing permits out there for hydropower purposes, some of which may be unsubordinated.
I think there is only a handful. They wanted the power to go back and subordinate those permits at the time that they issued the license. So they were thinking of the existing situation, not what happens in 1990. But that interpretation would be possible.
All I can tell you is that this was the state's section -- going back to your discussion of who did what, all I added was the last sentence to make sure they wouldn't come back and undo everything we had done with the contract.
CHAIRMAN NOH: Senator Crapo.
SENATOR CRAPO: This might be a good point

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for me to interject one comment I have. As I said, I am going to support sending the bill to the floor, but with regard to this particular section dealing with, essentially (tape inaudible) the new small hydro or at least impacting new small hydro development, I think there are some inequities in the bill where at least -- that we ought to address the type of discretion the director should have to impose such restrictions.
And it's my understanding that there will probably be some subsequent legislation introduced this term to address those issues. And so, although, I'm in agreement to send this bill to the floor, I think that we as a committee ought to be aware that there are some possible clarifications that need to be attached to that type of discretion on the part of the director.
CHAIRMAN NOH: Any other questions by the committee members? Are you ready for the questions? Senator Little.
SENATOR LITTLE: With this (tape inaudible) about the small hydro, what assurance have we got that there will be legislation coming to protect small hydro?
CHAIRMAN NOH: I presume the dedicated

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interest of the legislative representatives of people in those districts that are concerned. Okay, Senator Peavey.
SENATOR PEAVEY: One last question of Tom. Mr. Nelson, what happens to this agreement if nothing gets through and the whole thing blows up? Where are we now?
I think there is a misconception on the part of certain sections that state that they are going to be in better shape than they are now, and I might have you address that.
MR. NELSON: Mr. Chairman, Senator Peavey, the lawsuits which precipitated the hopeful resolution issue are still pending. And absent a timely, and I can't give you an idea of what that time would be, implementation of the agreement -- the agreement would be scratched and we will go back to war.
So the problems that led to the pressures to develop the agreement still exist, absent the agreement (tape inaudible).
CHAIRMAN NOH: Senator Peavey.
SENATOR PEAVEY: I thought I remembered seeing some dismissal notices. What portions of those lawsuits were dismissed? What do we have

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left (tape inaudible)?
MR. NELSON: Mr. Chairman, Senator Peavey, we still have the problem with rights versus people. But to date, since October 25th signing of the agreement, we have dismissed in round numbers 4,000 filings, if you will, from the suit.
As I say, it is hard to tell in people, because some of them you have ten people on them or you might have one guy with ten filings, but we have dismissed 4,000 filings.
In terms of filings still subject to the suit, I'd say there is probably 2,500 to 3,000 as a very rough estimate that we would still be in court with.
SENATOR PEAVEY: Mr. Chairman.
CHAIRMAN NOH: Senator Peavey.
SENATOR PEAVEY: What category? How could you classify the 2,500? Who are they?
MR. NELSON: Senator Peavey, as far as we know, they would be undeveloped applicants and permits. We are in the process of sending out a questionnaire to try and locate those people in that group that are developed or have made the 1180 investment that we don't know about. But by and large, it will be undeveloped applicants and

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permits.
Mostly, large agricultural because we have dismissed, to the extent that we can, the commercial, industrial, municipal, domestic people.
CHAIRMAN NOH: Senator Peavey.
SENATOR PEAVEY: Just one last question, to summarize it then, all we really shouldn't have any exiting irrigators left in a status where they are locked in combat with the power company; is that right?
MR. NELSON: Mr. Chairman, Senator Peavey, that is right. At least as soon as we can find out all of the 1180 beneficiaries, that won't be the case.
UNKNOWN PERSON: (Tape inaudible), the big question, of course, other than that group left is who is going to use the future -- what will future uses be of the remaining water?
CHAIRMAN NOH: Senator Ricks.
SENATOR RICKS: Mr. Chairman, may I ask Mr. Nelson a question while it's fresh on my mind?
The group that you referred to as being dismissed, they were dismissed with prejudice; is that right?

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MR. NELSON: Sure.
CHAIRMAN NOH: Senator Ricks.
SENATOR RICKS: So that means -- does that mean, then, that they could not be -- the courts could not -- or anybody could not sue them and challenge their water right in the future?
MR. NELSON: Mr. Chairman, Senator Ricks, the only meaning that has in the context in which that dismissal took place is that the power company is barred from ever challenging their water right.
Now, as I said before, if they have trouble with their neighbors, they have trouble with the state, whatever those other problems are, they will continue to have them. But the power company is barred from challenging their water right.
CHAIRMAN NOH: Senator Ricks.
SENATOR RICKS: Mr. Chairman, one further question, then. Mr. Nelson, do you have any idea about what quantity of the river that involves in terms of the cfs as far as the permit holders are concerned?
MR. NELSON: Mr. Chairman, Senator Ricks, the estimates are necessarily very rough, Senator,

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because when you are looking at holding paper right, somebody who has not proved up but has a filing, and it's on the basis of some of those filings that we did the dismissal, you find -- and I'm not being critical of the filers. It's just the way you do it at that stage. You over file on acreage and you over file on amount.
So if I were to go back through those people who were dismissed and tell you what they showed on paper, other than the licenses that they had in, I would have a vastly overstated amount.
Now, I have gone back through to try and determine from the basis of acreage involved on the people we know are existing and then use a depletion based on that acreage, and I come out in the vicinity of 1,000 cfs. But that is a really rough number because what you have is about three assumptions on top of a couple of guesses to even get that close.
But that's -- like I say, if you use the diversion numbers, it's huge. I would dare say you would be talking 10 or 15 or 20,000 cfs on the diversion. But in terms consumption, as best I could work out the acreage, it wasn't that big.
SENATOR RICKS: Mr. Chairman, one further

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question along those lines, that is the part, I guess, I haven't got quite clear in my mind. I'm trying to comprehend and understand because I'm wondering whether there is any really free water in that river if not -- we haven't used it all up in terms of permits. I guess that's what I'm trying to resolve within my own mind.

And I recognize the fact that when a person seeks a water permit, any one of us or whatever the case might be, and we seek a water permit for X number volume of water. And whether we use it for two months during the year or ten months during the year or what, we still have the permits and the right to that quantity of water.

I guess -- and I'm just trying to get that clear in my mind whether or not there is any excess water available in the whole river. That's where I'm kind of confused.

MR. NELSON: Mr. Chairman, Senator, if -- that is one of the ifs -- if our analysis was right that there's 4,500 in the river. In other words, if you repeated 1961 and 1985, the low flow of the river at the Murphy gauge would be 4,500.

All right. If that assumption is correct, implicit in that then is the conclusion,

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if you will, that all current development has been reflected in the river.

In other words, we have now felt the effects of all of that development. And that -- one person can see about as far to the ground as another, but I'm convinced, based on my conversations with experts at the Department and experts that we have and the experts that other people have hired, that that is a supportable conclusion.

So -- but if that is right, then there is 600 cfs in the river and that 1,000 cfs that we dismissed, if my number is right, is the 1,000 cfs that took it from 5,500 to 4,500. So they are already in the river. They have already been felt. Their impacts have been measured and their uses have been accounted for.

CHAIRMAN NOH: Okay. Are you ready for the question?

MS. HAYES: You've allowed everyone to talk but me.

CHAIRMAN NOH: The Chair has limited the discussion and the testimony to interrogation between members of the senate, particularly of the committee, and people involved in the negotiations

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or the Department of Water Resources.

We didn't intend for this to be a public hearing. We have had countless public hearings. The measure has been before us for a long, long time. And I'm certainly not one to want to cut off discussion, but at some point we have to get on with our business.

MS. HAYES: Well, I have a valid point to make.

CHAIRMAN NOH: All right. Then, Ms. Hayes, you may make your valid point.

MS. HAYES: All right. We have done some intensive research into the number of cfs that is in this river. And we have gone to the United States Geological Survey, and we maintain that there's 6,065 cfs in that river, that we should be -- you know, when we have qualified people, such as this, that are telling us that that is the amount, this and that, in that river over a 23-year period, that this is the average, that this is what we should be considering, and -- so that we are saying that we are not starting from a valid point. That we need to consider this 6,065 cfs's as the average flow in that stream for the past 23 years.

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If we start on the wrong (tape inaudible) in planning for this stream, you are going to be coming out with the wrong figures. And I think this is -- you go to people who keep records and you find out what they are.

Now this, I think this could throw your whole planning out of kilter, and so I do want to make that point.

CHAIRMAN NOH: Thank you. And I should point out those people were involved with the technical committee deliberations which guide negotiators in their (tape inaudible).

All right. Are you ready for the questions?

UNKNOWN SPEAKER: Mr. Chairman, Mr. Nelson has one last (tape inaudible).

CHAIRMAN NOH: Yes, Mr. Nelson.

MR. NELSON: Mr. Chairman, Senator Peavey, so that no one gets confused about the 6,065 cfs, if you take June 27th of every year for the last 23 years, you may very well come to a number, an average almost flows -- very well come to a number like 6,065.

But the USGS, who runs the gauging station at Murphy, recorded a flow on June 27,

1981, of 4,530 cfs. So what we are talking about here is a minimum flow. You know, you don't swim in average depth rivers, and fish don't live in average depth rivers.

This is a critical period planning mechanism. You look at the worst case and you say, "What could we accept in that river on the worst day that we can foresee we will have?" That day to date has been 4,530 cfs, not 6,065.

If you want to go to an average number, then admittedly it will be much higher. But your exposure to flows below an acceptable limit will be much greater.

CHAIRMAN NOH: As many are as in favor of senate bill 1008 signify by saying aye.

(Affirmative response.)

CHAIRMAN NOH: Opposed, no?

UNKNOWN PERSONS: No.

CHAIRMAN NOH: Would you like your votes recorded as such?

UNKNOWN SPEAKERS: Yes. (Tape inaudible).

CHAIRMAN NOH: Senators Ringert, Little, and Carlson voted no. Okay. Now, how about senate bill 1006?

Someone care to make a motion on senate

bill 1006?

SENATOR BUDGE: Mr. Chairman, I move that it go to a do pass.

SENATOR BEITELSPACHER: I second.

CHAIRMAN NOH: Moved and seconded that we put out senate bill 1006 with a do pass recommendation.

Is there any discussion? If not, all those in favor signify by saying aye.

(Affirmative response.)

CHAIRMAN NOH: Opposed, no?

UNKNOWN PERSONS: No.

CHAIRMAN NOH: Do you want your votes recorded?

UNKNOWN PERSONS: Yes.

CHAIRMAN NOH: Senators Ringert and Little vote no, and Senator Carlson.

Okay. I guess the Senate State Affairs Committee are going to consider the PUC bills, the adjudication bill is up across the way in the House. Thank you, troops, you are -- (end of tape)

(Meeting concluded.)

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REPORTER'S CERTIFICATE

I, Roxanne Patchell, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at , Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of March, 2007.

R. Patchell

Roxanne Patchell, Court Reporter
CSR No. 733

ADDENDUM G

JOURNAL OF THE STATE SENATE

JOURNAL

of the

STATE SENATE

ORGANIZATIONAL SESSION

and

FIRST REGULAR SESSION

of the

FORTY-EIGHTH LEGISLATURE

of the

STATE OF IDAHO

1985

PROPERTY OF THE LEGISLATIVE COUNCIL
BOISE, IDAHO

PESTICIDES; AMENDING TITLE 45, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 17, TITLE 45, IDAHO CODE, TO PROVIDE DEFINITIONS, TO PROVIDE FOR THE CREATION OF A LIEN ON CROPS FOR PROVIDERS OR APPLICATORS OF FERTILIZERS OR PESTICIDES ON, OR FOR THE GROWING OF SUCH CROPS TO SECURE PAYMENT FOR SUCH FERTILIZERS OR PESTICIDES; TO PROVIDE FOR THE PRIORITY OF SUCH LIEN; TO PROVIDE FOR FILING A NOTICE OF CLAIM OF LIEN; TO PROVIDE FOR CONTENTS OF THE LIEN CLAIM; TO PROVIDE FOR THE DURATION OF THE LIEN, TO PROVIDE A LIMITATION ON ACTIONS TO FORECLOSE SUCH A LIEN, AND TO PROVIDE FOR THE AWARD OF COSTS AND ATTORNEY'S FEES; AND TO PROVIDE FOR THE RELEASE OF A LIEN CLAIM.

S 1004 was introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

H 1, by Ways and Means Committee, was introduced, read the first time at length, and referred to the State Affairs Committee.

On request by Senator Ricks, granted by unanimous consent, the Senate advanced to the Fifteenth Order of Business.

Miscellaneous Business

On motion by Senator Ricks, seconded by Senator Kiebert, the Senate adjourned until 11:30 a.m., Monday, January 14, 1985.

DAVID H. LEROY, President

Attest: DOROTHEA BAXTER, Secretary

EIGHTH LEGISLATIVE DAY
MONDAY, JANUARY 14, 1985

Senate Chamber

President Leroy called the Senate to order at 11:30 a.m.

Roll call showed all members present except Senator Peavey, absent and excused.

Prayer was offered by Senator Lacy.

Reading and Correction of the Journal

The JUDICIARY AND RULES Committee reports that the Senate Journals of the proceedings of January 10 and 11, 1985, were read and approved as corrected.

FAIRCHILD, Chairman

Report adopted.

On request by Senator Ricks, granted by unanimous consent, the Senate advanced to the Sixth Order of Business.

Reports of Standing Committees

January 14, 1985

The JUDICIARY AND RULES Committee reports that S 1004 has been correctly printed.

FAIRCHILD, Chairman

S 1004 was referred to the Agricultural Affairs Committee.

On request by Senator Ricks, granted by unanimous consent, the Senate advanced to the Eleventh Order of Business.

Introduction, First Reading and Reference of Bills, House Petitions, Resolutions and Memorials

S 1005
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO THE PUBLIC UTILITIES COMMISSION AND ITS JURISDICTION TO REVIEW REVENUE REQUIREMENTS AND OTHER REGULATORY IMPLICATIONS OF THE SWAN FALLS COMPROMISE.

S 1006
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO THE DEPARTMENT OF WATER RESOURCES; AMENDING SECTION 42-1805, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE POWER TO PROMULGATE RULES AND REGULATIONS.

S 1007
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO WATER RIGHTS; AMENDING CHAPTER 5, TITLE 61, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 61-502B, IDAHO CODE, TO PROVIDE THAT GAIN UPON SALE OF A PUBLIC UTILITY'S WATER RIGHT SHALL ACCRUE TO THE BENEFIT OF THE RATEPAYERS.

S 1008
BY RESOURCES AND ENVIRONMENT COMMITTEE

AN ACT
RELATING TO WATER RIGHTS FOR HYDROPOWER PURPOSES; AMENDING SECTION 42-203, IDAHO CODE, TO REDESIGNATE THE SECTION, TO MAKE CERTAIN ORGANIZATIONAL CHANGES AND TO PROVIDE FOR THE MAILING OF NOTICES TO PAID SUBSCRIBERS; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203B, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES SHALL HAVE THE AUTHORITY TO SUBORDINATE RIGHTS GRANTED FOR POWER PURPOSES TO SUBSEQUENT UPSTREAM RIGHTS, AND TO LIMIT PERMITS OR LICENSES GRANTED FOR POWER PURPOSES TO A SPECIFIC TERM; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203C, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL CONSIDER CRITERIA WHEN AN APPLICANT'S APPROPRIATION WOULD SIGNIFICANTLY REDUCE THE AMOUNT OF WATER AVAILABLE FOR A SUBORDINATED POWER USE; AMENDING CHAPTER 2, TITLE 42, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 42-203D, IDAHO CODE, TO PROVIDE THAT THE DEPARTMENT SHALL REVIEW ALL PERMITS ISSUED PRIOR TO THE EFFECTIVE DATE OF THIS ACT; PROVIDING THAT THE PROVISIONS OF THIS ACT SHALL *NOT AFFECT* ANY INTERSTATE COMPACT; AND PROVIDING SEVERABILITY.

S 1005, S 1006, S 1007, and S 1008 were introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

FOR WHICH THE DIRECTOR MAY REFUSE TO ISSUE OR REFUSE TO RENEW A CERTIFICATE OF REGISTRATION.

S 1095
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO IMPLEMENTS OF HUSBANDRY; AMENDING SECTION 49-101, IDAHO CODE, TO INCLUDE MINT TUBS AND MINT WAGONS UNDER THE DEFINITION OF "IMPLEMENTS OF HUSBANDRY"; AND DECLARING AN EMERGENCY.

S 1096
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO THE DISTRIBUTION OF FEES FROM SNOWMOBILE FEES; AMENDING SECTION 49-2608, IDAHO CODE, TO PROVIDE FOR THE DISTRIBUTION OF MONEYS, TO CREATE THE SEARCH AND RESCUE ACCOUNT, TO PROVIDE FOR USES OF MONEYS IN THE SEARCH AND RESCUE ACCOUNT; TRANSFERRING MONEYS FROM A CERTAIN ACCOUNT IN THE DEDICATED FUND TO THE SEARCH AND RESCUE ACCOUNT, AND PROVIDING FOR THE USES OF SUCH MONEYS; AND DECLARING AN EMERGENCY.

S 1097
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO THE TRANSPORTATION OF ALCOHOLIC BEVERAGES, WINE AND BEER; AMENDING SECTION 23-506, IDAHO CODE, TO PROHIBIT THE TRANSPORTATION OF OPEN CONTAINERS OF ALCOHOLIC LIQUOR, WINE AND BEER.

S 1098
BY TRANSPORTATION COMMITTEE

AN ACT
RELATING TO MOTOR VEHICLE LIENS AND ENCUMBRANCES; AMENDING SECTION 49-412, IDAHO CODE, TO PROVIDE THAT IF A TITLE APPLICATION IS RETURNED FOR CORRECTION AND IS NOT RETURNED WITHIN A SPECIFIED TIME THE ORIGINAL DATE AND HOUR OF RECEIPT SHALL BE VOID.

S 1090, S 1091, S 1092, S 1093, S 1094, S 1095, S 1096, S 1097, and S 1098 were introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

H 19, by Education Committee, was introduced, read the first time at length, and referred to the Education Committee.

Second Reading of Bills

S 1054, by Local Government and Taxation Committee, was read the second time at length and filed for third reading.

H 28, by Resources and Conservation Committee, was read the second time at length and filed for third reading.

S 1052, by State Affairs Committee, was read the second time at length and filed for third reading.

S 1044, by Judiciary and Rules Committee, was read the second time at length and filed for third reading.

S 1066, by Education Committee, was read the second time at length and filed for third reading.

Third Reading of Bills

On request by Senator Ricks, granted by unanimous consent, S 1008, S 1067, S 1006, and S 1005 were placed at the head of the calendar.

S 1008 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Tominaga, Twiggs, Watkins, Yarbrough. Total - 34.

NAYS--Batt, Carlson, Crystal, Ricks, Ringert, Rydalch. Total - 6.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1008 passed, title was approved, and the bill ordered transmitted to the House.

On request by Senator Noh, granted by unanimous consent, the President ordered the Statement of Legislative Intent relating to S 1008 spread upon the pages of the Journal.

STATEMENT OF LEGISLATIVE INTENT
S 1008

Prepared by Senator Michael D. Crapo
of the Senate Resources and Environment Committee
February 1, 1985

I. *INTRODUCTORY STATEMENT.*

Beginning in approximately 1977, a significant controversy arose between Idaho Power Company and certain other water users in the State of Idaho over the extent of Idaho Power Company's water rights at the Swan Falls Dam. Ultimately litigation was instituted against numerous water users by Idaho Power Company to clarify the status of the disputed water rights. Both the Governor and the Attorney General of the State of Idaho became extensively involved in attempts to resolve this dispute. In 1983 and 1984, in two separate legislative sessions, the Idaho Legislature also grappled with the controversy unsuccessfully. At issue was whether the water rights of Idaho Power Company should be subordinated to future appropriators to encourage further development of agricultural uses, domestic, commercial, municipal or industrial (DCMI) uses, or other uses which would be beneficial to Idaho.

Ultimately, in October, 1984, an Agreement was reached between the Governor of the State of Idaho, the Attorney General of the State of Idaho and Idaho Power Company which resolved the controversy. The agreement required legislative action and was made contingent upon passage by the Idaho State Legislature of certain legislation which was

referenced in the agreement. This bill, Senate Bill 1008, is the centerpiece of the legislation which is contemplated by the agreement.

II. STATEMENT OF PURPOSE.

This legislation is intended to resolve conflicts over whether an existing water right for power is subordinated. The legislation resolves these conflicts by defining the nature of such water rights. It is also intended to assure that water is available for development in Idaho and to provide a basis for reallocation of water for future development. It recognizes that Idaho's population and commercial and industrial expansion as well as Idaho's agricultural needs will require an assured amount of water.

The legislation also clarifies the authority of the Idaho Department of Water Resources to subordinate future hydropower water rights. Finally, the legislation is an assertion by the Legislature of the State of Idaho of its authority to limit and regulate the use of water for power purposes.

III. SECTION BY SECTION ANALYSIS.

A. SECTION 1. (AMENDING SECTION 42-203 OF THE IDAHO CODE.)

Section 1 amends Section 42-203 of the Idaho Code by renumbering the section to be Section 42-203A and adding new notice requirements for applications to divert in excess of ten (10) c.f.s. or one thousand (1,000) acre feet of water. Notice of such applications must be published statewide, once per week for two consecutive weeks. Section 1 also provides a mechanism by which persons interested in being notified of any proposed diversions may request in writing to be notified by the Department of Water Resources. Such requests may specify any class of notices of application. Persons making such requests must pay annual mailing fees to be established by the Department of Water Resources.

B. SECTION 2. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 2 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203B, Idaho Code. This legislation is an exercise of the State's authority under the 1928 Amendment to Article XV, Section 3 of the Idaho Constitution to limit and regulate the use of water for power purposes. The section represents a specific legislative finding that it is in the public interest of the State of Idaho to assure that the State has the power to regulate and limit the use of water for power purposes to assure an adequate supply of water for future beneficial upstream uses. It also represents a legislative protection of the rights of a user of water for power purposes (1) against depletion to the extent of a minimum flow established by State action; and (2) to the continued use of water available above the minimum flow subject to reallocation to future uses acquired pursuant to State law. The water right for power purposes shall not be subject to depletion up to the amount of the minimum flow as defined by any applicable contract with the State. As applied to the Swan Falls Agreement, the existing minimum stream flow at the Murphy U.S.G.S. gauging station is recommended for change to seasonal flows of 3,900 c.f.s. and 5,600 c.f.s. The Agreement recognizes Idaho Power Company's rights as unsubordinated up to the amount of those flows. While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change. Valid subordination conditions governing any existing hydropower rights are not modified or removed by this legislation.

To accomplish the balancing of these potentially competing interests, this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. The term "state action" refers only to action by the Idaho Department of Water Resources in compliance with all applicable law, and/or the establishment of minimum stream flows in the State Water Plan by the Idaho Water Resource Board, both of which actions are subject to ratification, modification or rejection by the Idaho State Legislature. To the extent of the established minimum flows and any right recognized by contract, such water rights for power purposes remain unsubordinated to all uses. The amount of water or water rights held in the trust is thus keyed to the maintenance of the established minimum stream flows rather than any estimates of how much water may be available above such minimum flows. Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in the trust. No person to whom trust waters are reallocated shall be required to pay compensation to any party, other than appropriate administrative fees established by the director for processing of the reallocation.

The governor is given specific authority to enter into agreements with power users to define applicable minimum stream flows in accord with the terms of this section. These contracts must be ratified by the Idaho State Legislature.

Thus, existing hydropower rights which have not been effectively subordinated shall not be subject to depletion below any applicable minimum flows established by the State. Hydropower rights in excess of such flows will be held in trust by the State and are subject to subordination to, and to depletion by lawful beneficial uses. In addition, if the holder of

such a hydropower right enters into an agreement with the State defining the extent of its hydropower right, the right will remain unsubordinated to the extent provided by the Agreement. Such agreements must be ratified by law, and ratification of one such agreement is conferred by this section.

The Director of the Department of Water Resources is empowered as to all future licenses to subordinate the rights granted in either a permit or a license to subsequent upstream beneficial depletionary uses, to assure the availability of water for such uses. The director also shall have the authority to limit permits or licenses for power purposes to a specific term.

As applied to the agreement between Idaho Power Company, the Governor and the Attorney General, this 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 and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

C. SECTION 3. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

1. Section 3 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203C, Idaho Code. This section specifies the criteria which must be met to appropriate waters which are subject to the trust established in Section 2. This section contemplates a three-step analysis as to appropriations of water from the trust established in Section 2:

First, the proposed use must be evaluated under the criteria presently existing in Section 42-203A, including local public interest. (Senate Bill 1008 does not adversely affect the use of existing local public interest criteria. Review of these factors is separate from the new factors added by the bill in Section 42-203C.)

Second, if the proposed use meets these criteria, there must be a determination of whether the proposed use would "significantly reduce" the amount of water available to the power user whose rights are owned by the trust. If a significant reduction is not found, then the application should be granted.

Third, if a significant reduction is found, then the proposed use must be evaluated in terms of the criteria stated in Subsection 42-203C(2). The finding of a significant reduction does not infer that any portion of the trust waters should not be developed. Such a finding simply results in the necessity of evaluating the proposed use according to the terms of the criteria stated in Subsection 42-203C(2). These criteria focus on the benefits of the proposed use to the state and local economy, the impact on electric utility rates, the promotion of the family farming tradition, and the promotion of full economic and multiple use development of Idaho's water resources. The fifth criteria sets a cap on agricultural development above the Murphy Gauge.

Subsection 42-203C(2) (b) clarifies that the burden of proof in establishing that any of these criteria would prevent granting of the application is upon the protestant. This subsection was included to implement the specific legislative intent that the administrative burdens of meeting the new criteria would not block future development.

None of the factors in Subsection 42-203C(2) are to be given greater weight than any other by the director in determining whether to allow future beneficial use of the trust waters. This provision represents legislative intent that the consideration of the family farming tradition, hydropower use, domestic, commercial, municipal and industrial uses, or other multiple use developments are each to be given equal consideration in the reallocation process. It is the intent that otherwise qualified water uses which promote the family farming tradition or create jobs should be recognized as essential to the economy of the State of Idaho.

The criteria identified in Subsection 42-203C(2) are intended solely to guide the director of the Idaho Department of Water Resources in determining whether a proposed use has greater net benefits to the State than the existing hydropower use. The criteria identify those factors to be considered in making this determination. Proposed uses for domestic, commercial, municipal or industrial purposes and the like are not intended to receive less weight in the evaluation process simply because they are not mentioned specifically in the criteria. Nor is it intended that these uses be subject to the family farming standard contained in Subsection 42-203C(2) (ii), or the agricultural cap contained in Subsection 42-203C(2) (v). In such circumstances only the criteria relevant to the proposed use and its impact on hydropower would be pertinent.

The legislation also specifically ties the appropriation of water from the trust to conformance with "state law" and not to the new public interest criteria. This provides flexibility to the state in the future to change

the law if it becomes necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.

D. SECTION 4. (ADDING A NEW SECTION TO CHAPTER 2, TITLE 42, IDAHO CODE.)

Section 4 adds a new section to Chapter 2 of Title 42 of the Idaho Code to be designated as Section 42-203D, Idaho Code. This section provides that the Idaho Department of Water Resources shall review all water permits issued by it prior to the effective date of this act; provided, however, that permits having been put to beneficial use prior to July 1, 1985 are exempt. These permits are to be reviewed to assure that they comply with the requirements of this act. The director is authorized to either cancel the permits or subject them to new conditions.

E. SECTION 5.

Section 5 clarifies that this act does not modify, amend or repeal any existing interstate compact.

F. SECTION 6.

Section 6 declares the provisions of this act to be severable in the event that any portion thereof is declared to be invalid or unenforceable.

S 1007 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Batt, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Crystal, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 36.

NAYS—Carlson, Ricks, Rydalch, Tominaga. Total - 4.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1007 passed, title was approved, and the bill ordered transmitted to the House.

S 1006 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Gilbert, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Peavey, Rakozy, Reed, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins. Total - 30.

NAYS—Anderson, Batt, Carlson, Crystal, Parry, Ricks, Ringert, Rydalch, Tominaga, Yarbrough. Total - 10.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1006 passed, title was approved, and the bill ordered transmitted to the House.

S 1005 was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Roll call resulted as follows:

AYES—Anderson, Beck, Beitelspacher, Bilyeu, Bray, Budge, Calabretta, Chapman, Crapo, Darrington, Dobler, Fairchild, Horsch, Kiebert, Lannen, Marley, McLaughlin, McRoberts, Noh, Parry, Peavey, Rakozy, Reed, Ringert, Risch, Smyser, Staker, Sverdsten, Sweeney, Thorne, Twiggs, Watkins, Yarbrough. Total - 33.

NAYS—Batt, Carlson, Crystal, Gilbert, Ricks, Rydalch, Tominaga. Total - 7.

Absent and excused—Lacy, Little. Total - 2.

Total - 42.

Whereupon the President declared S 1005 passed, title was approved, and the bill ordered transmitted to the House.

S 1015, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

On request by Senator Darrington, granted by unanimous consent, S 1015 was referred to the Fourteenth Order of Business, General Calendar.

S 1016, having been held, was read the third time at length, section by section, and placed before the Senate for final consideration, the question being, "Shall the bill pass?"

Moved by Senator Anderson, seconded by Senator Beck, that S 1016 be referred to the Fourteenth Order of Business for amendment.

An amended motion was made by Senator Ricks, seconded by Senator Kiebert, that the Senate recess until 1:30 p.m. of this day.

The question being, "Shall the amended motion pass?"

The amended motion passed by voice vote, and the Senate recessed until 1:30 p.m. of this day.

RECESS
AFTERNOON SESSION

The Senate reconvened at 1:30 p.m., pursuant to recess, President Leroy presiding.

Roll call showed all members present except Senators Bilyeu, Kiebert, Lannen, Peavey, and Tominaga, absent and excused; and Senators Lacy and Little, absent and formally excused by the Chair.

Prior to recess the Senate was at the Thirteenth Order of Business, Third Reading of Bills.

Senator Peavey was recorded present at this order of business.

The President announced that the motion to refer S 1016 to the Fourteenth Order of Business, General Calendar, was before the Senate for consideration, the question being, "Shall the motion pass?"

ADDENDUM H

TRANSCRIPT OF PROCEEDINGS HELD ON JANUARY 18, 1985 BEFORE CHAIRMAN NOH

RESOURCES AND ENVIRONMENT COMMITTEE

* * * * *

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 hydropower purposes

TRANSCRIPT OF PROCEEDINGS

Held on January 18, 1985, 1:30 p.m.

before Chairman Noh

* * * * *

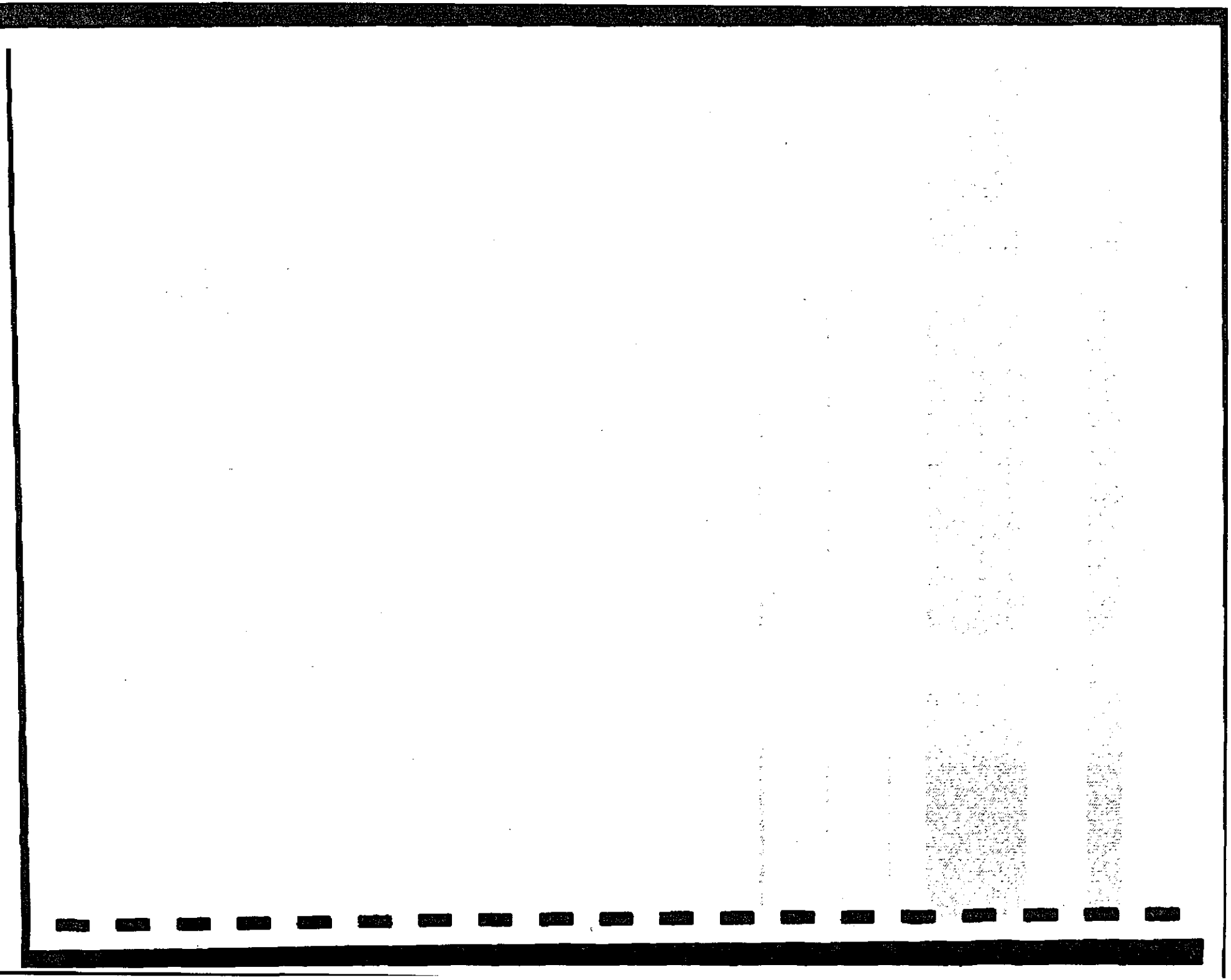
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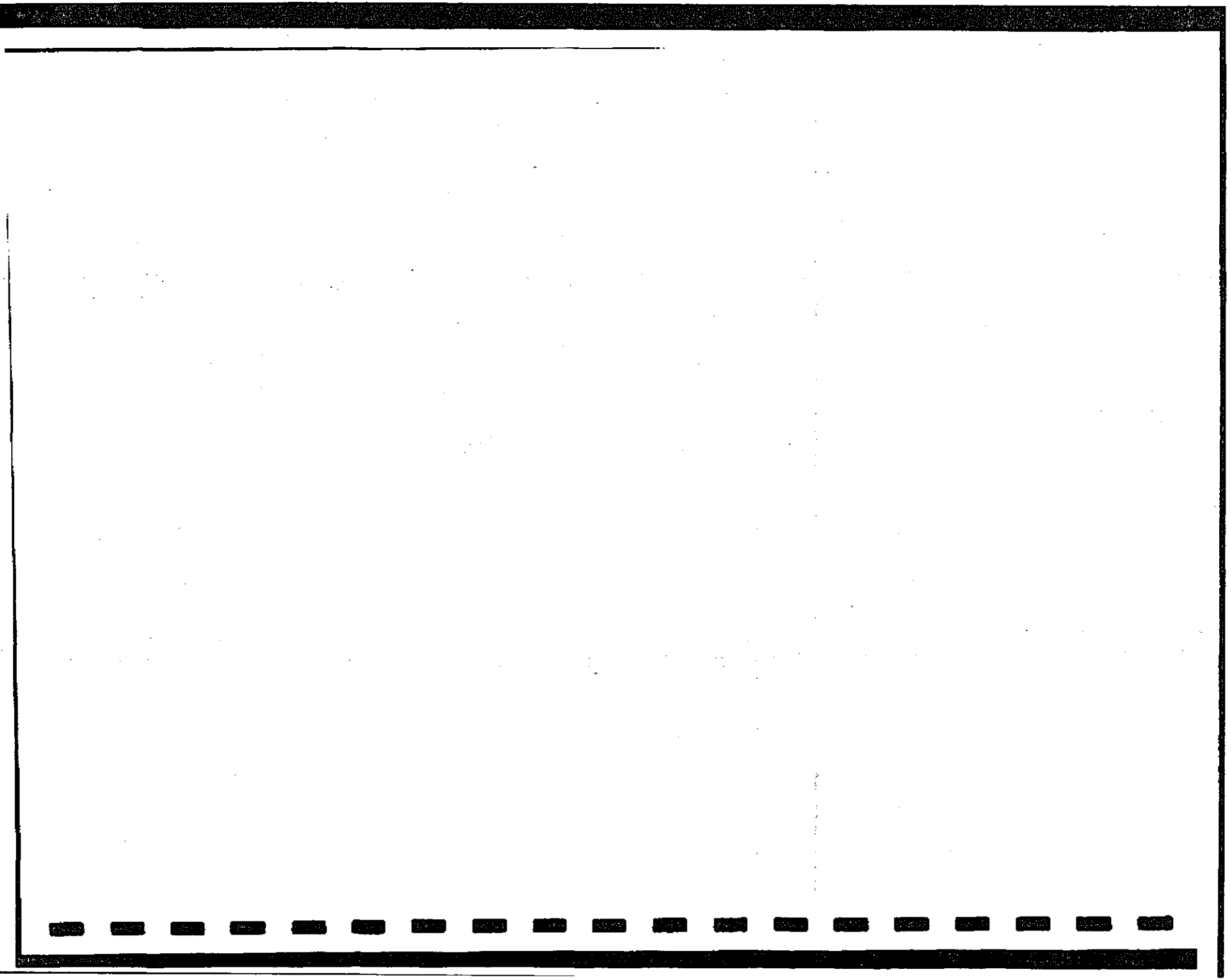


APPEARANCES

PRESENT:

Chairman Noh
Senator Beitelspacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Borsch
Senator Peavey
Senator Ringert
Senator Sverdsten
Pat Costello, Governor's Office
Pat Kole, Attorney General's Office
Tom Nelson, Idaho Power Company
Ward Conley, PUC
Mr. High, PUC
Mr. Swisher, PUC
Ken Dunn

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RESOURCES AND ENVIRONMENT COMMITTEE

* * * * *

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 hydropower purposes

TRANSCRIPT OF PROCEEDINGS

Held on January 18, 1985, 1:30 p.m.
before Chairman Noh

* * * * *

Transcribed by
Patricia J. Terry, CSR, RPR, CRR
CSR No. 653

APPEARANCES

PRESENT:
Chairman Noh
Senator Beitelspacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Hersch
Senator Peavey
Senator Ringert
Senator Svendsen
Pat Costello, Governor's Office
Pat Kole, Attorney General's Office
Tom Nelson, Idaho Power Company
Ward Conley, PUC
Mr. High, PUC
Mr. Swisher, PUC
Ken Dunn

* * * * * *

JANUARY 18, 1985

SENATOR BUDGE: Mr. Chairman, before you start, would you care to accept the minutes as written?

CHAIRMAN NOH: I'd be glad to do that.

SENATOR BUDGE: I so move.

CHAIRMAN NOH: It's been seconded by Senator Budge, seconded by Senator Ringert. Accept the minutes of the last meeting, all in favor say aye.

(Affirmative response.)

CHAIRMAN NOH: Opposed, no? The minutes carry.

So we'll start first then with S bill 1008, the main bill, but don't worry about it if questions come up moving from one bill to the other or any other aspect of this agreement. It might fit together because it all fits together as part of the puzzle.

MR. COSTELLO: Thank you, Mr. Chairman. First of all, I'm standing on a broken foot, so if I pass out, that's the reason. I want to keep this --

UNKNOWN SPEAKER: Mr. Chairman, why doesn't

Mr. Costello just sit down if he'd rather.

MR. COSTELLO: Maybe I will. I'll do that.

CHAIRMAN NOH: That would be fine. Good suggestion.

MR. COSTELLO: The attorney general's office has provided detailed testimony outlining what each of these provisions does, so I'm not going to go into great detail other than to note how all of this fits into the overall picture. The main bill, to take it just section by section, for those of you who followed the agreement, Section 1 here originated in Exhibit 1 to the agreement, which is part of the legislative package.

Section 2 was all the -- subparagraph 6 of Section 2 was Exhibit 7B to the agreement, which is not part of the legislative package, but it's one of the contingencies, the distinction there being the agreement does not take effect without this taking place, although the parties were not bound necessarily to actively support it. The reason for that being 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 far away from being a transfer as we could. So it's

Page 5

being imposed by operation of law through this rather than the power company agreeing to it by contract.

Subsection 6 of that Section 2 is what was called Exhibit 7A to the contract, which is the authority to impose subordination conditions on new permits. That's so that we won't hopefully get into this position in the future where there's a question whether or not a hydropower right has been subordinated. It does not mandate subordination conditions on all future hydropower rights. It is permissive and would give the director the authority to impose such conditions.

UNKNOWN SPEAKER: Chairman?

CHAIRMAN NOH: Yes.

UNKNOWN SPEAKER: Could you, Mr. Chairman, have Mr. Costello please repeat the exhibits of Subsection 6?

MR. COSTELLO: Subsection 6 was Exhibit 7A to the original Swan Falls contract.

UNKNOWN SPEAKER: And Mr. Chairman?

CHAIRMAN NOH: Yes.

UNKNOWN SPEAKER: Section 1, that was exhibit what?

MR. COSTELLO: Section 1 was the first part

Page 6

of Exhibit 1 to the contract.

UNKNOWN SPEAKER: Thank you, Mr. Chairman.

MR. COSTELLO: Section 3 is the public interest criteria which was the second half of Exhibit 1 to the contract. This is part of the legislative package. These are the new criteria the director must consider in granting new water right applications for water that may be available due to the imposition of a subordination condition.

And the Section 4 is -- I'm not sure which exhibit that came from or if it was in an exhibit, but it gives the department the authority -- Exhibit 7A -- in any event, okay, it was a separate exhibit, Exhibit 4, I believe, to the contract. This is the one that will give the department to go through the pending application, permit applications, and also the end develop permits to apply the new public interest criteria to those.

And the reasoning for that is that on paper the existing permits are sufficient to exhaust the 600 cfs that has been identified as available to meet the needs of future development, and so it is necessary to be selective in deciding

Page 7

which one of those -- ones of those are going to go forward and which ones should not go forward because they don't meet the public interest test.

And if I could move on now to the second bill, which is much simpler. You can turn straight to page two of the bill. All we've added is two new sentences to the authority granted to the director under Section 42-1805 Idaho Code. The first sentence which was added is No. 7, line four of page two, which is the so-called moratorium authority.

The historical background is that we've been operating under an informal moratorium that the director imposed after the Supreme Court decision in the Swan Falls case because he could not determine at that point whether water was in fact available to be appropriated on the Snake River above Swan Falls.

What the intention of this new section to this new No. 7 is to confirm that power and to expressly authorize him to do that should the circumstance arise in the future.

The final bullet there, No. 8, is the authority to promulgate rules. And the director currently has specific authority to promulgate

Page 8

rules for a number of different areas of department operations, but he does not have authority to promulgate rules to do such things as detail what's in the public interest under the new public interest criteria to deal with water markets and some of the other aspects of the processing of applications to appropriate water as is envisioned by the new management regime this agreement will put in place.

That is just a brief summary of the bill, and I think at this point I would turn it over to my two fellow negotiators for anything they would like to add.

CHAIRMAN NOH: Which fellow negotiator is next?

MR. KOLE: Thank you, Mr. Chairman, members of the committee.

CHAIRMAN NOH: Mr. Kole from the attorney general's staff.

MR. KOLE: I would like to just add a few comments. If you look at Senate Bill 1008, the negotiators were faced with two questions. One would be to try and rewrite 42-203 or the other would be to try and clean it up and then graft onto it some new criteria for the protection of

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hydropower interests.
In taking a look at this issue, initially we did think that it might be advisable to try and redraft the entire section, but once getting into the process we discovered that it was not and would be better to try and work within the experience of what we had on the books. So that's what we did. As we went through, we did make some minor changes just to make the thing read a little bit clearer. And if you look at page one, that's all we're doing.
If you looked at page two of the bill, you can see that there is a new requirement there of statewide notice if there is going to be a large diversion. And as part of this administrative process, there are groups that do like to become aware of various applications that are being considered by the department, so we've provided a procedure whereby they could get on a mailing list and receive notice in all cases. The rest of the section was about the same, other than to renumber and redesignate some of the provisions.
You get down to the bottom of page two, the authority to subordinate water rights and

Page 10

limit the term of permittable licensing. And what we tried to do here was to not only address the Idaho Power/Swan Falls controversy but also provided a method by which other controversies could be addressed.
I'm sure members of this legislature are aware of the fact that there is potentially a similar problem on the Spokane River out of Lake Coeur d'Alene. We wanted to provide a mechanism by which the governor would have the authority to enter into a negotiation to resolve that problem before we get the same type of crisis coming up down the road.
Also, you might notice on line 49 and 50 of page three that Subsection 6 of this section does not apply the licenses which have already been issued as to the effective date of the SAP (phonetic). What that does is that just makes it clear that we won't have any problems. There will only be prospective application of this particular law.
Turning to Section 3 of the act and the public interest criteria, I think it is important as we note in our written testimony that it was never the intent of the negotiators nor do we

Page 11

believe that we have altered any protection that currently is in existence for fish and wildlife and other instream guidance. The purpose here was not to change the local public interest standard. It's not to alter that in any way, shape, or form. But rather just to graft on a balancing test in the case of hydropower water rights.
The criteria that we have here is capable of being implemented without rules and regulations. Or if the legislature deems fit to pass SB 1006, there would be the authority to adopt rules and regulations. But we thought that was a policy choice that the members of the legislature should be able to make.
Then looking at Section 4 on the bottom of page four, as Mr. Costello has indicated, there are a large number of permits out there. The question that concerns the attorney general's office and of course you as legislators is what would the effect be if the state was held responsible for denying one of those permits? Would there be some liability that could be imposed against the state?
After researching this area and taking a look specifically at the Hidden Valley Springs

Page 12

case, we believe that our research, at least as disclosed to us, what we have in 42-203D meets the criteria, and we believe that we can review those permits without creating liability for the state.
Section 5 is just existing law, and Section 6 is your standard severability clause.
I believe Mr. Costello has gone into SB 1006 quite adequately, so I think that would conclude my comments. And I turn the floor over to Mr. Nelson.
CHAIRMAN NOH: Mr. Nelson.
MR. NELSON: Mr. Chairman, members of the committee, I might just give you a little bit of an overview of where the entire process is. It's obvious that given the things that have to be done, no one entity can do it. But if you have read the contract, you've seen that certain things were required as a condition to the effectiveness of the agreement. I might just tell you briefly where those are.
The filing with the Idaho Public Utilities Commission has been done, and the commission has entered an order deferring its decision to the legislature since that degree it was a parallel decision, at least in part. The

Page 13

FERC filing has been made. The time for intervention has either run or is close to running. So far as I know the date, there's one intervention by the National Marine Fisheries Service, which is an agency of the Department of Commerce. That intervention on its face seems to relate to the water budget under the Northwest Power Planning Act.

The bill on adjudication and adjudication funding is up for introduction in the house.

The bill on PUC jurisdiction is here I believe in the State Affairs Committee.

The company made the determination that no filing was needed with the public utilities commissioner of Oregon, so that was not done. I understand that the agreement was filed in the sense it was given to the commissioner and his staff, but there was no formal request for any action.

The state water plan amendments have been prepared in draft form. The water resource board had information meetings prior to Halloween, which I thought was big, since I had to go to all of them. The proposed amendments are now drafted

Page 14

and set for public hearing before the Water Resource Board commencing the 28th of January in Idaho Falls and continuing to the 6th in Lewiston. The Boise hearing for your information is set for the 5th in the Supreme Court meeting room at 2 p.m. and 7 p.m.

So the other matters that are running concurrently to the extent we can. I don't -- so far we have not seen any insuperable hurdles to (tape inaudible) things that divide the unappropriated water at Murphy. 600 or half remain instream, 600 to be available for appropriation. That part of the settlement is in the state water plan amendments, which according to the constitutional amendment if adopted by the water board will come back to the legislature.

Given the authorship of that constitutional amendment, I hesitate to say that it's not clear, but it isn't at all sure right at the moment how that process will work, other than the legislature has the final say. So that part will come back assuming further action by the water board.

To me there are a lot of elements to this plan, and I don't want you to get the

Page 15

impression that the only important part of what was done of the part of the settlement was the minimum stream flow. That is an important part, but an equally important part in view of the company are the public interest criteria which you have in Senate Bill 1008.

The company thought and still thinks that it's critical that hydropower be recognized as an element in consideration of new water uses that affect the river above Murphy. And that is important. The statute and the contract don't prohibit development. They're not intended to and they don't. They simply say, look, you may have an adverse impact on hydropower generation. That element of the public interest has to be addressed before you have further development. And if it's addressed and it's found to be in the public interest that you have that impact on hydropower, that it's in your state's overall best interest to proceed with development, you proceed with development. But that is a very important element of this plan, not just the river flows but also the public interest.

So with that overview, Mr. Chairman, I would yield to questions as they come up.

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CHAIRMAN NOH: I might first impose upon one of the three of you or anyone else who wants to do that to explain just where we are in settling the question of the Idaho Falls cost in the adjudication that cropped up yesterday in the House Resources Committee.

MR. COSTELLO: Yes, Mr. Chairman. I would be happy to do that.

CHAIRMAN NOH: Explain what happened there, what has transpired since then so we don't have a lot of rumors circulating.

MR. COSTELLO: Okay. And I also thought the committee members would like to have this, if they don't already have copies of the proposed changes to the state water plan. They are included in this issue of the currents as well as the text of the full Swan Falls agreement. So I guess I'll pass those around if anyone would like to have one.

And that details in the amendments how they are going to implement the new minimum stream flows and some of the other provisions affecting the state water plan in this agreement.

The question was raised in House Resources yesterday regarding the fee to be

Page 17

charged on hydropower generation to fund the adjudication of the Snake River. It was pointed out by several legislators from Idaho Falls as well as the mayor of Idaho Falls that the $25 per cfs charge worked a -- had the result of placing a disproportionate amount of the fee on the city of Idaho Falls because they have roughly 20,000 cfs of hydropower right there, which had the result of them paying 10 percent of the overall hydropower share of the adjudication when they only generate about 1 percent of the power.

CHAIRMAN NOH: (Tape inaudible.)

MR. COSTELLO: Right. It's low head, about 20 feet of head going through hall turbines.

Right now we are looking at changing that formula to provide for rated capacity as being the measure of the fee to be charged for hydropower. The overall amount to be generated for the adjudication from hydropower would remain constant at about 7.4 million overall for hydropower, which is roughly equivalent to the amount that agricultural users will pay, but it will be based on the number of cents per kilowatt of rated capacity.

CHAIRMAN NOH: As I understand the original

Page 18

formula had been reviewed by the city of Idaho Falls. They declared okay, and they went back and recalculated, and they made some mistakes. So this really shouldn't be blamed on a lack on the part of the people who put this together. It's just one of those human errors.

MR. COSTELLO: Yes, that's correct, Mr. Chairman.

SENATOR CRAPO: Mr. Chairman?

CHAIRMAN NOH: Yes, Senator Crapo.

SENATOR CRAPO: Is there available anywhere a breakdown of this schedule?

CHAIRMAN NOH: The new schedule?

SENATOR CRAPO: Well, the old one.

CHAIRMAN NOH: The old schedule is in the bill. You I think probably have copies of that bill which we introduced as an RS and is now at the House Resources Committee.

MR. COSTELLO: It's also in this tabloid.

SENATOR CRAPO: What I'm referring to is not really the schedule then but how the schedule is broken down.

CHAIRMAN NOH: We'll get that for you.

MR. COSTELLO: I have that here.

CHAIRMAN NOH: You have that here. Fine.

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Great. This is not the new formula. This is the –

MR. COSTELLO: Yes. There would be no difference. The $25 per claim for hydropower here is listed as yielding 7.2 million if you add the two hydropowers together. And the rated capacity, it will yield the same amount.

CHAIRMAN NOH: Okay. Do you have other questions for these gentlemen? I heard there are lots of them. Senator Ringert.

SENATOR RINGERT: Gentlemen, I'd like one of the negotiators to tell us just what is the public interest that you're referring to that's in -- that will be important to 203C. How is it defined?

CHAIRMAN NOH: Who wants to take a shot at that? Mr. Kole?

MR. KOLE: Thank you, Mr. Chairman, Senator Ringert. The public interest determination required pursuant to 203C is defined in 42-203C, 2A, one through five. Those are the only factors that the director will be considering in this particular determination.

It's actually a two-tier process. What happens is the director initially considers all of

Page 20

the factors listed on page two, in paragraph five, beginning at line 21. Those are the factors with which we're all familiar: reduction in quantity of water, whether or not the water supply is sufficient, whether or not the application's made in good faith or for delay or speculative purposes, and of course the local public interest standard.

After that determination has been made, the director then goes over to 203C. And if the water is water that is available because of this subordination condition, he then is required to make an additional public interest determination as specifically defined in paragraph 2A.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Mr. Kole, are you saying then that the director does not have authority if the other bill passes, the regulation authority, that the director will not have authority to expand the test of public interest and the standards of public interest beyond what you have stated here in 2A?

MR. KOLE: Mr. Chairman, Senator Ringert, as I understand it he would have the ability to more closely define what those factors are if that bill

Page 21

would have passed giving him rule and regulation authority. He would not be able to adopt a rule and regulation that was in conflict with the specific criteria established here. If that bill did not pass, it would just have to develop those criteria on a case-by-case basis as each individual application came before him.

SENATOR RINGERT: Mr. Chairman, another question. Would the negotiators explain why it is necessary to establish a trust for the 600 cfs of water above the minimum stream flow that's available for appropriate operation.

MR. NELSON: Mr. Chairman, Senator Ringert, in the course of the negotiation, at least in the final stages, we got lager-headed on the question of whether the company's water rights say at Murphy or at Swan Falls, just to pick an easy example, would be immediately subordinated by operation of the implementation agreement or would remain in place unsubordinated until such time as the state allocated that water to somebody else's use. It was the company's position then and still is that you have an additional argument under the Constitution that the river is fully appropriated if you leave that hydro right in place until such

Page 22

time as it's reallocated pursuant to the statute.

But it became somewhat of a political problem, so in order to get around it, the trust concept was adopted whereby that water is placed in trust. The agreement clearly says it's unsubordinated, so as far as the agreement goes, it's an unsubordinated block of water. The state then takes that water, places it in the trust, subject to reallocation, which had the effect of doing two things. It made clear the state's control over the allocation of the water, clearer if you will, and it left the water unsubordinated.

So the company retains its right to urge the state or force the state in the proper case to use that argument. And that's all it is is an argument under Article 15, Section 3 of the Constitution. The river's fully appropriated; ergo, the state does not have to allow the water to go to the first guy who comes down the pike.

So the trust concept got around that problem and I think tied it together to a point where it's a little more effective as a mechanism to accomplish the purpose of the agreement.

SENATOR RINGERT: Well, Mr. Chairman and Tom, do you feel that this provision will be an

Page 23

effective end run on Article 15, Section 3?

MR. NELSON: Mr. Chairman, Senator, I don't know. I can't obviously predict that it will carry the day, but our position was the argument is worth preserving because 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.

CHAIRMAN NOH: In other words, Mr. Nelson, this is also considered to be an effective way to protect the minimum flow from appropriation?

MR. NELSON: Mr. Chairman, that's correct. The minimum flow is itself subject to challenge by those people as being effectively a new recognized instream use with that priority date. And somebody with a prior permit could also say, "Hey, I'm prior. I could take the water in spite of your new minimum flow."

CHAIRMAN NOH: Do you want to continue the same line of questioning, Bill, or do you want to yield to --

SENATOR RINGERT: Well, along the same.

CHAIRMAN NOH: All right.

SENATOR RINGERT: I think I should direct

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this to Mr. Costello because he is leading the discussion, and that is, if you feel that the trust theory is necessary because the existing permits appropriate all the water that apparently the department feels is left for appropriations, does not the state have any obligation to the people who took those permits out years and years ago and have been waiting patiently for matters to resolve (tape inaudible) and all that?

MR. COSTELLO: Mr. Chairman, Senator Ringert, certainly to the extent that they have detrimentally relied and developed, then they can argue that it's a taking if you extinguish their rights. But we are talking primarily about remassaging those undeveloped permits that they have not made -- have not developed to this point.

SENATOR RINGERT: So I take it then that the state feels no obligation unless somebody spent money directly on the construction and diversion (tape inaudible)?

MR. COSTELLO: Mr. Chairman and Senator Ringert, we certainly owe them the obligation to treat them fairly, and they will be treated fairly. But they'll be treated fairly under the new regime of the public interest criteria rather

Page 25

than under the old straight appropriation.
CHAIRMAN NOH: Mr. Kole.
MR. KOLE: Mr. Chairman, Senator Ringert, a couple of additional points here. I think it is clear in the Hidden Valley Springs case that the state does have the authority to recall those permits and take a look at that without creating liability, particularly where in this situation we have provided a grandfathering in of anybody who has actually applied water to the land as of the last irrigation season.
Secondly, and I think concurrently with that, if you look at 203D on page four, each one of those persons prior to having any property right taken from them will have an opportunity for a hearing and an opportunity to explain why their particular project or permit should be permitted to go forward. So there is procedural due process being applied for those people.
CHAIRMAN NOH: Senator Crapo.
SENATOR CRAPO: Just a comment (tape inaudible) that I realize -- (tape inaudible) State of Idaho one, that relates specifically to water and hydropower and two, that refers to farming, the family farming tradition and then the

Page 26

state bill policy which refers to acres. It seems to me that it's not clear, but it could be argued that from this there is a bias against nonagricultural uses in the future, such as development, the National Engineering site here in Idaho Falls, or a major manufacturing outfit that came in and wanted to use water.
I guess I just wanted to know how a significant request for water by a nonagricultural user would be dealt with, particularly under roman numeral well 2A, roman numeral 5, which says that the development must conform to its staged development policy in developing number of acres.
CHAIRMAN NOH: Who would like to take a shot at that? Mr. Nelson.
MR. NELSON: Senator, the criteria as written and as we have understood them, and of course we're probably too close to the (tape inaudible) (tape silent) -- consumption of most industrial use is pretty difficult. Let's say they had to cool the power plant for a major use. Then you would merely look at 1 on the potential benefits and II depict the utility rates. In an industrial setting, that analysis, at least the ones I've seen, would compel you to grant it.

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Obviously it would have no impact on the family farming tradition. You might argue that it comes under 4, promotion of full economic and multiple use development of the water resources and would have no effect on the 20,000 acres.
So in that case, as we see it you would ignore the agricultural-related factors and (tape inaudible) remain. At least that was our intent, that the director would only apply ones that obviously made sense.
CHAIRMAN NOH: Mr. Crapo.
SENATOR CRAPO: If I understand you then correctly, Mr. Nelson, roman numeral 5 could not be used to say that as to industrial uses the amount of water utilized could not exceed the state's plan for agricultural?
MR. NELSON: Mr. Chairman, that would be correct. You also have the policy statement that's coming out of the proposed water plan amendment which allocates 150 cfs to industrial uses. So with that public policy statement in the water plan, you've probably gone a long ways toward approval under this standard in any event.
CHAIRMAN NOH: Mr. Crapo.
SENATOR CRAPO: With regard to the 150 which

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is being allocated for industrial uses, that's out of the 600, 450 cfs of the 600 available?
MR. NELSON: Mr. Chairman, that's correct.
SENATOR CRAPO: Would that then be determined as a limit or is that a specified minimum? Or what exactly is intended by this specification of 150 cfs?
MR. NELSON: Mr. Chairman, Senator, as I understand it, it's essentially a reservation of that much water for those purposes and subject always to change by the water board as it finds out if it's too high or too low or whatever. But the race is not to the swift for industry as to that 150 cfs. It's there and when they need it, it will be available.
CHAIRMAN NOH: Senator Beitelspacher.
SENATOR BEITELSPACHER: Mr. Chairman, to one of the three negotiators, much along the lines that Senator Crapo just enumerated on, on line 27 and 28 of the same section, we're referring to "No single factor enumerated above shall be entitled to greater weight by the director in arriving at this determination."
Does that not in itself preclude some further development of industrial development

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because of lines 23 through 25 of roman numeral 5?
MR. NELSON: Mr. Chairman, senator, as I say, that isn't the intent certainly, and to me if you have a solely agricultural factor, such as roman -- as little B, you simply couldn't apply it to an industrial use. So in making that analysis, the director when he got to that one would have to ignore it as I see it. Otherwise the system doesn't make sense. You would only be entitled to develop agricultural uses, which wasn't the intent.
SENATOR BEITELSPACHER: Okay. Thank you, Mr. Nelson. Thank you, Mr. Chairman.
CHAIRMAN NOH: Mr. Costello.
MR. COSTELLO: If I could just follow up on 5. The policy referred to, the staged development policy, is more fully spelled out in the water plan amendment as drafted, and it's clear from that, the text accompanying that we're not saying here that there is a mandate to go out and develop any number of acres. All we're saying, there's a cap at 20,000 so you cannot -- I think what I'm hearing here is that you're afraid that if this would prevent us from developing up to 20,000 or 80,000 in a four-year period that it would somehow

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conflict with No. 5, and that's not the case. The policy referred to is more fully addressed there. This is simply a cap and not a direction to go forward in and develop at least that much.
CHAIRMAN NOH: Mr. Crapo.
SENATOR CRAPO: May I ask one further question for clarification?
CHAIRMAN NOH: Certainly.
SENATOR CRAPO: Let's suppose that industrial uses came along in a given year and used up 50 cfs and that enough agricultural applications were made to develop 20,000 acres. Would both of those be able to be done in a single year?
MR. COSTELLO: Mr. Chairman.
CHAIRMAN NOH: Mr. Costello.
MR. COSTELLO: Senator Crapo, yes, there would be no conflict.
CHAIRMAN NOH: Senator Peavey.
SENATOR PEAVEY: Mr. Chairman and any one of the three negotiators, maybe Pat Costello, was there any room for consideration of fish and wildlife values in arriving at these criteria? Why were they left out?
MR. COSTELLO: Mr. Chairman, Senator Peavey,

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the original reason they were left out is because we were going to -- we had two versions, one which supplanted the old local public interest and had a comprehensive public interest determination similar to what was in a bill promoted last year by the governor and the attorney general, which would have subordinated everything and put it through a new public interest review.
We found that there was resistance even from among some conservationists who felt that they did not want the old local public interest wiped out because they felt that did give them a tool with which to challenge this. So we had option two, which was to leave the local public interest as is and simply add the new criteria that relate to the balance with hydropower and felt that we certainly did not intend to make the ability to take fish and wildlife into account any less available than it was before but that that was a separate issue since we're dealing here with protecting hydropower, water for hydropower because after all that's what was at issue in the lawsuit.
Having said that, I would go further to say it certainly is not the governor's intention

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to imply that by leaving fish and wildlife off this list that it is somehow not in the public interest. And if it needs to be stated more clearly in 42-203A that fish and wildlife can be considered under the local public interest, we would support doing that. However, we are bound to and do support existing 42-203C as written.
CHAIRMAN NOH: Any of the other two gentlemen have any comments on that?
MR. NELSON: Senator, Mr. Chairman, Senator Peavey, I would agree with Mr. Costello. I think that the parties are not committed to preservation of 203A in its present form as a part of these proceedings. However, if there is going to be an attempt to change that, I think it should be in a separate bill because we're tied to this program and we're committed to it, and as soon as we start amending it we get in a real mess.
CHAIRMAN NOH: Senator Peavey.
SENATOR PEAVEY: Another concern that I had, and I don't know where to fit it into the overall settlement without --
CHAIRMAN NOH: Senator Peavey, if you're going on to a different consideration, I think Mr. Kole had a comment on your first question.

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SENATOR PEAVEY: Okay.
MR. KOLE: Thank you, Mr. Chairman, Senator Peavey. I would agree with the comments of the other two negotiators. It was our thought that that really was not an issue that was directly involved in the lawsuit. While there may be concerns on that score, that should be addressed separately by the legislature so as to not reopen a lot of demands that came up last year in relationship to this particular bill.
CHAIRMAN NOH: Senator Peavey.
SENATOR PEAVEY: In other words, what we're saying is that any of us can propose additional criteria outside of this package and it will go on its own merits and that won't change things one way or another, I guess. One of the things I thought we should look at is critical livestock range. It's real easy to go out, for the BLM to give that range away, but the state doesn't have to give the water away if it's a valuable piece of winter range or turnout range. I guess a separate bill would be the place to address that.
CHAIRMAN NOH: Further questions? Senator Ringert.
SENATOR RINGERT: Mr. Chairman, can we turn

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to the other bill, the 1006, the second page, line five refers to "existing vested water rights." Now, in making this determination , is the director going to be able to consider the entire gamut or is he just going to look at adjudicated rights?
The rights at Swan Falls, whatever they might be that precipitated the present situation, as I recall had been adjudicated between the two parties back in 1907 or 1909 or something like that. As far as I can tell that was the only final judgment of adjudication that we had with respect to any of those water rights. The whole process was shut down because there was a determination of some sort made in a pending lawsuit that has not reached -- that has not reached *final judgment*.
So what's the standard we're looking at when we use the term "existing vested water rights" in this bill?
CHAIRMAN NOH: Mr. Nelson.
MR. NELSON: Mr. Chairman, Senator Ringert, the language was chosen in order to include a constitutional right not represented by an adjudication, a statutory right represented by

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license, or in my judgment you can get into a vesting question at a proper stage in a permit process. So my understanding of why we selected "vested" was to pick up water rights that fell into those categories.
Now, as far as Swan Falls is concerned, as an example, there are I think three water licenses at Swan Falls. In my parlance that's clearly a vested water right. There may be the adjudication as you point out. Probably at least as we understand adjudication now it is probably too narrow to be much more than a statement of a constitutional right that's contemporaneous with the use. But I think all of those water rights would be considered vested as I understand how that term is used here.
You may also have -- since this is broader than Swan Falls, the director would be entitled to protect a well, a permit on a well if the well were drilled, the water was in use. I think that's vested to the point the director could try to protect it by putting a moratorium in an area while they looked at say a critical groundwater designation.
UNKNOWN SPEAKER: (Tape inaudible.)

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SENATOR RINGERT: It seems to me that this procedure in effect will force the applicant then to go through the administrative appeal procedure, perhaps take it on up to court if dissatisfied (tape inaudible). And it further seems to me that -- well, it sort of puts the state in the position of saying we are no longer going to have free-wheeling appropriation. We are going to put the front end burden at least more so than in the past on the intending appropriator.
MR. NELSON: Mr. Chairman, Senator Ringert, I think that has that potential in the given factual setting. Certainly I think among my clients one of the things they like the least about the present system is the fact that if they're a senior appropriator, they have the burden of shutting off the junior. And they say why do I have to do that? I was here before he was. Why is it my problem?
UNKNOWN SPEAKER: (Tape inaudible.) (Tape silent.)
MR. NELSON: -- directing how development took place, which I think is probably a better way. The people can fight with the director on his moratorium the scope and timing of it a little

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easier than they can go back into court and convince a judge they should be relieved.

CHAIRMAN NOH: I have a question for any of you that would like to shoot at it. Under this agreement, what is to preclude a utility from if they can generate sufficient resources to buy up or lease whatever water they can get their hands on and in effect take up all of the remaining waters? As I read this, they're pretty well home free on all purchases -- purchased water and leased water.

MR. COSTELLO: Mr. Chairman, that's correct. They can acquire through purchase upstream stored water which they can run down the river. They are entitled to that and they can't of course be appropriated between the storage site and their hydro site. So they would be free to do that.

CHAIRMAN NOH: But this would not cause a problem on unappropriated water. How about waters that are, for instance, lost because someone failed to file a claim as of a cut-off date? Now, is that water in a situation where another party would have to file on the water? You can't go buy or lease water that's lost for failure to file a claim; can you?

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MR. COSTELLO: Mr. Chairman, no, there would be no right, no property right to acquire in that case. They would have difficulty establishing a right anywhere upstream from their facility because they would not be able to apply it to a beneficial use until down below. It's difficult really for me to conceive of them acquiring a right other than a right to a certain amount of storage water in storage in the stream itself.

SENATOR BUDGE: Mr. Chairman.

CHAIRMAN NOH: Senator Budge.

SENATOR BUDGE: Pat, is that true presently, though (tape inaudible)?

MR. COSTELLO: Mr. Chairman, Senator Budge, that is what --

SENATOR BUDGE: (Tape inaudible.)

CHAIRMAN NOH: One more question. Where are we say up in the Spokane River system, if the governor goes to Washington Water Power and says we want to negotiate a minimum flow so we can have further development and Washington Water Power says no, no, I won't negotiate, then where are we?

MR. KOLE: Mr. Chairman, first off, I think it's probably not well known, but we have already opened up discussions with Washington Water Power

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and they have indicated that they do want to negotiate. So I would think that the possibility of them absolutely refusing to negotiate is small.

But if they did, we would of course be in the same type of situation as we were with Idaho Power Company. We'd be in a lawsuit. But they have indicated that if this program passes, if they have the authority to negotiate with the governor, they intend to so do.

CHAIRMAN NOH: Now, is it possible, looking at future hydro development, say whatever it is, a hydro development on the Bruneau River or on the Salmon River or wherever it might be, is it possible for the director of the State of Idaho to subordinate those future hydro rights without officially establishing a minimum flow on the stream? How would that work? In other words, does the future subordination authority buy anything other than these waters placed in trust through minimum flow?

MR. COSTELLO: Yes, Mr. Chairman. Subparagraph 6 found under Section 2 of the main bill authorizes the director to impose this subordination condition on new permits and licenses for power purposes. And that is not in

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any way tied to the preceding five paragraphs, so it would just be a straight subordination condition.

I think the real question that you raise, though, is if he does that in the absence of a minimum flow, where is that right in terms of this regime established in the preceding paragraphs where it talks about the rights below the minimum flow being unsubordinated and the ones above it being held in trust, which is clearly that regime contemplates that there would be a minimum flow there, and we did not really intend that it would apply across the board if there were no minimum flows in place at that time?

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Why is the provision, Mr. Costello, that's on that same subsection that authorizes the director to limit a permit or license for power purposes, why is that any part of this Swan Falls settlement?

MR. COSTELLO: Mr. Chairman, with the senator's permission I defer to Pat Kole.

CHAIRMAN NOH: Yes.

MR. KOLE: Mr. Chairman, Senator Ringert, with the qualification of that, I'm not sure I can

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answer the question in terms satisfactory to you. But basically there's always been a question as to what the state's authority is pursuant to the 1928 constitutional amendment. And in taking a look at that issue, while there is good authority for the proposition that amendment was self-executed, as part of the settlement negotiations the attorney general believed that there should be specific authority given to the director to subordinate hydropower water rights, and that's what paragraph 6 does.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: This agreement is being promoted very heavily, I feel. The local newspaper is telling us through its editorial that the legislature should not mess around with the settlement in any way, shape, or form. And I don't see any reason at all for that particular provision which will affect a great deal of small hydro permits and applications to be in this tagging along on the emphasis that's been raised by the rush to settle the Swan Falls controversy.

The last one I saw like this was a rider on an 1888 appropriation bill in the United States Congress that tied up all the water in the

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western United States and all the land for the western United States for the next three years until they got the 1891 amendment of the present land law.

Now, would somebody tell me why this has to be in this Swan Falls settlement?

CHAIRMAN NOH: Any other comments?

MR. KOLE: Mr. Chairman, Senator Ringert, basically all paragraph 6 does is grant authority. It does not require the director to subordinate hydropower water rights, nor does it make it mandatory. In certain situations where there is productive upstream land that could be developed, the director will have to sit down and take a look at whether or not he should subordinate the hydropower license. Obviously if the director's determination is arbitrary or capricious or contrary to the policy set down by the legislature, then this decision could be appealed in court.

But I think the reasoning why it is here is because it was felt that the Swan Falls situation would not have arisen had the legislature enacted similar laws back in 1928. And the effort here was to make sure that as best

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we can foresee, we do not get ourselves into another Swan Falls situation in the future. That's the reason why it's in the agreement and why we think it's necessary.

CHAIRMAN NOH: In other words, we might head off a lot of court case and legal costs at some time in the future by acting now?

MR. KOLE: Mr. Chairman, that's correct.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: I can't let that go without one more comment. I think I know why it is here in this bill, but nobody has yet said that it's essential to settlement of the Swan Falls controversy.

CHAIRMAN NOH: Mr. Dunn.

MR. DUNN: Mr. Chairman, the primary reason I see it there is to avoid Swan Falls from recurring again. Without that, if Idaho Power Company decides to build one of the dams they have proposed on the Snake River, we're back in Swan Falls if there isn't clear subordination authority for any other group. It isn't just the small hydros. It's virtually all the small hydros that are high enough up in the basin that there is no development occurring above them.

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CHAIRMAN NOH: Questions? I might then with your permission, even though the legislation having to do with the Public Utilities Commission isn't before this committee, just for our edification, if I could call upon one of the commissioners, whoever would like to be the spokesman, or perhaps we might ask several of them to speak because often there's a difference in agreement among them on various issues as to how they're viewing this agreement, and particularly I've heard the question raised that if they adjudicate the legislation as drafted protecting Idaho Power from claims for failure to defend their water rights, would it apply to all waters rather than just those placed in trust through these kinds of agreements?

Do you gentlemen feel that you're going to have sufficient authority under the legislation to assure that the company doesn't dispose of or sell its water rights other than those which have been properly dealt with through this settlement legislation? Gordon (phonetic)?

UNKNOWN SPEAKER: Mr. Chairman, I haven't taken a look at that lately. I brought over the two bills that were on the agenda, so I really

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haven't given any thought to that. Commissioner High may have.
CHAIRMAN NOH: Mr. High, would you want to speak to that?
MR. HIGH: Yes. I think the crucial issue with respect to your question is not the bill before you but Senate Bill 1007.
CHAIRMAN NOH: Correct.
MR. HIGH: And that I might -- if you don't have it before you, it's a bill.
CHAIRMAN NOH: It was introduced through our committee.
MR. HIGH: Fine. That I think is extremely essential because in effect it clarifies the legal status of gains from sale and dedicates the level of the benefits from the sale to the customers of the company rather than to the shareholders of the company. It in fact sets the title of the water in the hands of the rate payers rather than the shareholders. And I might add that I think whatever happens to all these other bills, that bill should pass.
CHAIRMAN NOH: How about the other bill that affects -- that protects Idaho Power from claims by rate payers?

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MR. HIGH: I see no problem --
CHAIRMAN NOH: I heard it argued that that bill is too broad, that in effect it would free Idaho Power from failure to protect even their unsubordinated water rights inclusion within the minimum flow and wouldn't just protect them from claims by rate payers for that water which is in effect subordinated through the agreement process. Have you had a chance to examine that?
MR. HIGH: Well, perhaps in the bills you have before you and speaking to that water below the 3900 minimum flow, I would think the power company would have no incentive to deal with that water if all the benefits went to the rate payers. In other words, I can see where in response to Senator Crapo's question you could really deplete the water down to 3900 second feet. Remember this 3900 second feet was established by negotiation process taking into account historic flows, updated current projected conditions, and that there's nothing more uncertain than stream flows. And that uncertainty, and perhaps the committee would like to take into effect and set aside something more than 150 second feet for industrial future municipal uses. There's a protection

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against that uncertainty factor. And the uncertainty isn't just the demand kind of things (tape inaudible). Maybe I'm not responsive.
CHAIRMAN NOH: Senator Crapo, excuse me, then Senator Beitelspacher.
SENATOR CRAPO: Mr. Chairman, if I could address one more question in that regard.
CHAIRMAN NOH: Certainly.
SENATOR CRAPO: Were you suggesting, sir, then we as a committee specify or can the legislation specify certain amounts to be set aside as dedicated to industrial uses and specifically subordinate other uses in that amount?
CHAIRMAN NOH: Mr. High.
MR. HIGH: Yes, Mr. Chairman, Senator Crapo. In designing this package, I think as Mr. Nelson indicated, the minimum flow has to be tied to the public interest criteria. And if you take the minimum flow as something in the public interest, the minimum flow is rather meaningless if the process gets you down to 3900 second feet and suddenly the long-term climatic conditions change and you have a need to supply new municipal or other needs. And we all know that will deplete

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the minimum flow of those prior to the first priority.
And as a factor in your deliberations on public interest, I would suggest a paragraph be put in recognizing uncertainties and perhaps reserving something more than the 3900 second feet to recognize that uncertainty.
MR. SWISHER: Mr. Chairman.
CHAIRMAN NOH: Yes. Mr. Swisher is here, too.
MR. SWISHER: Chairman.
CHAIRMAN NOH: Yes, sir.
MR. SWISHER: With respect to the uncertainty with respect to the reality (tape silent) --
UNKNOWN SPEAKER: To the extent the director needs a moratorium while he's (tape inaudible).
MR. SWISHER: As for Senator Crapo's concern, historical water development has been based on the ability to assess the charges awarded to those who gain from a project, a fast way of oversimplifying the history of water development. But having watched three successive years of surplus run down the river and in watching the Boise River, for instance, be full bank to bank

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eight to nine months of the year for three successive years, it certainly occurs over and over again that some state law, I mean statewide, not just the Snake River Basin, needs to be put in place for water retention other than pure diversion for downstream use. That is to say when the Boise River is running that full, the Owyhee on the southwestern end and the aquifer of the Mountain Home desert is going down, that doesn't make sense when water is rushing down the Henry's Fork and nothing's being added to the creek. When the water is flooding Pocatello on the Portneuf and may put the temple under water in Salt Lake, it doesn't make sense (tape inaudible).

So following on this parcel, there is concern (tape inaudible) legislative policy with respect to statewide actions under a bonding program or under something in concert with additional reclamation sort of projects, treat the water in the future in the same manner that we have in the past.

CHAIRMAN NOH: Thank you, Mr. Swisher. Okay. Are there any other questions that we want to delve into? Senator Beitelspacher?

SENATOR BEITELSPACHER: (Tape inaudible.)

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MR. WARD: Mr. Chairman, I thought I would try to answer your original question now that I had a little time to look at it.

CHAIRMAN NOH: Done your homework.

MR. WARD: SB 1005 again. It seems to me there's probably not any question of the defense provided in 1005 being used for anything other than the matters specifically touched on in the contract. You have more lawyers here than you need. But it's what lawyers call an affirmative defense. It would deprive the PUC of jurisdiction, but it first must pertain to something relating to the contract. But it looks fine to me.

CHAIRMAN NOH: Thank you. Senator Beitelspacher.

SENATOR BEITELSPACHER: Mr. Chairman, since we have so many attorneys here, if we could go to page three of 1008, you'll surely recognize my limitations being from Northern Idaho. I'm just trying to get the water off the roads.

Page three between No. 5 and No. 6 we have the governor is empowered to enter into agreements defining that portion of a water right as being unsubordinated. And then on 6 you have

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the director having the authority to subordinate rights.

As I recall, the director works for the water board, which the Constitution and the Supreme Court case we touched upon over the last few years is set up as another entity, so to speak. Do we have a conflict there? Do we have another constitutional body in a sense that is outside of the reach of the governor that has the authority to subordinate water and another constitutional entity that has the authority to –

MR. COSTELLO: Mr. Chairman, Senator Beitelspacher, the authority granted under paragraph five is to enter into contracts which are not self-executing. Any contracts -- all this does is really authorize the governor to go out and negotiate contracts to bring to the legislature for ratification. None of them take effect unless they are ratified by law.

And because of that, in my view at least, I don't think this would raise any constitutional issues of separation of powers, either vis-a-vis the legislature or the water board, particularly given the passage of the constitutional amendment this November.

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CHAIRMAN NOH: Along those same lines, would you care to outline briefly just exactly what are the limits and the extent of a governor's power to grant water rights through the trust agreement. Sometimes -- this trust agreement has sometimes been interpreted as granting of the governor an inordinate amount of authority saying who gets water and who doesn't get water.

MR. COSTELLO: Yes, Mr. Chairman. As a matter of fact, when I was glancing through the attorney general's testimony I was a little troubled by a statement here that the governor would be empowered under this to approve of water to be allocated under the trust. That's not really what was contemplated here at all. This is strictly a passive trust over which the governor will not exert any active discretion. It's modeled after trusts that are set up to reserve water in certain lakes around the state. There are half a dozen of these trusts set up by Idaho law. The governor is named as trustee just because you need an individual to be sued in the event of some squabble over the trust assets.

And beyond that, it's automatic that water rights flow out of the trust into private

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hands if they are granted in accordance with state law. So it 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, and the company retains the beneficial use of the water as long as the trusts last. But it's a passive trust. No active role is taken by the trustee.

CHAIRMAN NOH: Mr. Kole and Mr. Nelson, do you concur with that interpretation?

MR. KOLE: Mr. Chairman, I do. In looking at page three, I think that is slightly inaccurate. 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. So I think that basically the last paragraph, it should not read the "governor will be empowered" but probably the "director will be empowered" to release water. And I'm referring to our prepared testimony.

CHAIRMAN NOH: You're referring to the testimony rather than the release?

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MR. KOLE: Yeah, that's correct, Mr. Chairman. That's really just an oversight that should have been corrected.

CHAIRMAN NOH: Fine. Mr. Nelson, is that the way you understand it?

MR. NELSON: Mr. Chairman, members of the committee, that's correct. And I think it's clear on page three the senator referred to lines looks like it's to 20, but it's about 16 through 19, the rights have to be acquired pursuant to state law. Under state law unless you change it, the governor plays no part in that process.

CHAIRMAN NOH: Okay. Other questions? Mr. Crapo. Excuse me. Did you want to comment further on that, Mr. Kole?

MR. KOLE: Mr. Chairman, thank you. Excuse me, Senator Crapo. Just on that trust provision it should be noted that the ultimate control over those trusts does rest with the legislature. They created those trusts, and of course they can alter them or take whatever steps are necessary.

CHAIRMAN NOH: Yes, Mr. Crapo.

SENATOR CRAPO: Mr. Chairman, my question relates primarily to one of procedure here in committee. Perhaps everybody knows the answer but

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me because I'm a freshman senator. But it seems to me that we need to leave a very good track of legislative history on this set of legislation because at least as I study it it needed some clarification in my mind. And I am sure there will be a lot more testimony and evidence presented with regard to the hearing.

Is it already set up by some mechanism that the testimony which is recorded here today and the prepared testimony and so forth becomes part of the written or prepared record that we direct it be maintained so that in the future there can be reference made and we can ensure that the intent of the legislature is followed?

CHAIRMAN NOH: Well, Senator Crapo, we might defer to Senator Budge. My understanding is that we have no financial provisions or procedures in precedent to do that. All I personally had in mind was to ensure that these tapes are -- that there's more than one copy of the tape and that they're placed in the records in the Department of Water Resources to create as good a record as we can.

I presume it would be possible to get an appropriation or some way or other have tapes

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transcribed if we could. But certainly written testimony, those sorts of things, I intend to attempt to preserve as best we can.

But is that correct, Senator Budge, we have no formal means of doing that?

SENATOR BUDGE: No, we don't have that. I think you're accurate in the tapes, keeping a record of the tapes, and also accurate notes.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Mr. Chairman, members of the committee, there is a problem even with the tapes because that is merely a record of the committee proceedings and does not necessarily reflect the intent of the other 30 senators who will vote on the floor. So it's a very nebulous job in Idaho to determine what is the intent.

CHAIRMAN NOH: Senator Crapo.

SENATOR CRAPO: Mr. Chairman, I'm aware of that. I guess as an attorney I do a lot of searching through legislative history where it's available to figure out what laws mean. But it definitely in my opinion would be beneficial to have as much preserved as possible.

For example, the written statement by Attorney General Jones, Jim Jones, was helpful and

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perhaps maybe we can just encourage those who appear before the committee in the future that if they would like to ensure that their understanding of the bill at least as represented in the legislative history as being something that would at least be considered that we make an avenue available for that to be done.

CHAIRMAN NOH: That's a good point. We certainly want to in the future cut down all the time we have to invest in attorney services searching through records. Senator Budge.

SENATOR BUDGE: Mr. Chairman, members of the committee, I think the nature of the legislation itself justifies very accurate records to be referred to in the future to be available.

CHAIRMAN NOH: Senator Horsch.

SENATOR HORSCH: Mr. Chairman, similar to Senator Crapo, I must defer my years because of my freshman status over here on the Senate side, but in the House by majority vote we have spread upon the pages of the journal a letter of intent.

CHAIRMAN NOH: Yes.

SENATOR HORSCH: And you can make that as long as you want. If you can get a majority vote, you can put every bit of the notes in the journal.

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CHAIRMAN NOH: That is correct. Senator Beitelspacher.

SENATOR BEITELSPACHER: Yes. Thank you, Mr. Chairman. Back to No. 6, if I might, 42-203B, "The director shall have the authority to subordinate the rights granted in a permit," et cetera. Where are we at with compensation then for the holder of a hydropower right at a later date? In the event that -- let's assume that I invest 5 or 6 million dollars or 10 million dollars, whatever it might be, in a small hydro right, have it producing. PUC and FERC in their wisdom determine I should receive some compensation from a power company for that. And Senator Peavey buys a sheep allotment above me and decides to water the grass up there for those little lambies. Where am I going to be with my investment once he starts pulling the water out of the creek for his sheep?

MR. NELSON: Mr. Chairman, senator.

UNKNOWN SPEAKER: Do I have a paddle?

MR. NELSON: You don't have a paddle and it's all downhill. If as is the practice now your permit was subordinated when issued, you would be subject to Senator Peavey's lambs. Now I

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understand that lambs don't actually keep much of the water you run through them, so you may not be hurt too badly. But you would be -- if your permit had been subordinated, you would be subject to his depletion. If it were not subordinated, if the director decided in his wisdom that you should have a chance to get your project paid out before the subordination took effect, then you might have a right to compensation in that situation.

CHAIRMAN NOH: Senator Beitelspacher.

SENATOR BEITELSPACHER: Mr. Chairman, Mr. Nelson, is it all entirely up to the director as to whether or not I receive compensation or not? And is there anything in here that sets up criteria by which he shall determine how much I shall be compensated, or is that to be promulgated by rules and regulations at a later date?

MR. NELSON: Mr. Chairman, senator, the compensation issue would follow the subordination issue initially. If you were subordinated, you would have no right to compensation. And it is solely the director's discretion as this is written to implement the constitutional provision. So he has no guidance. My guess is that hen's teeth and unsubordinated power rights from now on

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are going to be about on a parity.

CHAIRMAN NOH: Mr. Dunn, do you care to comment on hen's teeth?

MR. DUNN: Mr. Chairman, I found a hen's tooth. One of the things that we're trying to do on small hydro and it would be one of the things we would define in the rules and regulations is that if those small hydros where just a small amount of water makes a drastic change in economic effect of it is to issue the permit for a period of time. We would look at the payout period of the project and at that time then look at subordination. Where it's necessary, we can protect that plan for a time so there isn't a major economic disaster. But they don't have protection in perpetuity.

CHAIRMAN NOH: Thank you, Mr. Dunn. Okay. Anything else? Are you ready to call it quits for the day? And I look forward to our 7 o'clock Monday evening public hearing where we'll take testimony. Anything else for the good of the order?

I want to thank you all for being here today. Depending on the wishes of the committee, we may have another session. I guess we're

adjourned.

(Meeting concluded.)

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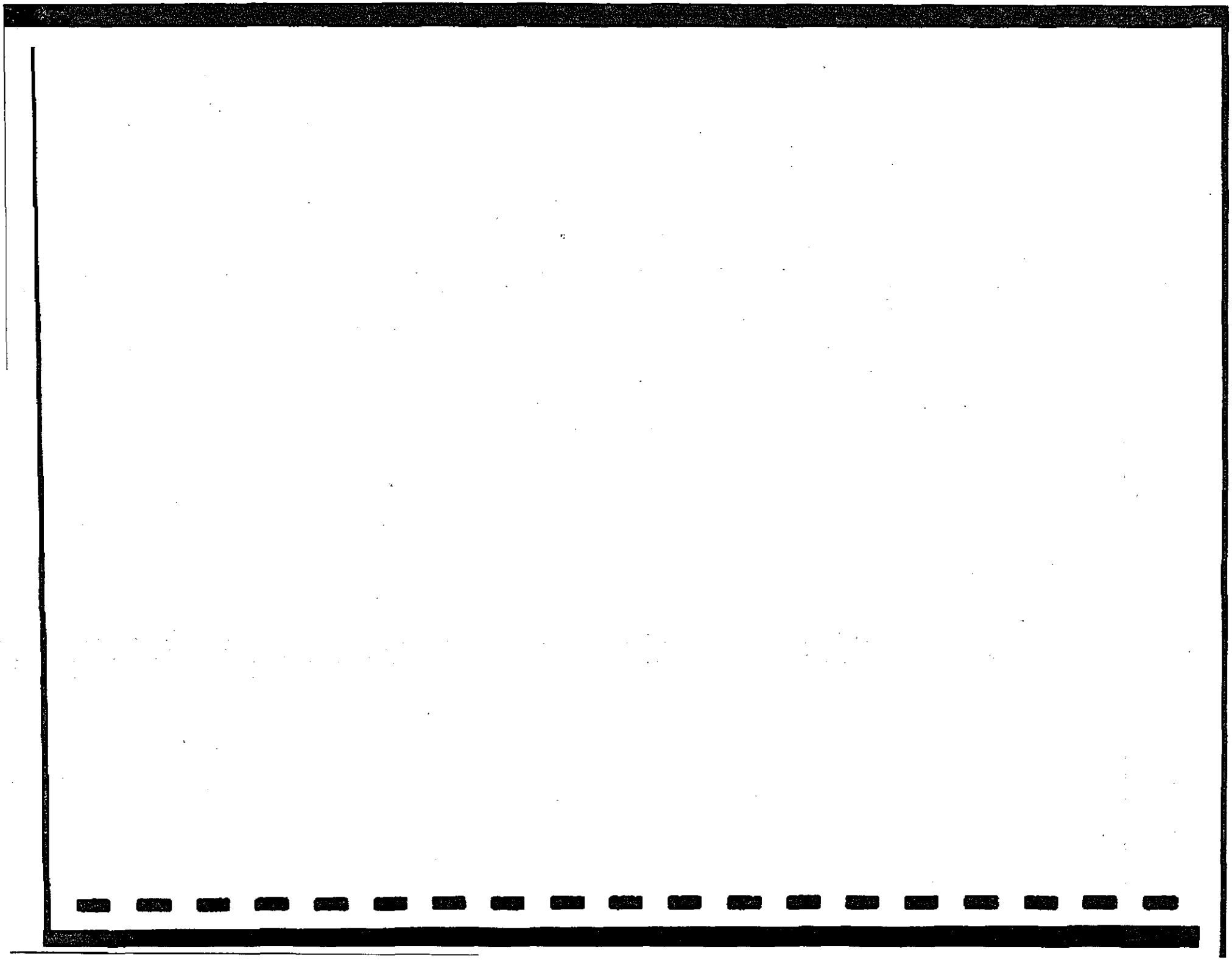
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REPORTER'S CERTIFICATE

I, Patricia J. Terry, Certified Shorthand Reporter, Registered Professional Reporter by testing, a Notary Public, do hereby certify:

That I am the reporter who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

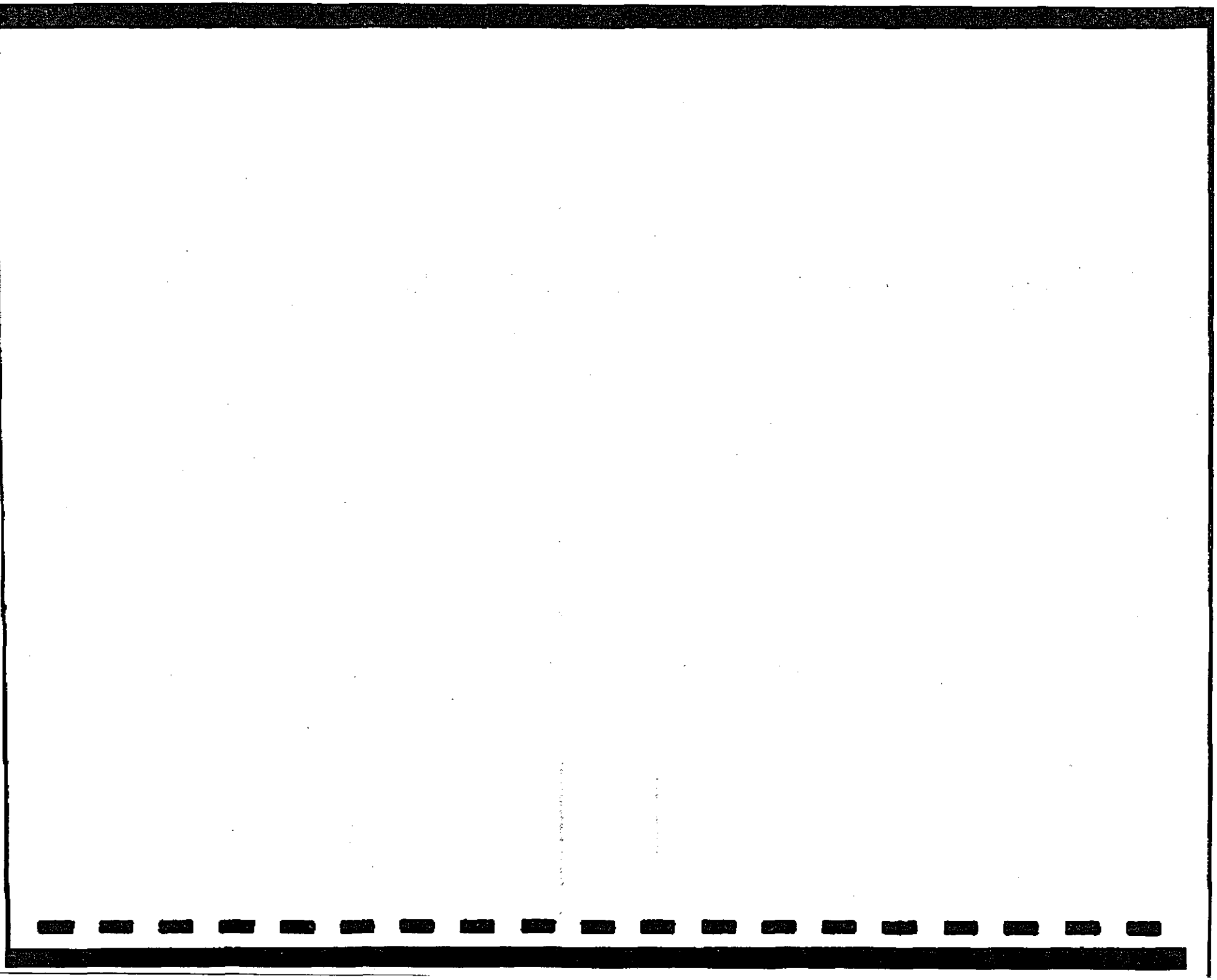
That the foregoing reporter's transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at Boise, Idaho.

I further certify that I have no interest in the event of the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th of February, 2007.

Patricia J. Terry Court Reporter
CSR No. 653

PATRICIA J. TERRY
NOTARY PUBLIC
STATE OF IDAHO



ADDENDUM I

TRANSCRIPT OF PROCEEDINGS HELD ON JANUARY 25, 1985 BEFORE CHAIRMAN NOH

RESOURCES AND ENVIRONMENT COMMITTEE

* * * * *

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 hydropower purposes

TRANSCRIPT OF PROCEEDINGS

Held on January 25, 1985, 1:30 p.m.

before Chairman Noh

* * * * *

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APPEARANCES

PRESENT:

Chairman Noh
Senator Beitelspacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Kiebert
Senator Little
Senator Peavey
Senator Ringert
Senator Sverdsten
Senator Tominaga
Pat Costello, Governor's Office
Pat Kole, Attorney General's Office
Tom Nelson, Idaho Power Company
Ken Dunn

* * * * * *

RESOURCES AND ENVIRONMENT COMMITTEE

* * * * *

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 hydropower purposes

TRANSCRIPT OF PROCEEDINGS
Held on January 25, 1985, 1:30 p.m.
before Chairman Noh

* * * * *

Transcribed by
Debora Ann Kreidler
CSR No. 274

APPEARANCES

PRESENT:
Chairman Noh
Senator Bottelsgacher
Senator Budge
Senator Carlson
Senator Chapman
Senator Crapo
Senator Horsch
Senator Kleber
Senator Little
Senator Peavey
Senator Kingert
Senator Sverdsten
Senator Tominaga
Pat Costello, Governor's Office
Pat Kole, Attorney General's Office
Tom Nelson, Idaho Power Company
Ken Dunn

* * * * * *

JANUARY 25, 1985

THE CHAIRMAN: Some interest, I know, in -- somewhere or other to develop legislative intent to go along with this. Perhaps what we should do first is call upon some of the negotiators to discuss with us those points that were raised at the hearing.

Who's prepared to do that? Who would like to do that? Where's Mr. Kole? I guess he's going to be a little bit late, isn't he?

UNIDENTIFIED SPEAKER: I don't know where he is.

UNIDENTIFIED SPEAKER: Mr. Chairman, he's at the judiciary committee very briefly on a victim's rights bill.

THE CHAIRMAN: Okay. Well, maybe we'll --

MR. NELSON: I can -- there's certain comments made at that hearing, Mr. Chairman, which I have addressed briefly in a written statement which I've submitted to the committee.

THE CHAIRMAN: Right.

MR. NELSON: And I would assume (unintelligible).

I think one item of general discussion might be the -- how the criterion in 203(c), the

so-called new public interest criteria, fit in the existing process. Senate Bill 1008 remodels existing 203 only to the extent to make it a complete sentence in the body and to renumber it A. I believe there's a publication to that in that section. But basically, the existing public interest criteria, speculation, financial responsibility and so on, and remain exactly as they are today.

The 203(c) criteria are new. And the 203(c), as written, requires, essentially, a three-step process. Although, in all actuality, I assume it will be in one administrative hearing. We'll review the existing criteria to make sure it passes muster under those standards. You determine that the proposed use will or could have a significant impact on existing hydropower right. And then, after you have those two determinations out of the way, then you address the new public interest standard.

So to me, the way the bill is structured can be no question of impairing any existing public interest review. Whatever that statute says now, it continues to say. This is a new review on different issues. And 203, as it now exists, will

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continue to exist in just exactly that fashion. If 203 as it exists now is inadequate, I think those inadequacies should be addressed in separate legislation, and not tacked onto this one.

Admittedly, the negotiators and the parties approached the Swan Falls resolution from the standpoint of litigation. There were certain issues in that litigation. The compromise addresses those issues in that litigation and doesn't purport to be an across-the-board public interest reallocation to review of what we had. So I don't think those kinds of criticisms are really valid with where to go with the structure.

THE CHAIRMAN: Mr. Kole, do you want to -- what we're starting on here, Pat, is just a general review of the points that were raised at the hearing.

MR. KOLE: Thank you, Mr. Chairman.

Yes, I have specific comments prepared on the testimony of Mr. Runft. And I would like to begin by pointing out that Mr. Runft's first observation that this is a hybrid is correct. And that's because we intended it to be that way. We were trying to address two issues, first, resulting lawsuit, and secondly, more importantly,

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providing a mechanism in state law so that Swan Falls type problems, it could be resolved without expensive litigation.

And I think as we pointed out last week, there are other problems like this throughout the state. And the Spokane River is a prime example. Now, Mr. Runft's second suggestion, it created exemption process whereby certain hydropowered water rights could be exempted from the subordination process is precisely what we have done with these two bills. We have created a process where the director will make a determination as to whether or not a certain water right should be subordinated or not be subordinated.

Now, in making that determination, now, if you look at 1006 in combination with 1008, he's got to promulgate rules and regulations that will come back before you for your review. And those will set forth the criterion under which subordination will take place. So I think it's very important to look at the bills in toto and realize that precisely what Mr. Runft's concern is is what we are addressing.

His third point was that the word state

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action in section 42-203(b)(3) is too broad a phrase. And quite frankly, in negotiating this particular proposition, what we were concerned about was SJR 17 -- 117 which was the current resolution last year which addressed how you create minimum stream flows. We wanted to leave the authority open that this or future legislatures, they want to become more actively involved in the minimum stream flowing process. So we did not want to preclude you from being able to act in this area. And that's the reason for using that term.

Mr. Runft next contended that there was -- there would be an inability to obtain financing if there was a subordination condition placed into the hydropower water rights. That, frankly, is factually erroneous. To date, the department has issued over 216 subordinated water rights. And not one of those projects has had difficulty obtaining financing. In fact, many those projects not only have obtained financing, but are now in the process of being put on-line. So those are -- just hasn't happened.

The wonders (phonetic) that we've talked to, including insurance companies that questioned us

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about what a subordination issue has meant, have all indicated that they have no problem with the subordination conditions.

He also objected to having a term permit. That's been our understanding that one of the concerns expressed by many legislators has been we don't know how to predict the future. What happens if there are new alternative sources of energy available that are cheaper than hydroelectric generation. In that case, we would want to have the authority to reallocate that water. All that term permit does is give you the authority to wait around and come back and take a look at the situation if you so desire. If you don't, that water right, in turn, can be reinstated and there shouldn't be any problem.

He finally argues that the permits that have been issued as to the state should be grandfathered in. So if you look at the case of Hidden Springs Trout Ranch at 102 Idaho 62.3, the Idaho Supreme Court addressed that issue quite specifically and found that the legislature could act in the area of permits, (unintelligible) permits could do. So I would suggest to you that it's very important to maintain the flexibility in

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the criteria that you have before you.
One other point he made was that the permits that are out there should not be reevaluated. Well, one of the primary concerns of Idaho Power Company and other users has been that there are so many permits out there, they could have an adverse impact on our ability to manage the stream system. If agricultural permits are going to be reevaluated, it struck negotiators that it would be only fair that all permits be reevaluated.
I do have his testimony reduced to writing. And there were supposed to be copies provided to you. I don't see them here, so I'll leave the written comments with the secretary for including them in the record of these proceedings. I'd be happy to stand for questions.
THE CHAIRMAN: Is there questions?
SENATOR RINGERT: Mr. Chairman?
THE CHAIRMAN: Senator Ringert.
SENATOR RINGERT: Pat, right there at the end, you mentioned the review process was important because you needed some authority or flexibility in managing the water resource. Could you expand on that a little, please?
MR. KOLE: Mr. Chairman, Senator Ringert,

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I'm not sure I understand precisely your question.
SENATOR RINGERT: Well, I'll try to simplify it.
Why do you need to review authority on existing permits?
MR. KOLE: Mr. Chairman, Senator Ringert, it's our understanding there are a number of permits out there, basically, and if they were to be developed, they would, in effect, take all the available water for appropriation in the Snake River system. By reevaluating and looking at those permits in accordance with the new public interest criteria, we believe that we will be able to more effectively manage the resource and get additional development over that which would occur if we were to follow a strict priority approach.
THE CHAIRMAN: Mr. Ringert.
SENATOR RINGERT: What causes you to believe that? I mean, what empirical value do you have that tells you that that's the proper way to go.
MR. KOLE: Mr. Chairman, Senator Ringert, I would like to defer that question to Ken Dunn because he's completed the analysis (unintelligible).
THE CHAIRMAN: Mr. Dunn?

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MR. DUNN: Mr. Chairman and Senator Ringert, the number of outstanding permits, if they were all developed, would lower the minimum flow of the Snake River to the present minimum flow. And that's based on those permits that were available in 1976, permits and applications. Since that time, there have been a number of others that have been approved.
Once you put the lid on it, the propensity to develop, because it's the last opportunity you have, and you start making people develop (unintelligible) they might not otherwise have. So there are outstanding applications and permits to do that, if they were all available.
SENATOR RINGERT: Well, Mr. Chairman?
THE CHAIRMAN: Mr. Ringert.
SENATOR RINGERT: To continue the line of questioning, won't the priority system take care of existing water rights and protect them? Or doesn't our priority system work anymore.
MR. DUNN: Mr. Chairman, Senator Ringert, priority system works if you didn't have moratoriums and other things involved. The moratorium we're talking about are Bureau of Land Management. Bureau management of land. As you

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know, Desert Entry and Carey Act filings have not been approved for a number of years. That builds up a big backlog of things. The water right filings have been made. We're in a situation where people who were not going to the Carey Act or DLE, and some of them who were able to go around that have developed. And they have a later priority than some of these outstanding permits. It's just a fact of life.
Once you start managing the resource, and you're at the -- start approaching the end of the development, priority system creates a lot of diseconomies (phonetic). You have later rights developed and earlier rights undeveloped and no water. So you can develop the early ones and go in and try and shut off the later ones. It really makes no difference.
THE CHAIRMAN: Mr. Ringert?
SENATOR RINGERT: Mr. Chairman, isn't that the appropriator's risk, Ken, that he has his land available first, that's one thing, but he -- shouldn't he recognize that his permit is a later priority date, he runs the risk that he might wind up short of water if somebody else comes on line in accordance with the priority of their permit?

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MR. DUNN: Mr. Chairman, Senator Ringert, I think that's right if you have a normal system operating, which we do not have. We have the government in the process of having messed it up to begin with. Due to decision, right or wrong, the decision was to not create a land rush, therefore, the development didn't occur for whatever reason.

SENATOR RINGERT: One more, Mr. Chairman, and then I'll get off (unintelligible).

THE CHAIRMAN: Senator Ringert.

SENATOR RINGERT: Are we then governing with policy in this state where land and not water sets the priority?

MR. DUNN: Mr. Chairman, with this bill, I think you do it different than that. You start setting the priority in terms of good economic development. For example, if the outstanding permits are let with no further review, many of them are for extremely high lift pumping plants directly out of Snake River. And once that occurs, you have immediate depletion. And the amount of land that you can develop in shrinks dramatically because you don't have the return flow. You don't have water coming back from above

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Swan Falls. The economic expansion in the state is going to be very small.

That's one of the reasons in all our discussions we've said the best development would be further upstream in the Snake system. The high level pumping is a direct diversion from the river, which has an immediate effect on hydropower. And it also requires substantial land to get the water up there. And if somebody knows that, whoever they are, that that's the only opportunity they're going to have to get water, you don't do it now, you're going to lose it, you start driving the decision not based on good economics, but on the fact if I put it in, I might make it, it's worth a chance. You let bankruptcy in the come back. That's not good for the economy.

SENATOR RINGERT: One thing leads to another.

Ken, this economic and foreign commodity situation, I personally, I really have doubts that we're going to see anymore high lift projects of great consequence, particularly if they're a direct diversion during irrigation season so that they have to have enough capacity to pump their

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needs 24 hours a day throughout the irrigation season. But then, are we coming to the point where your Department's determination of economic feasibility, suitability and efficiency is going to determine the priority of use of water?

MR. DUNN: Mr. Chairman, Senator Ringert, I think we're coming to the point in time Snake Basin where there isn't enough water to meet the needs. In this situation, we're not coming to the point where my department is going to make the decision of priority. We're coming to the point where the legislation you pass, the rules and regulations I adopt and you approve will set some general priorities of what has to be done in order for somebody to be able to use water in the state. It will not be a strict first in time, first in right, no matter what, you get the water. In the extreme scarce resource, I think those kind of changes need to be made.

THE CHAIRMAN: Are there other questions of Mr. Kole or Mr. Dunn? Are we going to have all our questions answered?

Senator Crapo.

SENATOR CRAPO: Mr. Chairman, is Mr. Costello going to make any statements today?

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THE CHAIRMAN: Mr. Costello, do you have something for the good of the order here?

MR. COSTELLO: Thank you, Mr. Chairman, Senator Crapo. I believe that I would just associate myself with the remarks of Pat and Tom. The one additional point that I would cover, yes, concerns comments at the public hearing, and I believe also Senator Crapo made at the last meeting of this committee regarding the absence of mention in the public interest criteria Senate Bill 1008 of uses other than agricultural uses. And all I would like to do is point out that you don't even reach the public interest criteria unless you first find that the proposed use would result in a significant reduction of water available for hydropower.

Most of the other uses and nonagricultural uses, particularly domestic, commercial, municipal and industrial is almost entirely nonconsumptive. And virtually all of those uses would never reach the public interest criteria. The only exception would be, I suppose, some particular industrial application. But certainly something like that, another hydro project, for example, would be strictly nonconsumptive and the public interest

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criteria would not even apply.
And that's the only thing that I have.
THE CHAIRMAN: Yes, Senator Crapo?
SENATOR CRAPO: For a question –
THE CHAIRMAN: Certainly.
SENATOR CRAPO: Mr. Costello, did the negotiators get into any detail as to what is meant by significantly reduced?
MR. COSTELLO: Mr. Chairman, Senator Crapo, no, we did not. That would be left to be fleshed out by Department of Regulations just as the criteria themselves would have the further detail of the regulation.
SENATOR CRAPO: And maybe this question could be answered by any of the negotiators. I wonder if any of the negotiators even have any ideas or guesstimates of what that phrase means that we could just be enlightened with. For example, would it be a significant reduction if a well was going to have an impact ten years down the line of some small amount? Is it defined in terms of time? Is it defined in terms of amount? Or what is contemplated here by the Department?
MR. COSTELLO: Mr. Chairman –
THE CHAIRMAN: Mr. Costello.

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MR. COSTELLO: -- Senator Crapo, the phrase is individually or cumulatively with other uses. So if you had a well pumping from the aquifer which would not impact the river for ten years, but if you can project that if there were a number of wells in the same vicinity, and that that would have a result at Thousand Springs of X CFS in the year 2000, whatever, yes, it would be possible, in my view, to find a significant impact.
THE CHAIRMAN: Would either of the other negotiators care to comment on that?
Mr. Nelson, Mr. Kole?
MR. NELSON: Mr. Chairman, Senator Crapo, I don't think that that phrase is much different than the burden your company faces with the existing lawsuit. I think that in order to get relief from the Court, it is incumbent on the company to show potential for a significant impact from either an area or a group of people, or however the Court wanted to analyze it.
To me, when you look at the sophistication of the gauging systems on the Snake and so forth, you may be looking at something, perhaps, that we could theoretically measure, for example, in the river. We're now down to the point we're talking

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about 600 CFS. If you look at one CFS out of 600, that could be significant. Maybe the cumulative effect would have to be 2 or 3 or 4. The problem we have is the hydrology of the basin is such that you can argue an isolated effect in a certain part of the aquifer. So significant reduction was intended to allow people to argue with the hydropower right holder that they're not tributary in a significant sense. But we didn't feel we could get more specific than that because of the unknown. But I think that's the burden we have right now, that if we couldn't show the potential for a significant effect in the pending lawsuit, I don't think we can get any relief.
SENATOR CRAPO: Mr. Chairman, I'd like to --
THE CHAIRMAN: Yes, Senator Crapo.
SENATOR CRAPO: -- follow up with a question.
I guess I'm kind of interested in seeing that this 600 CFS that is made available through the trust is made liberally available. And I'm just kind of wondering, is that the intent of the negotiators. Or is it the intent of the negotiators that each time an appropriation is applied for, there's going to be a lot of hurdles

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that any prospective developer must go through? And I guess that's kind of all of what I'm getting here. And maybe the only way to answer my question is to just say yes or no, we do intend, as the legislature or as the negotiators for the legislature to make this something that's liberally available, or are we going to make it restricted.
THE CHAIRMAN: And we might end up saying we want some of each.
SENATOR CRAPO: Yeah, I mean, I don't know – I really don't know what this means is what I'm saying. But I would like to know what we intend it to mean.
THE CHAIRMAN: Mr. Nelson.
MR. NELSON: Mr. Chairman, Senator Crapo, I can tell you where I came down when we were looking at how this would work. And concerns were expressed that you're going to have the ma and pa farm walk in and all of a sudden you've got a hearing room full of people in there to oppose their ten-acre addition to their existing farm. And that's addressed a couple of ways, one, the burden on the protestant, for example. But I think the real protection against that kind of an

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administrative ambush, if you will, is just the way the administrative process works.

For example, any time you go over to the PUC on an electric rate, utility rate case, for example, in theory, you can start at A and go to Z, and you can litigate in front of the Commission every issue that's possible to raise in a utility rate case. But the fact is, when you get there, usually you're down to a couple of things like how are you going to measure rate base, and what's going to be determined (unintelligible). And by and large, the Commission's previous decisions tell you what kind of a rate you're going to get if you want to litigate the other parts of that rate case, so you don't litigate.

In this situation, I have the belief, based on conversations with my counterparts and with Ken Dunn, that that's how this is going to develop, that we'll either have an area-wide proceeding, or a group entry proceeding or -- we won't be faced with a situation where every ten acres comes up naked for a hearing on economic benefit.

So the administrative part here is not going to be a problem, at least once we get used to it. On the issue of whether water is liberally or

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niggardly available, from our standpoint, the fox is probably in the hen house. The decision here is going to be made by the Department that, for a hundred years, has had no constraints except availability of water on approving new development. So this is -- it's a whole new ball game for them.

It's our belief that those decisions will be made on a relatively liberal basis if you can show the economics are there. In other words, that's not going to be a close-run issue. For example, one of the offers I made last year in the subordination fight was that we'll put those kinds of decisions -- we'll be real easy on the subordination bill, but we'll put the decision on the Fish and Game Committee.

To raise the issue that the attitude with the agency that you're before determines a lot on how things are done. So in my view, if the economics are there for a particular use, it's probably going to be approved. I mean, that's not saying anything against Mr. Dunn and what he's been doing. (Unintelligible) mention the budget and the constitution (unintelligible).

But we've got a whole change in state policy

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to implement here. And I don't think it's going to be hard to get a new use of water approved in the system if the economics are there. If they're not there, then it shouldn't be approved.

THE CHAIRMAN: Mr. Kole, would you like to comment?

MR. KOLE: Mr. Chairman, Senator Crapo, just to add one comment, as we went through the negotiations, we tried to protect the small farmer who wants to just (unintelligible). That's why we specifically mentioned the maintenance of the family farming tradition. The idea was that somebody had started the development. They had 120 acres under cultivation, but wanted to add 20 or 30 acres more by leveling and improving their operation. That type of operation would have a little bit of advantage from the statutory process. And that's why we specifically (unintelligible).

THE CHAIRMAN: Tom, do you have anything you want to --

SENATOR RINGERT: Mr. Chairman?

THE CHAIRMAN: Senator Ringert.

SENATOR RINGERT: Mr. Chairman, Ken, on the 42-203(b) in view of permits on page 4, I'm

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looking at that, and I'm also looking at the fiscal notes. I'm sure you have some idea of how many permits have been outstanding, and what kind of review process will be necessary.

Do you have anything in mind for review? If so, how long will it take? How much will it cost the State?

MR. DUNN: Mr. Chairman, Senator Ringert, it will cost the State more than it has cost them in the past. But I do not look at the review as being a detailed review of every permit before you. We're going to ask them areas and fines that are going to be applicable to a lot of permits that come up. And so the first few are going to be expensive by comparing it (unintelligible). And after that, as Mr. Nelson said, if you've got the answers on most of the things, you start getting into one or two items that we'll have to look at.

Secondly, if I might, my proposal is to raise the fees for water rights so that we cover the major portion of that cost (unintelligible).

SENATOR RINGERT: Okay. Couple of things, then. First, will your present staff be adequate to handle the review? And secondly, if we already

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have enough permits issued to use up all the water in the river, when can we expect to have money flowing in from new applications that will help offset some of the general fund costs for permit making?

THE CHAIRMAN: Ken?

MR. DUNN: Mr. Chairman and Senator Ringert, we do have sufficient applications to use up the 600 second-feet. Timewise, I would anticipate by the first of the fiscal year, we would have new regulations adopted and emergency rules so that we could at least get started. And we could try to proceed as rapidly as we can. But we're not going to clear all those up in the first six months. We have on file, I would guess, probably 3,000 water rights applications. It's going to take a long time. We've been collecting them for two years without (unintelligible).

SENATOR RINGERT: Applications.

MR. DUNN: Applications and (unintelligible).

SENATOR RINGERT: Now, staff -- is present staff adequate or --

MR. DUNN: Mr. Chairman and Senator Ringert, I would not plan on adding new staff, because it's

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going to be more heavy work loads and it's going to go back to the normal routine. We would just stretch it out a little longer and we can get it accomplished. As far as fees, we presently have fees to get us through FY 1986 at the rate we've been standing, and with income that comes in. And we still are receiving applications, I'm anticipating.

THE CHAIRMAN: Senator Sverdsten.

SENATOR SVERDSTEN: Mr. Chairman, concerning the testimony given by -- concerning the hydroelectric units on the Little Salmon, how would you proceed with those in relation to the bills? Are they you -- do you see holding them up to any extent? Will they be handled soon? Or what will you do in that area?

MR. DUNN: Mr. Chairman, Senator Sverdsten, the nonconsumptive uses such as that, fish farms and some others, we would process them and have been processing them in a normal time frame. This would not hold them up because they don't create problems in consumptive use. So I think it will go on (unintelligible) just as we've done in the past, but (unintelligible).

(Recording cuts off.)

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UNIDENTIFIED SPEAKER: -- relate to you, it mostly depends on where the development occurred. If it all occurred in the lower part of the Snake, just above Swan Falls and you've taken all the water directly out of the river, you know, you can get to 30, 40,000 acres and use up the 600 second-feet, you don't get the bang for the dollar for the CFS. As you go higher in the system, you're able to develop more because of the current flow.

THE CHAIRMAN: Any other questions?

Senator Crapo.

SENATOR CRAPO: Mr. Chairman, I'm not sure who can answer this question. Maybe I'll just put it out to the negotiators and any other experts in the room. But at the hearing, there was a concern raised about the question as to whether Idaho's going to be able to protect its water for use in Idaho vis-a-vis other states. And I'm not sure whether that's a legitimate concern or not. And if it's possible for water -- for other states to get ahold of Idaho water, I was wondering if somebody could tell us how another state or an entity outside this state would go about getting control of the water in Idaho.

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Does anybody in here know how that would happen or could happen, if it is a real threat?

THE CHAIRMAN: That's a very legitimate question. Maybe we ought to ask the negotiators how they dealt with that particular subject.

Who wants to lead off? Mr. Nelson?

MR. NELSON: Mr. Chairman, Senator Crapo, we didn't specifically deal with it. There's a US Supreme Court case, four maybe -- I think it's a common name -- dealing with exported ground water. The Court, to me, made it pretty clear that its ability to discriminate in favor of its citizens as opposed to citizens of other states is pretty limited.

I think if you want to postulate a diversion so we can talk about it, let's take this specter that's raised about major diversions out of the Snake above the Hell's Canyon project, for example. There, I think if we had a statute or even a constitutional provision that says you flat can't convert water out of the Snake for use in another state, that you're wasting your time to even pass this particular legislation.

But basically, as I read -- and cases like it, that the state's system of allocation and

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appropriation will be honored in that situation, as opposed to, say, an interstate equitable apportionment case in the Supreme Court. There I think the most effective from that happening is probably the minimum flow and other existing rights on the Snake River which would be impacted by that kind of a major diversion from the Snake, say, to Arizona or California.

So to answer your question directly, we didn't address it. I don't think it can be addressed that directly. I would point out that both the FPC and the state license subordination for all of the licenses of Hell's Canyon, except maybe the Brownlee Reservoir license -- I know they're trying to subordinate for that one -- all say that they're only subordinated for uses within the Snake River watershed. So anyone proposing a massive diversion for use outside the watershed would run head-on into a 35,000 second foot water right at Brownlee. And I think when you have 35,000 second feet Snake (unintelligible). So I don't think it's a real concern given both the policies we have in place in terms of minimum flows and the existing water rights on the Snake, that I think we're probably as well protected as

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we can be.

SENATOR CRAPO: Can I ask a few follow-up questions?

THE CHAIRMAN: Certainly may.

SENATOR CRAPO: My understanding, then, wha you're saying is basically the state is protected by Idaho's Power Company's water rights because they are not subordinated for uses outside the state -- or outside the basin.

MR. NELSON: That's correct.

SENATOR CRAPO: I have heard figures saying that over a period of years, even though there's been a lot of water appropriated from the river, the river hasn't dropped an equal amount. And I guess -- I don't know whether those figures are accurate or not. That's probably a good reason to have a hydrologic study done. But if it turns out that a hydrologic study shows that some of the diversions that we're using now for, say, agriculture or other uses that appear to somehow recharge the aquifer a little bit (unintelligible) anyway, if that hydrologic study shows more water available than we now contemplate, would that have any impact on the ability of the Idaho Power Company's water rights to protect us from claims

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that there was extra water in Idaho available?

Am I making my question clear?

MR. NELSON: Mr. Chairman, Senator Crapo, I think I understand your question, Senator. The protection -- my example of the Hell's Canyon water rights and the protection there is protection in the sense that the water would have to remain in the river in Idaho at least to those points. If it were to determined, for example, that the aquifer could safely yield more than our supposed 600 CFS, I don't see how it's going to have any impact on the Hell's Canyon issue. It may have an impact on how much you can develop. And the agreement isn't written around 600 CFS being available for development. It's written around the minimum flow. So if there's more than 600 CFS available for development, it's available. And the contrary, likewise, is true. (Unintelligible) our best estimate of existing conditions.

SENATOR CRAPO: So if I understand correctly, then, what we passed here today doesn't say that there's 600 CFS available. It says there may be 600, there may be 500, and there may be a thousand. Whatever it is, the minimum flow cannot

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drop below the established point at different times of the year.

MR. NELSON: Mr. Chairman, Senator, that's exactly right. All this is is a planning standard against which the state measures new uses. And the state's planning and it's approval of new uses should be aimed at protecting that minimum flow. And if more information's available they can take more without damaging the flow, then so be it.

SENATOR CRAPO: Thank you.

THE CHAIRMAN: Mr. Kole, would you care to comment on this general proposition.

UNIDENTIFIED SPEAKER: I think Mr. Kole stepped out.

(Unintelligible).

THE CHAIRMAN: Mr. Costello or Mr. Dunn, would you care to comment on that, please?

MR. DUNN: Mr. Chairman, I'd like to talk about the other out of state diversion. And that's water staying in the stream and the call on the downstream states. The protection you have there is, one, the power company rights remain in place until the water is used by other users in the state. So there is an existing right. And secondly, if there is a call on that, again, the

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best protection you have is a clear identification of what the water rights are.

There have been some equitable apportionment cases in the United States. And they vary back and forth as to what the Court says. And in some cases, they say each state or each entity has a right to a good portion of that water, 50/50 or 60/40 or however. In the recent case in Colorado, Colorado wanted to prohibit some -- or not prohibit. They wanted to require some more efficient diversions downstream to make water available in Colorado. And the Court said no, they don't have to do that. So depends what you're doing with water, and if you clearly identify it (unintelligible).

THE CHAIRMAN: Senator Tominaga had a question he's dying to ask here.

SENATOR TOMINAGA: It was back when Mr. Kole was here. For example, there's an irrigation project in my area that covers about 75,000 acres. And both negotiators talk about protection for the small farmer. Well, this irrigation company is thinking of picking up 5, 10 acres here, but the total would probably add up to 4 or 5,000 acres in a concentrated -- fairly concentrated area. Yet,

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if each individual farmer was to go in and apply with -- I guess what I'm saying is you're looking at maybe 5,000 acres of land maybe being picked up around this irrigated company. They're only picking up 5, 10, 15-acre plots.

Is that what significantly would reduce the most flows for that particular? And would that development not take place? Because, when you add the cumulative up, it would be significant. If you take it on an individual basis, it would not. And so I'm guessing -- I need to ask whether Tom or Ken or Pat, you know, how --

THE CHAIRMAN: Would you care to comment on that?

SENATOR TOMINAGA: Since we're trying to protect the small farmer, how is that going to, you know, be --

THE CHAIRMAN: (Unintelligible) going to be cumulatively protecting (unintelligible)?

Anyone care to shoot at that one?

MR. COSTELLO: I would -- Mr. Chairman, Senator Tominaga, it would clearly, to me, meet the significant reduction test. And, therefore, you would have to pass the public interest criteria. However, I think it would probably fair

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well under the public interest criteria in that, because the water would be used for a number of small farm operations within the irrigation company, would probably fit the small farming preference.

SENATOR TOMINAGA: One follow-up question. Then could that happen in a cumulative basis all across the state in any area, where, if you have enough cumulative, sooner or later the water's going to run out if the cumulative adds up to the 20,000 or 80,000. So how are we going to handle that?

THE CHAIRMAN: Mr. Costello?

MR. COSTELLO: Mr. Chairman, Senator Tominaga, yes, eventually it will run out. But by giving preference to locations primarily upstream (unintelligible) and groundwater rather than direct pumping, we hope to make it last as long as we possibly can, that there is an influence. And I shouldn't say from that point there would be no development. It will be under market system rather than under appropriation system.

THE CHAIRMAN: Anyone else comment on that?

Okay. Senator Crapo -- Senator Peavey?

SENATOR PEAVEY: No, I have no comment.

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THE CHAIRMAN: Senator Crapo has raised the question with me of attempting to develop a -- some legislative -- a formal legislative intent to be inserted in the record that -- of course, that can be done at any time. If he succeeds in achieving that, it could be put in the record at any time.

You want to discuss that with us any, Senator Crapo?

SENATOR CRAPO: Yes. Mr. Chairman, it's my concern that, when I first read the legislation, I didn't really understand for sure what the intent was. And we've had three very good hearings now. And I think that I pretty well understand the intent. And with the exception of a few questions, I'd like to know how the committee members are coming down on. I feel pretty good about the whole package.

But I think in the future, if this ever gets to court, or if the Department of Water Resources need guidance on how to interpret different aspects of this, that it would be very beneficial that we, as a committee, develop a statement of intent or legislative purpose that accompanied this that said what we really intend to happen.

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Maybe even use some examples like they do in the Federal Register – or in the Federal Regulations (unintelligible).

And you know, first of all, I'm not sure that we can even accomplish this because there may be too much of a divergence among the committees to agree. I would hope not, but it would seem to me that if there's a divergence on the Committee as to what's intended by this bill, we ought to resolve that now before the bill goes to the floor so that we know what we all think this bill means and either agree on it, or at least know that the majority agree on what we are contemplating.

THE CHAIRMAN: What's the Committee's pleasure? I'm not at all opposed to appointing a Committee of two to try to see if they can work out this sort of thing. I think it would probably be wrong to put the majors on hold for whatever time it might take to answer those kind of agreements. There's certainly no reason why we can't have discussions here in terms of any questions anyone has about -- in general terms of what (unintelligible).

Senator Beitelspacher.

SENATOR BEITELSPACHER: Well, Mr. Chairman,

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I too share Mike's concern. I see no reason why a couple of the parties couldn't sit down and do that and have a letter of intent and order to go along with it to clarify.

UNIDENTIFIED SPEAKER: Mr. Chairman, (unintelligible), I agree. The only thing that bothered me to some extent is certainly there are many, many interested parties hanging here, you know, outside of the legislative body. So you're going to have to reach an agreement with the negotiators too. And so how you will achieve that – you certainly can't get off on a wrong direction (unintelligible) select (unintelligible).

THE CHAIRMAN: Well, I would think this would be more a matter of legislative intent rather than negotiators intent. But got to be something that doesn't badger up the whole agreement.

But would it be your understanding, Senator Crapo, if we do this that (unintelligible)?

SENATOR CRAPO: Well, I'd like to make two comments. First of all, it's not my intent, nor do I think it's anybody else's intent to sidestep

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any of the concern of the negotiators. I think that they probably ought to be involved with whoever works on this to make sure that they all agree with what's being said.

Secondly, I do object to putting the bill on the floor while we do this, because if we put the bill out on the floor and then find out that there are some significant areas of disagreement, then we got a real problem. Then we got a floor debate rather than a resolution of those disagreements here in the Committee.

And so I see no reason why we couldn't hold the bill in the Committee until – you know, for a week or whatever time it took to put this together, and then put it out. But I realize there seems to be a strong desire to get the bill out of the Committee.

THE CHAIRMAN: I think one of the problems is maybe -- I think it's probably a realistic concern, people who tried to accomplish these sorts of things, usually it's a matter of more than a week, maybe more than two weeks, maybe a month. That would be --

But anyway, what's the feeling of some of the other committee members -- Committee?

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Senator Ringert?

SENATOR RINGERT: Mr. Chairman, I'm probably concerned on both sides of that particular point. And I would think that a week ought to be plenty of time to develop a worthwhile statement of intent. So I move if we hold it still in the Committee for one week to develop -- for the specific purposes of developing it if it can be done, a statement of intent, but --

THE CHAIRMAN: Is there a second?

SENATOR CRAPO: I second it.

THE CHAIRMAN: Been moved and seconded. Discussion?

UNIDENTIFIED SPEAKER: Mr. Chairman, I'm not too sure -- I understand the concern for not being sure, but what kind of an instrument are you going to use with regard to intent? And where are you going to make it a matter of record? And how is it going to correlate to the bill that, of course, we're going to find possibly in Idaho code. I'm not sure I understand -- I don't recall having done this in the past. And I'm not sure how it would work this time.

THE CHAIRMAN: Yeah. There have been letters of intent placed in the journal

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(unintelligible).
UNIDENTIFIED SPEAKER: Okay.
(Unintelligible).
THE CHAIRMAN: One of you people one want to explain what's legally involved here?
Senator Ringert and Senator --
UNIDENTIFIED SPEAKER: Well, Mr. Chairman, the concern that -- I think you brought it up two or three meetings ago is that, in most cases with legislation at the state level, we do not establish a good statement of legislative intent. And when there are ambiguities in the bill and the statute, then we have a contest over it, and you go to court. And one effort is to try to -- Supreme Court trying to figure out what the legislature intended when it used this word or this phrase or, you know, entire paragraph, whatever. And the statement of intent is very helpful in that respect.
Now, in the Federal Congress, they print formal committee reports that become part of the permanent record and are -- those reports go to the floor with the bills so at least somebody looking at the whole words of the law 40 years later or even sooner than have some expression of

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what the people were looking at when they voted on the floor. That's what we're talking about.
THE CHAIRMAN: Senator Peavey.
SENATOR PEAVEY: Well, Mr. Chairman, you know, there's pluses and minuses on both sides of this argument. But I can sure see some of the pitfalls. We've got the House Committee to deal with. You've got the possibility of fairly pure language here that needs to be fleshed out with rules and regulations. And then that's another set of documents that could be in conflict.
You've got the history of this legislation that goes back to about 1977, at least that far, and lately a very intensive effort by a group of people who were -- started out at loggerheads, and negotiated and negotiated and negotiated and reached a settlement. And I would really hate to jeopardize that whole process that -- something that we could develop here, something that the House could develop over there, and all this could just be starting to write another bill. I think if there's -- I would rather see us get the bills on the way, and get this long process closed down.
With that in mind, I'd move that we send Senate Bill 1006 to the floor with a do pass.

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SENATOR BUDGE: Second the motion.
(Unintelligible.)
THE CHAIRMAN: Been moved --
UNIDENTIFIED SPEAKER: Well, are we dealing with 1006 or 1008?
THE CHAIRMAN: As far as I'm concerned, we can put them both in the same motion. I guess we're dealing with --
SENATOR PEAVEY: I would amend my motion or remake it to include both bills that -- people might want to divide the --
THE CHAIRMAN: It's been moved that we send SB 1006 and 1008 to the floor with a do pass.
Has it been seconded?
SENATOR BUDGE: I did.
THE CHAIRMAN: By Senator Budge.
Now, is there discussion on the subject two motions.
Senator Ringert. Excuse me.
Senator Ringert.
SENATOR RINGERT: Mr. Chairman, members of the committee, just in response to Senator Peavey's comments, a couple. The regulations that Mr. Dunn's department issued should not be in conflict with the statute. The regulations are

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supposed to flesh it out and explain it. So there's -- not that there isn't a remote chance that there could be a conflict, but there shouldn't be.
And the second point is if the House does not agree with the Senate's statement of intent, to me, that is just a pretty good indication that this bill is improperly written anyway. If people can't agree on what's meant by it, and the very body that enacts this law, what are we going to have the Department of Water Resources (unintelligible) try to figure out.
UNIDENTIFIED SPEAKER: Well, Mr. Chairman, just in response to that, Senator Ringert, the regulations, hopefully, at least they won't be in conflict with the bill, but the letter of intent certainly could be. And it could also be in confusing issue if it's in conflict with what the Department comes up with.
THE CHAIRMAN: Senator Budge?
SENATOR BUDGE: Mr. Chairman, members of the committee, as I hear the discussion here, what is being attempted is something that I've never heard of before. I think the discussion itself is -- should be a clear example of what if the Committee

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doesn't agree on what you're discussing on letter of intent. What if the Committee doesn't agree? I think this is a good example right here that concerns you, Pat.

I think the vote of the committee itself is the intent, if you talk about a piece of legislation. Every piece of legislature that passes the legislature is a contest of one form or another. If an individual wants to put a letter of intent on the floor, I think that's in the rules and available. The Committee, I believe, in the testimony that's been had -- and one thing I think most of us are forgetting, maybe, that it has to pass the muster of the negotiators, the entire package.

And I think that is all important if we're looking for the welfare of the people of the State of Idaho. They spent a lot of time on it and a lot of effort. And this discussion I hear is a little bit like the, I think, too many attorneys, you know. Let's -- getting involved, you know. The worst session I ever had is when we had nine attorneys on the Senate floor.

And I believe that, as far as I'm concerned here, there's nothing to be gained by having the

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committee come up with a letter of intent. I think the secretary's going to take accurate rules of all the hearings and testimony and copies of it. And that should be enough. And I'm sure they're going to support the substantive motion.

THE CHAIRMAN: Senator Beitelspacher.

SENATOR BEITELSPACHER: Mr. Chairman, I certainly am very appreciative of our attorneys here. I would never speak disparagingly of their efforts of the past.

SENATOR BUDGE: As trying as they are at times.

SENATOR BEITELSPACHER: Well, I -- with all due respect, Senator, Mr. Chairman Budge, I have to say that Senator Ringert, many times, has tried to help me with things, and I've been appreciative of it, and many times has caught things.

But Mr. Chairman, I've got to echo what John Peavey has said. We've dealt with this for a long time, and I think it's time to move this on. I think that the rules -- the Senate rules allow for a majority and minority report to be filed on something. They allowed for the placement of that in the journal, and to clarify, at least, the opinion of the majority of the members of the

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Senate on the position. And I see nothing wrong with that. I've spoken with Senator Crapo about it. And I think it might be a good idea.

But as you've said, we've had this here for a long time. And it's Senator Spear (phonetic) is worried about the trees and rocks in his district. It's time to move it on out to -- here yesterday, I recall, we had a bill where there was some difference of opinion about what it meant on the floor of the Senate. And the majority prevailed at that time. And maybe the majority will prevail here.

THE CHAIRMAN: Senator Crapo.

SENATOR CRAPO: Mr. Chairman, for a question.

If this bill goes -- gets reported out on Monday, when would it be likely to be voted on?

THE CHAIRMAN: Well, depending upon Congress and all those other kinds of things, I presume it would be Wednesday.

UNIDENTIFIED SPEAKER: Wednesday.

SENATOR CRAPO: Does that mean, then, if -- I guess there's another question, then --

THE CHAIRMAN: Yes.

SENATOR CRAPO: Can a majority or minority

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report be made on a bill that's already passed the Senate?

THE CHAIRMAN: My understanding is that it can at any time. We can put something in the journal at any time.

SENATOR CRAPO: Mm-hmm.

THE CHAIRMAN: And on top of that, we can file additions to the committee report with our minutes. One of the suggestions, which sounded pretty good to me, is that if we get our minutes and our records all put together, we might get to file all over at the law library.

SENATOR CRAPO: Just one follow-up comment. I guess, just in argument against the substitute motion, I can understand the reasons that some people would like to see this get out quickly. It has been around for a long time. We've been dealing with it, and so forth. But I guess I just feel that taking another week to look at things carefully is not inappropriate. And I don't think on an issue as important as this that we ought to be rushing it through without due consideration.

And if there's going to be a disagreement, which I hope there isn't -- but if there is going to be one, I would think it would be much more

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healthy for this legislature for that to be discovered when the bill is still in committee and can be worked out.
THE CHAIRMAN: Is there any further discussion?
UNIDENTIFIED SPEAKER: Mr. Chairman, Senator Little was called out of here by leadership. And if we do that, we need to notify him that a motion on either of these bills came up for a vote. Could we go at ease for a minute while he's --
THE CHAIRMAN: Yes. Committee would be at ease. And we'll go and get -- who would be a good volunteer to -- Marty, would you mind doing that? We'd appreciate that.
UNIDENTIFIED SPEAKER: Thank you, Senator Calavara (phonetic).
THE CHAIRMAN: While we're at ease, I certainly -- if the substitute motion does pass, I think it's understood by everyone, this won't preclude any efforts to develop committee reports legislative intent and all of the other things.
UNIDENTIFIED SPEAKER: Well, Mr. Chairman, I think your idea of filing the minutes in the law library is probably as effective as anything that

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I can think of as far as a matter of record.
UNIDENTIFIED SPEAKER: Mr. Chairman, I think your comment initially when we got involved with this that accurate minutes should be kept of this committee, and I'm sure you have with the letter of intent itself.
THE CHAIRMAN: (Unintelligible) done a good job.
(Unintelligible.)
THE CHAIRMAN: We may have to come back to some of the off and on to try to be sure that we have your comments that -- you know how it is when you get recorded on things. Sometimes when it's transcribed back (unintelligible) reflect what you're saying.
UNIDENTIFIED SPEAKER: That's only the newspaper.
(Unintelligible conversation.)
UNIDENTIFIED SPEAKER: Reed, if there was anybody that you could have speared with that, he was sitting right over there. 'Cause he had a number of years experience up here haranguing us before he ever became official.
UNIDENTIFIED SPEAKER: I know that. I know that.

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(Unintelligible conversation.)
THE CHAIRMAN: Senator Little has returned. As far as I know, he still has most of his skin.
SENATOR LITTLE: Thank you. I appreciate being called out (unintelligible).
THE CHAIRMAN: Okay. We have before us two motions. The main motion to hold the bill in Committee for one week to develop a statement of legislative intent to accompany the legislature to the floor. We have a substitute motion to put the bill out with a do pass with the understanding that it would not preclude development of those sorts of comments which we can assert -- insert in the record or (unintelligible) according to our (unintelligible).
Any further discussion?
Senator Chapman -- or --
UNIDENTIFIED SPEAKER: Carlson.
THE CHAIRMAN: Carlson.
(Unintelligible.)
SENATOR CARLSON: Mr. Chairman --
UNIDENTIFIED SPEAKER: The one with the short hair.
UNIDENTIFIED SPEAKER: Not short of hair.
SENATOR CARLSON: Mr. Chairman --

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THE CHAIRMAN: Yes, sir.
SENATOR CARLSON: You mentioned put the bill out. Two bills?
THE CHAIRMAN: Yes, sir.
Okay. I guess we better have a roll call vote.
Secretary would call the roll please on the substitute motion.
THE SECRETARY: Beitelspacher?
SENATOR BEITELSPACHER: On the substitute motion, I vote aye.
THE SECRETARY: Budge?
SENATOR BUDGE: Aye.
THE SECRETARY: Carlson?
SENATOR CARLSON: No.
THE SECRETARY: Chapman?
SENATOR CHAPMAN: No.
THE SECRETARY: Crapo?
SENATOR CRAPO: No.
THE SECRETARY: Horsch?
SENATOR HORSCH: No.
THE SECRETARY: Kiebert?
SENATOR KIEBERT: Aye.
THE SECRETARY: Little?
SENATOR LITTLE: Aye.

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THE SECRETARY: Noh?
SENATOR NOH: Aye.
THE SECRETARY: Peavey?
SENATOR PEAVEY: Aye.
THE SECRETARY: Ringert?
SENATOR RINGERT: No.
THE SECRETARY: Sverdsten?
SENATOR SVERDSTEN: Aye.
THE SECRETARY: Little?
SENATOR LITTLE: No.
THE SECRETARY: Six noes. Six yeses.
THE CHAIRMAN: Okay. Substitute motion has -- Senator Crapo has a big smile.
(Unintelligible.)
THE CHAIRMAN: So we will now vote on the main motion to hold the bill for one week.
THE SECRETARY: Beitelspacher?
SENATOR BEITELSPACHER: No.
THE SECRETARY: Budge?
SENATOR BUDGE: No.
THE SECRETARY: Carlson?
SENATOR CARLSON: Aye.
THE SECRETARY: Chapman?
SENATOR CHAPMAN: Aye.
THE SECRETARY: Crapo?

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SENATOR CRAPO: Aye.
THE SECRETARY: Horsch?
SENATOR HORSCH: Aye.
THE SECRETARY: Kiebert?
SENATOR KIEBERT: No.
THE SECRETARY: Little?
SENATOR LITTLE: Aye.
THE SECRETARY: Noh?
SENATOR NOH: Aye.
THE SECRETARY: Peavey?
SENATOR PEAVEY: No.
THE SECRETARY: Ringert?
SENATOR RINGERT: Aye.
THE SECRETARY: Sverdsten?
SENATOR SVERDSTEN: Aye.
THE SECRETARY: Six -- eight for.
THE CHAIRMAN: Okay. Senator Beitelspacher.
SENATOR BEITELSPACHER: Mr. Chairman, the motion was on 1008?
(Unintelligible conversation.)
UNIDENTIFIED SPEAKER: What if we disagree on that?
UNIDENTIFIED SPEAKER: It will be the same old committee.
(Recording ends.)

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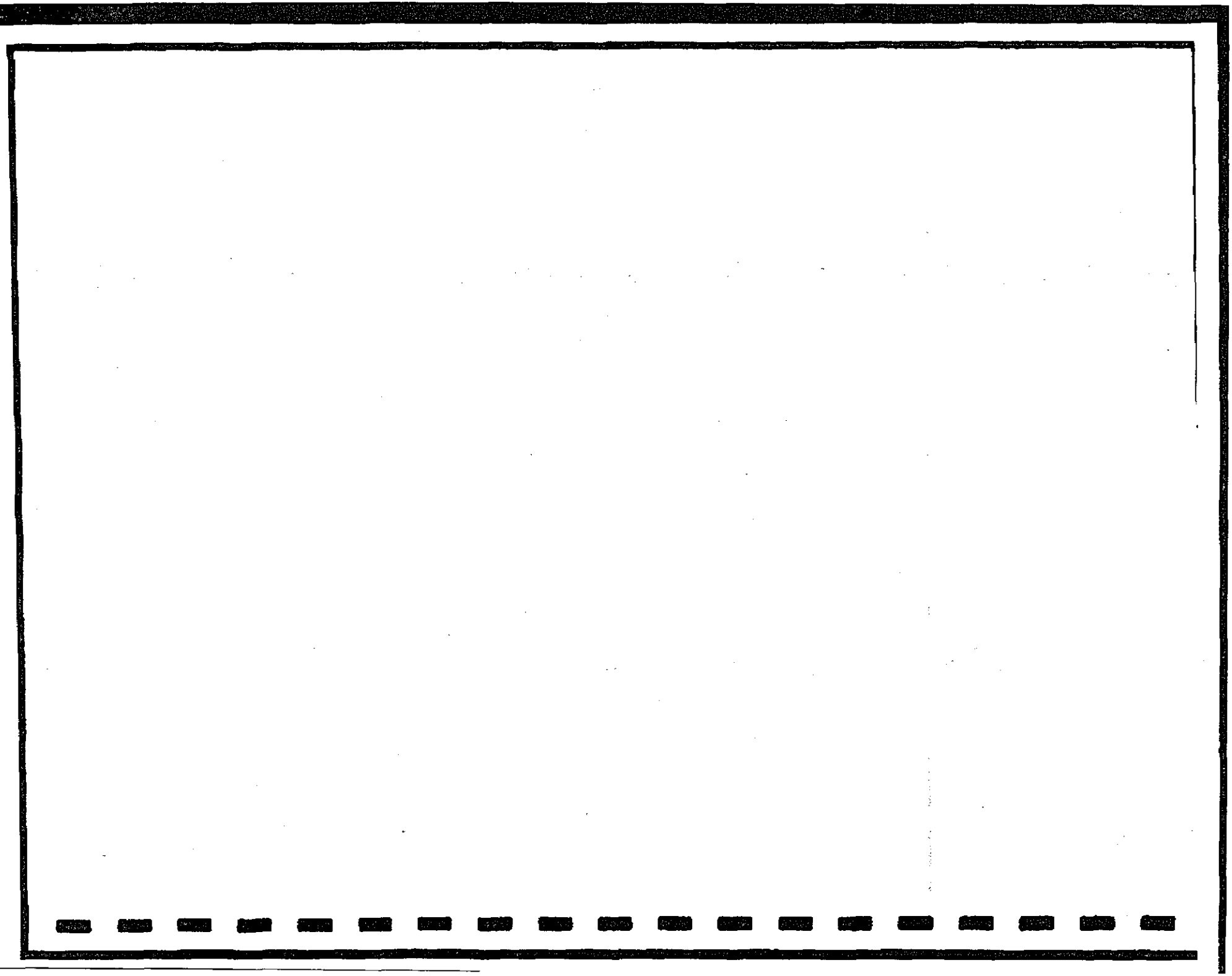
REPORTER'S CERTIFICATE

I, Debora Ann Kreidler, Official Court Reporter, County of Ada, State of Idaho, hereby certify:

That I am the reporter who transcribed the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and that the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause.

IN WITNESS WHEREOF, I have hereunto set my hand February 23, 2007.

Debora Ann Kreidler, Official Court Reporter
CSR No. 754



ADDENDUM J

ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF MANDATE

RECEIVED
JAN 29 2008
DEPARTMENT OF
WATER RESOURCES
Michelle Emerson

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

NORTH SIDE CANAL COMPANY and TWIN FALLS CANAL COMPANY, **Petitioners,** **vs.** **David R. Tuthill, Jr., in his official Capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES,** **Respondents.**	**Case No.: CV 2007-1093** **ORDER GRANTING MOTION TO DISMISS PETITION FOR WRIT OF MANDATE**

I. PROCEDURAL HISTORY

On September 26, 2007, the North Side Canal Company and Twin Falls Canal Company (collectively as "Petitioners"), through counsel of record Barker Rosholt & Simpson LLP, filed a *Petition for Peremptory Writ of Mandate* ("*Petition*") petitioning the Court to issue a writ of mandate compelling the Idaho Department of Water Resources ("IDWR" or "Department") and its Director David R. Tuthill Jr. (collectively as "Respondents") to void the Director's September 5, 2007, Order; to close any protest or comment period; and to issue a license to the Petitioners in accordance with Respondents' statutory duties as defined by Idaho Code § 42-219. Also on September 26, 2007, the Petitioners filed an *Application for Alternative Writ of Mandate*.

On the same date, the Honorable John K. Butler filed an ***Order of Disqualification***. The case was assigned to the undersigned judge on October 1, 2007, in his capacity as District Judge for the Fifth Judicial District and not in his capacity as Presiding Judge of the Snake River Basin Adjudication.

On October 10, 2007, this Court issued an ***Order Denying Petition for Alternative Writ of Mandate***.

On November 6, 2007, the Respondent's filed a *Motion to Dismiss* pursuant to I.R.C.P. 12(b)(1) and (6), together with a *Memorandum* and *Affidavit in Support*.

On December 14, 2007, the Petitioners filed a *Response to Respondents' Motion to Dismiss*.

A hearing was held on the *Motion to Dismiss* on December 21, 2007. At the conclusion of the hearing, the Court took the matter under advisement. Also on December 21, 2007, the Respondents filed an *Answer*. Following the hearing, the Court received an *Amicus Brief*, together with a supporting affidavit, filed on behalf of Mud Lake Water Users, Independent Water Users, Jefferson Canal Company, Monteview Canal Company, Producers Canal Company, Fremont-Madison Irrigation District and Eastern Idaho Water Rights Coalition (collectively as "Amici").

II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on December 21, 2007. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or December 24, 2007.

III. FACTS

On March 30, 1977, the Petitioners filed an *Application for Permit* with IDWR to appropriate water from the Snake River for year-round hydropower production at the Milner power plant at a rate of diversion up to 12,000 cfs. Notice was published in accordance with

Idaho Code § 42-201. As no protests were filed a permit was issued to the Petitioners on June 29, 1977 ("Milner Permit").

The deadline for filing proof of beneficial use under the permit was originally June 1, 1982. As a result of delays, the Petitioners sought and received deadline extensions in 1982, 1987, 1990, and 1992. Prior to seeking an extension of the 1987 deadline, the Swan Falls Agreement was executed and the Legislature passed Idaho Code § 42-203B, which among other things authorized IDWR to subordinate hydropower rights to future upstream consumptive uses. As a result, in 1987 when the Petitioners sought the second extension, the Chief of Operations Bureau for IDWR, L. Glen Saxton, notified the Petitioners that the granting of the extension would be conditioned on the Petitioners acceptance of the following subordination provision:

> The rights for the use of water acquired under this permit shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the state of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the state of Idaho initiated later in time than the priority of this permit.

Attachment G to *Petition.*

In a letter dated May 8, 1987, counsel for Petitioners raised the following concern with the proposed condition:

> At the time of the issuance of the Hells Canyon license, the subordination was to irrigation of lands and other beneficial consumptive uses in the Snake River Water Shed. In your proposed language, non-consumptive uses such as groundwater recharge could take the total flows of the upper Snake available to the Milner Power Plant and put them underground eliminating any generation at the project. The language would also facilitate a non-consumptive diversion of water above the project for fish propagation or some other non-consumptive purpose with the return of the water below the project. Finally, the language would facilitate a diversion of surplus flows of the Snake River to the Bear River Basin for any purpose.

Attachment H to *Petition.* Counsel for Petitioners then proposed the following amendments to the condition:

> The rights for use of water acquired under this permit shall be junior and subordinate to all other rights for the consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho that are initiated later-in-time than the priority of this permit and shall not give rise to any right or claim against any future rights for the

> consumptive beneficial use of water, other than hydropower and groundwater recharge within the Snake River Basin of the State of Idaho initiated late-in-time than the priority of this permit.

Id. (emphasis added).

In a letter dated November 18, 1987, the Respondents notified the Petitioners that they would use the amended language proposed by counsel for Petitioners as a condition of approval on the extension request. This is the condition that appears in the Milner Permit.

On October 29, 1993, the Petitioners submitted proof of beneficial use for 5,714.7 cfs, of the 12,000 cfs for which application was originally made. Since that time the Petitioners have relied on the Milner Permit and have been beneficially using water under the permit.

In 2006 and the spring of 2007, the Petitioners verbally requested that the Respondents issue a license for the Milner Permit. On September 5, 2007, in response to the Petitioners' request, the Respondents issued a *Notice of Intent to Issue License*. Attachment P to *Petition*. The *Notice of Intent* set forth the background and status of the Milner Permit and then provided, in relevant part:

> Proof of beneficial use having been submitted under the permit, the Department is prepared to issue a license for the water right pursuant to Idaho Code § 42-219. Counsel for Permit Holders have orally requested that the Respondent issue a license for the water right.
>
> The Department received written requests for notice of an opportunity to be heard on the form of the subordination condition to be included in the license for Water Right No. 01-7011 from the Bingham Ground Water District on January 11, 2007; from the Idaho Ground Water Appropriators, Inc. on February 7, 2007, for and on behalf of its ground water districts and other members, represented by the law firm of Racine Olson Nye Budge & Bailey, Chartered; and from the Mud Lake Water Users, Independent Water Users, Jefferson Canal Co., Monteview Canal Co., and Producer's Canal Co., on April 16, 2007, represented by the law firm of Holden Kidwell, Hahn & Crapo, P.L.L.C.
>
> NOW THEREFORE NOTICE IS HEREBY GIVEN that the Department will accept and consider written Comments from the Permit Holders and other interested persons or entities addressing the form of the subordination condition that should be included on the license for Water Right No. 01-7011. Any Comments submitted should be addressed to Director, Idaho Department of Water Resources, P.O. Box 83720, Boise, Idaho 83720-0098 and received by the Department or post marked on or before October 10, 2007.

In response, the Petitioners initiated this action seeking a writ of mandate to compel the Respondents to issue a license for the Milner Permit in accordance with Idaho Code 42-219 and to prohibit the actions the Respondents were taking as provided by the September 5, 2007, *Notice of Intent to Issue License*. The Petitioners did not submit written comments to IDWR as provided by the *Notice* nor did they request a hearing before the Director.

IV. DISCUSSION

A. Arguments

The Respondents have now moved to dismiss the Petition alleging that the Petitioners have failed to exhaust available administrative remedies. The Respondents argue that Petitioners must wait until the license is issued and then pursue these remedies through the administrative process and the Idaho Administrative Procedures Act, Idaho Code § 67-5201 *et seq.*

The Petitioners argue that there are no more administrative remedies available because Idaho Code § 42-219 requires that the Petitioners perform the ministerial function of issuing the license after proof of beneficial use has been submitted. The Petitioners argue that Respondents are acting outside the scope of their authority by reopening the administrative record to comments after the protest period has closed, the permit issued, diversion works completed, and beneficial use proven. The Petitioners argue that the considerable investment in the diversion (hydropower) project was made in reliance on the issuance of the permit and the conditions ultimately negotiated and agreed upon. By permitting the record to be reopened to comments at this stage allows for protests to cloud an administrative record that was previously free of protests when the *Application for Permit* was approved and the diversion works completed in reliance on said approval.

B. Standards of Review

1. Motion to Dismiss, I.R.C.P 12(b)(1) and (6).

The Respondents' *Motion to Dismiss* is brought pursuant to I.R.C.P. 12(b)(1) "lack of jurisdiction over subject matter" and I.R.C.P. 12(b)(6) "failure to state a claim upon which relief can be granted." The failure to exhaust administrative remedies can implicate subject matter jurisdiction because a "district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted." *Owsley v. Idaho Industrial Com'n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005) (citing *Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990)). The failure to exhaust administrative remedies can also be brought under I.R.C.P. 12(b)(1). *Id.* If a claimant fails to exhaust administrative remedies, then dismissal of the claim is warranted. *White v. Bannock County Comm'rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003) (string citations omitted). On a motion to dismiss, "the Court looks only at the pleadings and all inferences are viewed in favor of the non-moving party." *Id.* at 133, 106 P.2d at 459 (citing *Young v. City of Ketchum*, 137 Idaho 102, 1094, 44 P.3d 1157, 1159 (2002)).

The Idaho Administrative Procedures Act provides that "[a] person is not entitled to judicial review of an agency decision until that person has exhausted all administrative remedies required in this chapter." I.C. § 67-5271(1). However, "[a] preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not permit an adequate remedy." I.C. § 67-5271(2). There are two recognized exceptions to the exhaustion requirement: (1) When the interests of justice so require and (2) when an agency has acted outside its authority. *American Falls Reservoir Dist #2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (March 15, 2007). In *American Falls Reservoir Dist #2*, the Idaho Supreme Court recently held:

> Important policy considerations underlie the requirement for exhaustion of administrative procedures, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.

Id. at 872, 154 P.3d at 443 (citing *White v. Bannock County Comm'rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003)).

2. Writ of Mandate.

Idaho Code § 7-302 provides that a writ of mandate "may be issued . . . to compel the performance of an act which the law especially enjoins as a duty resulting from the office, trust or station . . . ." Idaho Code § 7-303 provides that the "writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." In *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 794 P.2d 632 (1990), the Idaho Supreme Court stated "[m]andamus will lie if the officer against whom the suit is brought has a 'clear legal duty to perform the desired act and if the act sought to be compelled is ministerial or executive in nature.'" *Id.* at 44, 794 P.2d 633 (quoting *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 953, 703 P.2d 714, 717 (1985). A ministerial act is:

> That which is done under the authority of a superior; opposed to *judicial.* That which involves obedience to instructions, but demands no special discretion, judgment or skill. Official's duty is 'ministerial' when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts.

Ausman v. State, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993).

Further, the "[e]xistence of an adequate remedy in the ordinary course of law, whether legal or equitable in nature will prevent issuance of a writ . . . and the party seeking the writ must prove that such remedy exists. . . . [M]andamus is not a writ of right and the allowance or refusal to issue a writ of mandate is discretionary. *Id.* (citations omitted).

3. Discretion of Court.

A court acts within its discretion when it: 1) correctly perceives the issue as one of discretion; 2) acts within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) reaches its decision by exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993 1000 (1991).

C. Analysis

1. The Petitioners have failed to exhaust all available administrative remedies.

The Court holds that the Petitioners may not use a writ of mandate as a substitute for following the grievance process set forth in Idaho Code § 42-219(8) and Idaho Code § 42-1701A(3). Idaho Code §§ 42-219(8) and 42-1701A(3) set forth the administrative procedure for contesting IDWR's action with respect to issuing a license or failing to issue a license based on a permit. Idaho Code § 42-219(8) states:

> In the event that the department shall find applicant has not fully complied with the law and the conditions of the permit, it may issue a license for a portion of the use which is in accordance with the permit, may refuse issuance of the license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail.

I.C. § 42-219(8). The statute then provides: "The applicant may contest such action by the department pursuant to section 42-1701A." *Id.*

Idaho Code § 42-1701A(3) provides:

> Unless the right to a hearing before the director or the water resources board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director within fifteen (15) days after receipt of written notice . . . a written petition stating the grounds for contesting the action by the director and requesting a hearing.

I.C. § 42-1701A(3). Idaho Code § 42-1701A(4) then provides:

> Any person who is aggrieved by a final decision or order of the director is enabled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in Chapter 52, title 67, Idaho Code.

The Petitioners filed proof of beneficial use on October 29, 1993. On July 27, 2006, Director Dreher indicated in a letter that "the issuance of a license for the water right is pending." Petitioners then verbally requested that Respondents issue a license in 2006 and again in 2007. In response Director Tuthill, who succeeded Director Dreher issued the *Notice of Intent to Issue*

License. The *Notice* referred to the communications received from other water users regarding the subordination provision and stated that the Department would receive comments on the issuance of the license on or before October 10, 2007. The *Notice* did not reopen a protest period nor did it give those submitting comments party status. The Petitioners did not respond to the *Notice*, nor otherwise object to the Director's reopening of the record to comments, nor did they ask for a hearing before the Director on the issue. The Petitioners also could have waited until the license was issued and then request a hearing. The Petitioners argue that continuing with the administrative process will result in the administrative record becoming improperly clouded with additional facts after the protest period has already closed resulting in prejudice and ultimately precluding any adequate remedy. The Petitioners also argue that after the beneficial use examination for the permit the issuance of the license is ministerial and because IDWR is acting outside the scope of its authority all administrative remedies have been exhausted. This Court disagrees.

The Petitioners had the opportunity to raise with the Director the issue of receiving comments by submitting their own comment or by specifically requesting a hearing on the alleged irregularities in the process in accordance with Idaho Code § 42-1701A(3). The Petitioners also still have the opportunity to raise and be heard on the issue once the license is issued. Ultimately, if the Director issues the license according to the subordination condition now included in the permit, the Petitioners have no grievance. If the Director modifies the condition the petitioners can raise the issue with Director and ultimately seek judicial review in accordance with Idaho Code § 42-1701A(4). Because the issue of whether the Director can appropriately consider additional comments after the beneficial use examination presents a threshold question of law a reviewing Court would be not be bound by the Director's determination on this issue as would be the case with the Director's factual determinations. Were it ultimately determined that the Director could not appropriately consider the comments there would be no prejudice to the Petitioners as the comments would be excluded from consideration. Accordingly, the Court finds no prejudice to the petitioners by continuing with the administrative process and exhausting their administrative remedies.

2. The issuance of the license following the beneficial use examination is not a ministerial duty.

The Petitioners raise the argument that following the proof of beneficial use examination the issuance of the license is simply a ministerial act. Idaho Code § 42-219(1) requires an intermediate step prior to the issuance of the license. After all evidence is filed in relation to proof of beneficial use, IDWR is then charged with "carefully examining the same, *and if the department is satisfied that the law has been fully complied with* . . . the department shall issue . . . a license confirming such use." I.C. § 42-219(1)(emphasis added). The statute then provides that if IDWR finds that the applicant has not complied with the law or the conditions of the permit "it *may* issue a license for that portion of the use which is in accordance with the permit or *may* refuse issuance of the license and void the permit." I.C. § 42-219(8) (emphasis added). Because IDWR has some level of "discretion" in conjunction with making the compliance determination prior to issuing the license the duty of issuing the license is not a simple ministerial act. At this stage, IDWR has not made such a determination with respect to the form of the subordination language that should be included in the license despite the November 18, 1987, agreement between the Petitioner and IDWR. Simply because there is a prior agreement in place with respect to the form of the subordination remark does not make the duty to issue the license ministerial. If a determination is made contrary to the terms of the agreement then the issue of the effect and enforceability of the agreement can still be raised with the Director and through judicial review if necessary.

In *Cantlin v. Carter*, 88 Idaho 179, 397 P.2d 761 (1964), the state engineer approved the applicant's permit application. Eighteen months later the applicant completed the diversion works and submitted proof of completion. The applicant then sought to file proof of application of water to beneficial use. In the meantime, the state engineer received protests regarding the issuance of the license for the water right. As a result, the state engineer issued an order denying the proof submitted by the applicant and cancelled the permit on the basis that there was no available water for appropriation. *Id.* at 182, 397 P.2d at 764. The action of the state engineer was upheld by the Idaho Supreme Court. *Id.* at 187, 397 P.2d at 769.

A similar issue also arose in the context of the SRBA. In ***Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge (Subcase 36-08099, River Grove Farms)* (Jan 11, 2000)(*River Grove Farms*)**, an applicant filed a permit application for a hydropower right in 1982. The permit application was approved in 1983. The permit did not include a subordination remark for hydropower.

Construction of the diversion works, the application of the water to beneficial use and the beneficial use examination were completed in 1985. The applicant received a letter from IDWR indicating that the licensing examination had been completed but that it would be awhile before the license was issued because of the pending Swan Falls dispute. Approximately six years elapsed before the license was ultimately issued in 1992. In the meantime the Idaho legislature enacted Idaho Code § 42-203B (6) authorizing IDWR to subordinate hydropower rights to future upstream consumptive uses. When the license was issued it included a subordination remark. The applicant failed to contest the inclusion of the remark after the license was issued but objected to the remark in the SRBA proceedings. One of the many arguments raised was that the water right vested at the time the water was applied to beneficial use and not upon the issuance of the license. Therefore I.C. § 42-203B (6) could not be retroactively applied to diminish the scope of the vested hydropower right. In essence the issuance of the license is more of a formality.

The Hon. R. Barry Wood, then presiding judge of the SRBA, disagreed. Judge Wood held that the water right vested at the time the license was issued. The Court relied on the holding in *Cantlin v. Carter,* the statutory scheme itself and various other cases holding that a water right is inchoate until the license is issued. [1] Judge Wood ruled:

> River Grove's assertion that a water right vests upon application to beneficial use, and not upon the issuance of the license by IDWR, may well be a correct statement of the law as to water rights made under the constitutional method (versus the permit method) and made prior to the 1971 statutory amendments making the permit process the exclusive method of appropriation. To the extent that the cases cited by River Grove correctly state the law as it existed prior to 1971, this aspect of the cases was legally altered by the legislature upon enactment of the aforementioned statutory amendments. Furthermore, the cases cited by River Grove are limited in that water right was acquired solely under the permit system . . . [I]t is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested.

---

[1] The following cases were cited for the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate right, not a complete appropriation).

. . .

> In 1971 the legislature amended I.C. §§ 42-103 and 42-201 to the effect that surface water rights could thereafter only be acquired by following the application, permit, and license procedures set forth in Title 42 of the Idaho Code. Chapter 2 of Title 42 sets forth the steps that must be completed before a water right comes into existence. Briefly, one who wishes to appropriate the unappropriated waters of this state must first make application to IDWR for a permit, and include certain information such as the source, point of diversion, purpose of use, etc. I.C. § 42-202. IDWR then publishes notice of the proposed diversion, inviting interested parties to protest the application. I.C. § 42-203A(1)-(4). IDWR then considers the application, protest or not, and makes various findings as to whether (a) the proposed diversion will reduce the quantity of water for existing water rights, (b) the water supply is sufficient for the proposed use, (c) the application is made in good faith, (d) the applicant has sufficient financial resources, (e) the proposal will not conflict with the local public interest, and (f) the proposal is not contrary to conservation of water resources. I.C. § 42-203A(5). Depending upon these findings, IDWR can approve, partially approve, approve upon conditions, or reject the application. *Id.* Upon approval, the applicant has a specified period of time to construct the proposed diversion works. I.C. § 42-204. Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is to then carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, **IDWR may refuse to issue the license**. I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . .." It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- **including issuance of the license** -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.

River Grove Farms at 24-25. Although the decision was never appealed from, this Court finds it to be on point and persuasive.

This Court holds that following the beneficial use examination the issuance of the license is not a ministerial act. The Department must first make a determination whether the use complies with the law and the terms of the permit. While the Court does have some concern with the length of time it takes for IDWR to complete its final determination and issue the license the statute does not provide for a time limit.

3. Mandamus is not an appropriate remedy.

Having determined that the act of issuing the license is not a ministerial act and having determined that the Petitioner's still have administrative remedies available in the ordinary course of law, this Court in the exercise of its discretion concludes that mandamus is not an appropriate remedy.

D. Conclusion.

The Court holds that Petitioners have failed to exhaust their available administrative remedies. For the reasons previously discussed the Petitioners are not giving up any rights by waiting until IDWR issues a license and then if necessary requesting a hearing before the Director and seeking judicial review. Aside from the issue of clouding the record with additional facts, which this Court addressed, the Petitioner's concern is further delay in the issuance of the license. Counsel for the Respondents stated that the license would have been issued by now but for this intervening action. Ultimately, depending on the form of the subordination remark included in the license further proceedings may not be necessary. Recent experience has shown that by issuing a writ at this stage significant delay would result while the parties litigated the propriety of the writ. For the above-stated reasons the Respondent's *Motion to Dismiss* is **granted**.

V. ORDER ON AMICUS PARTICIPATION

The decision on whether to limit participation to amicus curiae is discretionary with the trial court. *State v. United States (In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge)*, 134 Idaho 106, 111, 996 P.2d 806 (2000); 4 Am. Jur. 2d *Amicus Curiae* § 8. The principle role of amicus curiae is to aid the court on questions of law. 4 Am. Jur. 2d at § 6. Among other things, a court may evaluate whether the proffered information is timely, useful, or otherwise necessary to the administration of justice. Additionally, a court should look to whether the parties to the lawsuit will adequately present all relevant legal arguments. *Id.* § 8.

In the instant case, the Court's decision turns on a question of law. The Amicus brief does not raise any new issues. The legal issue has broader reaching application than just the instant case. In cases such as this a certain degree of liberality in allowing a brief to be filed is

warranted. While the Court has some concerns regarding the timeliness of the brief, on balance the Court **grants** the amicus participation and has considered the brief.

IT IS SO ORDERED

DATED: January 15, 2008

John M. Melanson
District Judge

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 28 day of January, 2008 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

Travis Lee Thompson
Attorney at Law
P. O. Box 485
Twin Falls, ID 83303-0485
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By Judy Owens
Judy Owens, Deputy Clerk

ADDENDUM K

MEMORANDUM DECISION AND ORDER ON CHALLENGE; ORDER ON STATE OF IDAHO'S MOTION TO DISMISS CLAIMANT'S NOTICE OF CHALLENGE

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

In Re SRBA	)	Subcase No. 36-08099
	)	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON CHALLENGE; ORDER**
Case No. 39576	)	**ON STATE OF IDAHO'S MOTION**
	)	**TO DISMISS CLAIMANT'S**
	)	**NOTICE OF CHALLENGE**

I.
APPEARANCES

Mr. Patrick D. Brown, P.C., Attorney for Claimant and Challenger River Grove Farms, Inc..

Mr. Peter J. Ampe, Deputy Attorney General, Natural Resources Division, Attorney for Respondent State of Idaho.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

This Court having heard oral arguments on the challenge on December 17, 1999, with no party seeking additional briefing and the Court having requested none, the matter is deemed fully submitted for decision on the next business day, or December 20, 1999.

III.
STATE OF IDAHO'S MOTION TO DISMISS RIVER CLAIMANT'S NOTICE OF CHALLENGE

On October 13, 1999, the State filed a motion to dismiss the *Notice of Challenge* filed by River Grove Farms, Inc. (hereinafter "River Grove"[1]) on the grounds that River Grove did not participate in the State's *Motion to Alter or Amend* before the Special Master, and that AO1 § 13 makes such participation a prerequisite to a challenge. The State's *Motion to Dismiss Claimant's Notice of Challenge* is DENIED for the following reasons:

First, the purpose of the AO1 provision relied upon by the State (AO1 § 13) is to prevent non-parties to a subcase from becoming a party to a subcase for the first time at the challenge stage. It was not intended to cover the rare situation presented in this case where the claimant (who already is a party to the subcase and who actually participated in the trial of the case) fails to actively participate in a motion to alter or amend.

Second, because this Court has the duty to independently review a special master's findings of fact and conclusions of law (*See Seccombe v. Weeks*, 115 Idaho 433), this Court would rather have the benefit of River Grove's briefing and oral argument on challenge in deciding the substantive issues.

IV.
THE STANDARD OF REVIEW OF A SPECIAL MASTER'S REPORT OR RECOMMENDATION IN THE SRBA

The Significance of the Director's Report in Adjudication of Water Rights in the SRBA

A statement of the standard of review of a special master's report or recommendation regarding water rights claimed under state law in the SRBA begins with an understanding of the statutorily created procedural framework of how a "state based" claim is processed. *See* I.C. §§ 42-1401 to –1428 (1996 & Supp. 1999); SRBA

[1] For the sake of simplicity, a reference to River Grove in this opinion may also refer to River Grove's predecessors-in-interest.

Administrative Order 1, Rules of Procedure (Oct. 16, 1997). The pleadings in an adjudication proceeding consist of such documents as the notices of claim, objections, and responses thereto. *Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995).

Summarily stated, the principal steps in a state based water right claim are as follows:

1. A claim of a water right is filed. I.C. § 42-1409 (Supp. 1999).
2. IDWR makes an examination of the relevant water system and of the claim. I.C. § 42-1410 (1996).
3. As a result of the IDWR examination, a Director's Report is filed. I.C. § 42-1411 (Supp. 1999).
4. Objections and/or Responses to the Director's Report can be filed by the claimant or any other party in the SRBA. I.C. § 42-1412 (Supp. 1999); I.C. § 42-1411(5).
    A. The parties to a subcase can stipulate to the contested elements of a water right by the use of a Standard Form 5. IDWR may concur therewith. AO1(4)(d)(3). If IDWR does not concur, the Court shall conduct any hearing necessary to determine whether a partial decree should be issued. AO1(4)(d)(3)(c).
    B. Uncontested and settled subcases are partially decreed.
5. Contested subcases proceed toward resolution. The District Court may refer these subcases to a special master. I.C. § 42-1412(4)-(5).
    A. Settlement conference.
    B. Scheduling conference.
    C. Trial before a special master.
6. In referred subcases, a **Special Master's Report or Recommendation** is filed with the Court. AO1(13).
7. **Motions to Alter or Amend a Special Master's Report or Recommendation** are filed, heard and ruled upon by a special master. AO1(13).

8. Objections ("Challenges" in the SRBA) to the final **Special Master's Report or Recommendation** are filed with the SRBA District Court. I.R.C.P. 53(e)(2); AO1(13).
9. A decision is made by the District Court on the **Challenge** and a Partial Decree is entered.
10. An appeal to the Idaho Supreme Court may be taken.

As it relates to the standard of review, the Director's Report (step 3 above) is of major significance because by statute, the Director's Report constitutes *prima facie* evidence of the nature and extent of a water right acquired under state law, and therefore constitutes a rebuttable evidentiary presumption. I.C. § 42-1411(4)-(5); *see Silverstein v. Carlson*, 118 Idaho 456, 461-62, 797 P.2d 856, 861-62 (1990); *State v. Hagerman Water Right Owners. Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418 (1997). The objecting party has the burden of going forward with evidence to rebut the Director's Report as to all objections filed. I.C. § 42-1411(5). However, I.C. § 42-1411(5) is silent as to the quantum of proof necessary to overcome the presumption raised by the Director's Report. If a statute is silent as to the quantum of proof necessary to overcome a presumption, then the presumption is overcome when the "opponent introduces substantial evidence of the nonexistence of the fact [presumed]." *Bongiovi v. Jamison,* 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986), *citing* Committee Comment to I.R.E. 301. Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 938 (1993). "When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *Hagerman Water Right Owners. Inc.*, 130 Idaho at 745, 947 P.2d at 418. If the presumption is overcome by the objector, then the claimant has the "ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5). That is, when the *prima facie* evidence is rebutted by competent evidence, the issue is decided, like other issues, on the sum of the proof. *See* D. Craig Lewis, Idaho Trial Handbook, § 12.5 (1995), *citing Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956).

Therefore, from the "get-go," a special master's evidentiary view of an "objected to" subcase is directly affected by the content of the Director's Report, who filed the objection (i.e. who has the burden of going forward with the evidence), and to which elements of the claim the objection is directed (i.e. the scope of the objection). I.C. § 42-1411(5). In turn, a review of a **Special Master's Report or Recommendation** by the District Court is likewise influenced by the procedural history of the particular subcase(s).

Special Master's Report or Recommendations (as to the unobjected to portion of Director's Report)

I.C. § 42-1411(4) purports to mandate that the unobjected to portions of the Director's Report be decreed as reported. Normally, this is exactly what happens. However, despite the unyielding language of this statute, the SRBA district court retains discretion to apply law to facts and render its own conclusions regarding unobjected to water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995), *citing* I.R.C.P. 55. Additionally, I.C. § 42-1412(7) allows the district court to delay entry of partial decrees for those portions of the Director's Report for which no objection has been field if the district court determines that the unobjected claim may be affected by the outcome of a contested matter.

Special Master's Report or Recommendations (as to the objected to portion of Director's Report)

Because the district court has the duty to independently review a special master's report, the findings of fact and conclusions of law contained therein do not stand automatically approved in the absence of a challenge. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989); C. Wright and A. Miller, Federal Practice and Procedure § 2612 (1995).

Under I.R.C.P. 53(e)(2), written objections/challenges may be served upon all other parties within fourteen (14) days of service of the notice of the filing of a special

master's report.[2] It should be noted, however, that AO1(13)(a) provides that "**[f]ailure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend the Special Master's Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge.**"[3]

Applications to the referring district court for "action upon the report" are covered by I.R.C.P. 53(e)(2), and are to be by motion. The court, **after hearing**, has a wide range of actions available. The court may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it to a special master with instructions. I.R.C.P. 53(e)(2). Where a challenge to a special master's report is filed, a district court must hold a hearing on the issues raised therein. *See Kieffer v. Sears Roebuck & Co.*, 873 F.2d 954, 956 (6th Cir. 1989). Of course, the parties could waive oral argument and submit the challenge on the briefs.[4]

Findings of Fact of the Special Master

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone,*

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[2] If a **Motion to Alter or Amend a Special Master's Recommendation** is timely filed under AO1(13)(a), the time to file a challenge under I.R.C.P. 53(e)(2) is suspended until the special master files a decision on the **Motion to Alter or Amend**.

[3] It may seem anomalous that actual participation in a **Motion to Alter or Amend** is a prerequisite to a Rule 53(e)(2) challenge in the SRBA, but such a challenge or objection is not a prerequisite to appellate review. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989) (holding that objections to findings and conclusions of the master are not required to preserve an issue for appeal). The following reasons, however, explain this apparent anomaly: First, because of the large and complex nature of the SRBA litigation, and the potential that a large number of parties may have an interest in a particular issue or subcase before a special master, it is necessary for those interested parties to involve themselves in the proceedings before the special master, at least at the **Motion to Alter or Amend** stage. *See* AO1 (13)(a). Allowing interested parties to sit back and wait for the special master's final report and then file a challenge with the district court would cause unjustifiable expense and delay. Second, the district court has the affirmative duty to independently review the special master's report (irrespective of whether it has been challenged) using the clearly erroneous standard as to findings of fact and a free review of the conclusions of law. Upon such review, the district court may, on its own initiative, adopt, modify, or reject the report, receive further evidence, or refer it back to the special master. In contrast, an appellate court – which is not a fact finding court – is limited to the record before it in deciding whether the trial court's findings are clearly erroneous and/or whether the conclusions of law are incorrect.

[4] If no party files a challenge to a special masters report and recommendation, the court will not usually hold a hearing under I.R.C.P. 53(e)(2). As a practical matter, such a hearing would accomplish little, if anything; it would not be an efficient use of judicial resources, and would create unnecessary expense for the litigants.

Inc., 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings which a district court adopts in a non-jury action are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,[5] although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, *supra*, § 2614; *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100,

[5] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special masters findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra,* § 2585.

With respect to stipulated facts, I.R.C.P. 53(e)(4) provides that when parties stipulate that a special master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered (meaning freely reviewable by the referring district court).[6]

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied,* 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is

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[6] Read literally, this rule absolutely requires a referring district court to accept stipulated facts without any question. While this would be the result in the vast majority of cases, it is logical that the intent of this rule is much like the "uncontradicted testimony rule" of evidence. This "rule" is that "[t]he uncontradicted testimony of a credible witness must be accepted by the trier of fact unless the testimony is 'inherently improbable, or rendered so by facts and circumstances disclosed at the hearing . . . or impeached by any of the modes known to the law." *Faber v. State*, 107 Idaho 823, 824, 693 P.2d 469, 470 (Ct. App. 1984), *citing Dinnen v. Finch*, 100 Idaho 620, 626-627, 603 P.2d 575, 581-82 (1979). *See also Russ v. Brown*, 96 Idaho 369, 373, 529 P.2d 765, 769 (1974) ("[T]he trial court must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable or impeached"); *Roemer v. Green Pastures Farms, Inc.*, 97 Idaho 591, 593, 548 P.2d 857, 859 (1976) ("The district court, sitting as a trier of fact, may reject uncontradicted testimony of a witness if the testimony is inherently improbable."); *Wood v. Hoglund*, 131 Idaho 700, 703, 963 P.2d 383, 386 (1998) ("[I]t has long been recognized that unless a witness's testimony is inherently improbable, or rendered so by facts and circumstances disclosed at trial, the trier of fact must accept as true the positive, uncontradicted testimony of a credible witness."); Wright and Miller, Federal Practice and Procedure § 2586 (1995) ("The court need not accept even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable."). Hence, a reviewing district court, through its inherent powers and sitting as the final arbiter of all the issues, could reject stipulated facts which were inherently improbable and/or which would result in a fraud being perpetrated on the court or on others.

less clear. Professor Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 35.14 (1995), *citing Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), *citing* Idaho Appellate Handbook § 3.3.4.2.

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151,153, 922 P.2d 1077, 1079 (Ct. App. 1996).

Conclusions of Law of the Special Master

In contrast to the standard of review relative to findings of fact, a special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley,* 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley,* 124 Idaho at 534, 861 P.2d at 104. Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard.

Label is not Decisive

Plainly, the label put on a determination by a special master is not decisive. Therefore, if a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

Mixed Questions of Fact and Law

There is substantial authority that "mixed questions of fact and law" are not protected by the "clearly erroneous" standard and are freely reviewable. Wright and Miller, *supra*, § 2589; *U.S. v. Ekwunoh*, 12 F.3d 368, 372 (2nd Cir. 1993).

The Bottom Line Regarding Findings of Fact and Conclusions of Law

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

Standard of Review Regarding Admission or Exclusion of Evidence

A district court reviews a special master's decision admitting or excluding evidence, including the testimony of expert witnesses, under the abuse of discretion standard. This is the same standard that is used by an appellate court to review such decisions made by a trial court. *Morris by and through Morris v. Thomas*, 130 Idaho 138, 144, 937 P.2d 1212, 1218 (1997), *citing Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995).

In *Burgess,* the Idaho Supreme Court articulated the following test for whether a trial court (and likewise a special master) has abused its discretion:

> (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Burgess, 127 Idaho at 573, *citing Rhodehouse v. Stutts*, 125 Idaho 208, 213, 868 P.2d 1224, 1229 (1994).

A trial court, and likewise a special master, may exclude or strike evidence upon the motion of a party. Furthermore, a trial court or special master may exclude evidence offered by a party on its own authority, without a motion to strike or an objection made

by the opposing party. *Morris*, 130 Idaho at 144, 937 P.2d at 1218, *citing Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992).

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. I.R.C.P. 61; I.R.E. 103; *Burgess*, 127 Idaho at 574, 903 P.2d at 739; *Hake v. DeLane*, 117 Idaho 1058, 1065, 793 P.2d 1230, 1237 (1990); *Morris*, 130 Idaho at 144, 937 P.2d at 1218.

V.
BRIEF PROCEDURAL AND FACTUAL BACKGROUND

1. River Grove's predecessor-in-interest (Indian Point Associates) filed an Application for Permit with IDWR on July 12, 1982, seeking to appropriate 2.0 cfs from Billingsley Creek for a hydropower purpose of use. At the point of diversion from Billingsley Creek, the water was to be conveyed through the Barlogi ditch to a point of re-diversion into another ditch and ultimately to the proposed power plant.

2. This permit was approved by IDWR on October 18, 1983, for 2.0 cfs and included the following subordination language: "Use of water under this permit is subordinated to future diversion of water for irrigation or other consumptive beneficial uses." In approving the permit, IDWR also inserted the condition that "[t]he permit holder shall either install a measuring device or an access port or provide a certified measurement or computation of flow based upon system design to be prepared by a professional engineer."

3. River Grove's predecessor-in-interest had completed construction of the diversion works and applied the water to beneficial use on or before February 26, 1985, this being the date that IDWR conducted an on-site beneficial use examination. The Beneficial Use Field Report indicates that the flow was measured as "1.92 cfs going into pipeline used for power." *See* Trial Exhibit 1 (Beneficial Use Field Report).

4. On April 18, 1985, IDWR sent a letter to River Grove's predecessor-in-interest (Paul E. Watkins), which reiterated that a licensing examination had been completed on February 26, 1985, with a measurement of "1.92 cfs of water going into the pipeline to your power plant, (2,367 [sic 2.367] cfs total flow minus 0.443 cfs going over the weir with the pipeline full)." This letter also stated that "[y]our water license will not be issued for some time due to the Swan Falls water rights dispute. However, your water right is protected by the timely filing of your proof of beneficial use." Trial Exhibit 5 (letter from IDWR to Paul E. Watkins) (which this Court interprets to mean that the permitee had complied with the time requirements of I.C. § 42-204 and did not need to seek an extension of time to complete the works).

5. IDWR issued a Water Right License to River Grove's predecessor-in-interest (Paul and Inez Watkins) on April 3, 1991, for 1.92 cfs. This license contains the following language: "The water right confirmed in this license for hydropower purposes shall be junior and subordinate to all rights to the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this license and shall not give rise to any right or claim against any future rights to the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this license."

6. Neither River Grove nor the their predecessors-in-interest contested, in an administrative proceeding or otherwise, IDWR's inclusion of the subordination clauses contained in either the permit or the license.

7. A Notice of Claim to a Water Right was filed in the SRBA for water right no. 36-08099 by Paul Watkins and Inez Watkins on July 6, 1988, which claimed 2.0 cfs for power purposes.

8. An Amended Notice of Claim to a Water Right was filed in the SRBA for water right no. 36-08099 by Paul Watkins and Inez Watkins on December 7, 1997. On December 11, 1997 Special Master Haemmerle issued an *Order*

Granting Late Filing of Amended Claims. This Amended Notice of Claim claimed 1.92 cfs measured at the penstock, or alternatively 2.53 cfs measured at the point of diversion from Billingsley Creek. Additionally, the remark section of this Amended Notice states that "[t]here is no authority for subordination, & it was accomplished without statutory or constitutional due process. There should be no subordination."

9. On April 29, 1993, Paul Watkins and Inez Watkins filed an Objection to the Director's Report as to Quantity, Priority Date, Consumptive Use, Remarks, and Other.

10. On September 10, 1993, Keith Higginson, Director of IDWR filed a Response to Objection.

11. The initial Director's Report (November 2, 1992) for this water right was for 1.92 cfs with a remark that "0.24 cfs of right no. 36-00106 is limited to use for conveyance losses in delivery of this [36-08099] right ." The initial Director's Report also included a remark which recited the subordination language contained in the license.

12. The Supplemental Director's Report for Water Right Nos. 36-00106 and 36-08099 (February 2, 1998) recommended that the water right be decreed for 1.92 cfs, with at remark that "the appropriator is entitled to the quantity of water described for power purposes at point of measurement in the penstock, so long as the quantity diverted at the point of diversion does not constitute unreasonable waste." (Penstock meaning the point where the water actually enters the hydropower plant and not the point of diversion out of Billingsley Creek.) This Supplemental Director's Report also contained the subordination language.

13. The Amended Director's Report (May 15, 1998) recommends that the water right be decreed for 1.92 cfs, and also contains the same "measurement" remark as found in the Supplemental Director's Report. Also, this Amended Director's Report contains the subordination language.

14. Numerous proceedings were held before the Special Master, including a trial held on May 24, 1999, culminating in a *Special Master's Report and Recommendation* (June 7, 1999), which recommended that the water right be decreed for 2.51 cfs (1.92 cfs measured in the penstock plus a conveyance loss of 0.59 cfs). Furthermore, the Special Master recommended that the water right be decreed without the subordination remark.

15. On July 28, 1999, the State filed a *Motion to Alter or Amend*, arguing that the water right should be decreed as it was licensed, i.e. for 1.92 cfs and with the subordination remark.

16. On August 20, 1999, Special Master Haemmerle issued an *Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation*, which stated that "[w]ater right 36-08099 should be decreed as reported in the Director's Report including the [subordination remark]." Attached to this *Order* was a *Special Master's Recommendation* which was at variance with the Amended Director's Report in that it stated a quantity of 2.51 cfs rather than 1.92 cfs.

17. On August 30, 1999, the State filed a *Motion to Correct Clerical Error* pursuant to I.R.C.P. 60(a), pointing out this discrepancy. This Motion was granted by Special Master Cushman on October 5, 1999, correcting the *Recommendation* to provide for 1.92 cfs.

18. On September 3, 1999, River Grove filed its *Notice of Challenge*.

VI.
ISSUES PRESENTED

In its *Notice of Challenge*, River Grove states the following issues:

1. Did the Special Master err in concluding the subordination and quantity issues were not properly before this Court due to a lack of jurisdiction?

2. Did the Special Master err in holding the Claimant could not "collaterally attack" or challenge the subordination provisions recommended?

3. Did the Special Master err in concluding that the Claimant is barred from challenging the subordination provisions and quantity because it had failed to exhaust administrative remedies?

4. Did the Special Master err in recommending the right be decreed as recommended, given undisputed facts and law establish IDWR acted beyond its authority in licensing and recommending subordination?

5. Did the Special Master err by failing to find and/or conclude that the statute upon which IDWR relied to confer authority for subordination is inapplicable and may not be retroactively applied to this water right?

6. Did the Special Master err by recommending subordination under I.C. Section 42-203A, *et seq.* given the mandates of those statutes were admittedly not followed by IDWR?

These issues are addressed below as the "subordination remark" issue and the "conveyance loss" issue.

VII.
DECISION

1. Subordination Remark Issue

In his *Order Granting Motion to Alter or Amend*, Special Master Haemmerle held that River Grove's objection to the subordination remark contained in the Director's Report constitutes an impermissible collateral attack on an administrative agency's

(IDWR's) action.[7] Specifically, and citing to a previous decision, Special Master Haemmerle held:

> If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative [review] and, if necessary, a judicial review of the license. I.C. §§ 42-1701A and 67-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote omitted] *See e.g. Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

Supplemental Findings of Fact and Conclusions of Law (Facility Volume)(Subcases 36-02048 et.al.)(July 31, 1998) at 11-12 (Subsequently adopted by the District Court in *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, (December 29, 1999). This Court has reviewed this conclusion of law by the Special Master, and concurs therewith.

River Grove's claim in the SRBA to water right 36-08099 is predicated on the license issued April 3, 1991. The license, in turn, is predicated on the permit issued October 18, 1983. River Grove's objection to the subordination remark contained in the Director's Report is a very belated attempt to seek judicial review of an administrative agency's decision (IDWR). River Grove and/or its predecessors-in-interest failed to timely request a hearing pursuant to I.C. § 42-1701A, which allows for administrative review of IDWR's decisions in accordance with the Idaho Administrative Procedures Act, I.C. §§ 67-5201 to 67-5292 ("APA"). An opportunity for such a hearing presented

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[7] The Special Master also held that:

> [E]ven if special circumstances existed excusing [River Grove] from exhausting its administrative remedies in this case, such as a claim that IDWR lacked statutory or constitutional authority to subordinate the water right under Idaho Code § 42-203, [River Grove] would have had to pursue its claim in front of a court other than the SRBA where IDWR could be made a party to defend its actions. *See. e.g. Twin Falls Canal Co. v. Idaho Dep't of Water Resources*, 127 Idaho 688, 905 P.2d 89 (1995). Simply stated, the SRBA is not the proper forum for judicial review of agency determinations addressing conditions attached to licenses.

Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation, (August 20, 1999). River Grove argues that this conclusion of law is incorrect. However, because other issues in this case are dispositive, the Court declines to address this particular issue.

itself when the application for permit was approved (October 18, 1983) and when the license was issued (April 3, 1991). Upon approval of the permit, River Grove's predecessor-in-interest undertook construction of its hydropower facility with full awareness of the subordination condition imposed by IDWR. The permitee did not seek judicial review (of either the permit or the license) in accordance with the APA. At the time, former I.C. § 67-5215 also required exhaustion of administrative remedies as a prerequisite to judicial review.[8] This section further required a petition for judicial review to be filed with the district court within 30 days after the service of the final agency decision. The license on which River Grove's claim is predicated became final after the time for seeking review expired. Accordingly, this Court does not have jurisdiction to go back and review IDWR's decision at this point in time. *See Fairway Development Co. v. Bannock County*, 119 Idaho 121 (1990)(absent exceptions to the exhaustion doctrine, the district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted).

River Grove argues that this Court should depart from the general rule that administrative remedies should be exhausted because IDWR did not have the authority to place the subordination condition in either the permit or the license in the first instance (i.e. IDWR acted *ultra vires*). River Grove relies on *Bohemian Breweries v. Koehler*, 80 Idaho 438, 332 P.2d 875, which states that:

> While as a general rule administrative remedies should be exhausted before resort is had to the courts to challenge the validity of administrative acts, such a rule is not absolute and will be departed from where the interests of justice so require, and the rule does not apply unless the administrative agency acts within its authority.

Id. at 446, 332 P.2d 883. River Grove's reliance on the "*ultra vires*" exception to the general rule is misplaced for the following reasons:

[8] The current statutory provision requiring exhaustion of administrative remedies is I.C. § 67-5271 (1995 & Supp. 1999).

A. The rule requiring exhaustion of administrative remedies should be departed from only in situations where adherence to the rule would cause irreparable injury.

At oral argument on challenge, Counsel for the State argued that a party seeking deviation from the exhaustion of administrative remedies rule must also show that irreparable injury would result if the party were not allowed to seek review directly from a court. This Court agrees. Counsel for the State directed this Court to *Williams v. State*, 95 Idaho 5, 501 P.2d 203 (1972), and *Grever v. Idaho Telephone Company*, 94 Idaho 900, 490 P.2d 1256 (1972) for this proposition. In *Williams*, the Idaho Supreme Court discussed the above quoted language from *Bohemian Breweries*, and stated that "[t]he application of [the] doctrine [allowing departure from the rule requiring exhaustion of administrative remedies] should be limited to those situations where requiring the exhaustion of administrative remedies would occasion delay which would cause irreparable injury regardless of the outcome of the proceedings." *Williams*, 95 Idaho at 8. Indeed, even in the *Bohemian Breweries* case, the Idaho Supreme Court found that "[t]he threatened action of the Commissioner [of Law Enforcement] in this case would cause the brewery irreparable injury in loss of capital investment, money, business earnings and good will." *Bohemian Breweries*, 80 Idaho at 446. This "irreparable injury" standard was reiterated in *Grever*, 94 Idaho at 903. *See also Arnzen v. State*, 123 Idaho 899, 906-907, 854 P.2d 242, 249-250. In the case at bar, the fact that River Grove's predecessors-in-interest took no action when the permit was issued, administratively or otherwise, to contest IDWR's action, unequivocally demonstrates that this is not one of those situations where administrative remedies need not be exhausted. In other words, River Grove cannot be allowed to construct its diversion works and hydropower facility with full knowledge of the subordination condition, and then wait nearly ten years[9] before coming into court and asking for review of an administrative agency's action. River Grove clearly has not satisfied the irreparable injury standard in this case.

[9] IDWR approved the Application for Permit on October 18, 1983, and the subordination provision was objected to for the first time on April 29, 1993.

B. In 1983, when the application for permit was approved, IDWR had the lawful authority to subordinate the priority of water rights used for power purposes.

Prior to the enactment of I.C. § 42-203B(6) (July 1, 1985)(a legislative declaration that IDWR has authority to subordinate hydropower rights), IDWR was authorized to condition approval of hydropower permits upon subordination of priority to subsequent non-hydropower water uses. The source of this authority is twofold. The first source, as urged by the State's counsel, is Art. 15, § 3 of the Idaho Constitution, which states that:

> The 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.** Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution. (emphasis added).

Counsel for the State argues that this Article has provided IDWR with the authority to subordinate hydropower water uses since its enactment in 1928. River Grove argues that IDWR cannot derive authority from this constitutional provision without first being filtered through a specific legislative enactment, which did not occur until the passage of I.C. § 42-203B in 1985. At oral argument on challenge, counsel for River Grove relied on *Beker Industries, Inc. v. Georgetown Irrigation District*, 101 Idaho 187, 610 P.2d 546 (1980), for the proposition that IDWR cannot glean lawful authority or direction directly from the Constitution. However, this Court is not persuaded that *Beker Industries* stands for the proposition so asserted. In *Beker Industries*, the Idaho Supreme

Court looked to the legislative history of the statutory provision at issue,[10] and determined that by striking certain language in the final version of a bill, the legislature specifically intended that IDWR not have the particular authority at issue. No constitutional provision was at issue in *Beker Industries*.

While it may be somewhat unusual for an administrative agency to derive authority directly from a constitutional provision, there is no question that administrative agencies are constrained thereby. As such, IDWR is required to look to constitutional pronouncements for guidance when exercising its discretion. As explained below, IDWR has been granted the discretion to place reasonable conditions upon the applications to appropriate the waters of this state. While the policy statements found in the Constitution may not be intended to speak directly to IDWR, the exercise of discretion requires adherence thereto, and so does ordinary common sense.

The second pre-1985 source of authority for IDWR to subordinate hydropower uses was I.C. § 42-203 (now codified as I.C. § 42-203A(5) (1996 & Supp. 1999)), which states in relevant part that "[i]n all applications whether protested or not protested, where the proposed use is such . . . that it will conflict with the **local public interest**, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use . . . the director of the department of water resources . . . may grant a

[10] In *Beker Industries*, the statutory provisions at issue was were I.C. §§ 42-108 and 42-222(1).

permit **upon conditions**."[11] This "local public interest" consideration was adopted by the legislature in 1978, and has been interpreted by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441. In *Shokal*, the Court considered whether the "local public interest" included consideration of effluent discharge from a proposed fish

[11] At the time the Application for Permit was approved (October 18, 1983), I.C. § 42-203 read in its entirety as follows: 42-203. NOTICE UPON RECEIPT OF APPLICATION -- PROTEST -- HEARING AND FINDINGS -- APPEALS. On and after the passage, approval and effective date of this section, upon receipt of an application to appropriate the waters of this state, the department of water resources, shall prepare a notice in such form as the department may prescribe, specifying the number of the application and the date of filing thereof, the name and post-office address of the applicant, the source of the water supply, the amount of water to be appropriated, in general the nature of the proposed use, the approximate location of the point of diversion, and the point of use, stating in said notice that any protest against the approval of such application, in form prescribed by the department, shall be filed with the department within ten (10) days from the last date of publication of such notice. The director of the department of water resources shall cause the notice to be published in a newspaper printed within the county wherein the point of diversion lies, or in the event no newspaper is printed in said county, then in a newspaper of general circulation therein. This notice shall be published at least once each week for two (2) successive weeks.

Any person, firm, association or corporation concerned in any such application may, within the time allowed in the notice of application, file with said director of the department of water resources a written protest against the approval of such application, which protest shall state the new and address of protestant and shall be signed by him or by his agent or attorney and shall clearly set forth his objections to the approval of such application. Hearing upon the protest so filed shall be held within sixty (60) days from the date such protest is received. Notice of this hearing shall be given by mailing notice not less than ten (10) days before the date of hearing and shall be forwarded to both the applicant and the protestant, or protestants, by certified mail. Such notice shall state the names of the applicant and protestant, or protestants, the time and place fixed for the hearing and such other information as the director of the department of water resources may deem advisable. In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.

Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (1) that it will reduce the quantity of water under existing water rights, or (2) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (3) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (4) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (5) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use. The director of the department of water resources may reject such application and refuse issuance of permit therefor, or may partially approve and grant permit for a less quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

Any person or corporation who has formally appeared at the hearing, feeling aggrieved by the judgment of the director of the department of water resources may seek judicial review thereof in accordance with section 42-1701A(4), Idaho Code.

propagation facility. In its analysis, the Court approvingly cited two cases from other jurisdictions, *Tanner v. Bacon*, 103 Utah 494, 136 P.2d 957 (1943), and *East Bay Municipal Utility District v. Department of Public Works*, 1 Cal.2d 476, 35 P.2d 1027 (1934), both of which interpreted similar statutory provisions. In *Tanner*, the Utah Supreme Court analyzed Utah's statutory provision which requires the State Engineer to reject applications which "would prove detrimental to the public welfare." *Tanner*, 136 P.2d at 962 (citing Utah Code Ann. § 100-3-8 (1943) (currently designated as Utah Code Ann. § 73-3-8)). The Utah Court held that under this statutory provision, the plaintiff's application to appropriate water for hydropower purposes could be subordinated to water rights which may be acquired by competing appropriators under subsequent applications.

Similarly, in *East Bay*, the California Supreme Court interpreted a statutory provision which stated in part that "[t]he [state water] commissioner shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest." *East Bay*, 35 P.2d at 1028 (citing Section 15(St. 1913, p. 1021) as amended (St. 1921, p. 443). Relying on this statutory mandate, the state water commissioner had inserted the following language into a permit issued for hydropower purposes: "The right to store and use water for power purposes under this permit shall not interfere with future appropriations of said water for agricultural or municipal purposes." *East Bay*, 35 P.2d at 1027. In upholding the state water commissioner's action, the California Court stated that:

> Of course, it must always be kept in mind that the state cannot arbitrarily, and upon caprice only, reject an application. Clearly, the manner in which the unappropriated waters of the streams of the state shall be distributed among the applicants therefor involves questions of policy, and the Legislature, in the interest of public welfare, may prescribe reasonable conditions and priorities in such distribution. . . . Where the facts justify the action, the water authority should be allowed to impose, in the public interest, the restrictions and conditions provided for in the act.
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> *Id.* at 1029.

In *Shokal*, although the Idaho Supreme Court was considering water quality rather than subordination of hydropower rights, the Court stated that: "Both the Utah and California Supreme Courts have upheld state water agencies which had granted

[hydropower] appropriations subject to future appropriations for uses of greater importance – in effect prioritizing among uses according to the public interest. . . . The Director of Water Resources has the same considerable flexibility and authority . . . to protect the public interest."

C. In 1991, when the license was actually issued, IDWR had the authority to subordinate the priority of water rights used for power purposes.

It is clear that IDWR had the authority, pursuant to I.C. § 42-203B(6), to require subordination of River Grove's hydropower right in 1991 when the license was actually issued. River Grove asserts that its right became vested on or before February 26, 1985, and therefore I.C. § 42-203B(6) cannot not be applied retroactively to its water right. River Grove cites *Cantlin v. Cater*, 88 Idaho 179, 186 (1964) for the proposition that its water right vested as of the date its diversion works were complete and the water was beneficially used (i.e. on or before February 26, 1985).

In *Cantlin*, the Idaho Supreme Court made the statement that "[b]y actually diverting and applying water to a beneficial use, a legal appropriation is made, notwithstanding application was not made to the State Reclamation Engineer to prosecute such appropriation." *Id.* (citing *Furey v. Taylor*, 22 Idaho 605 (1912))(obviously addressing the constitutional method of appropriation which existed prior to 1971). Despite this language, the facts of *Cantlin* belie Claimant's proposition because Cantlin had obtained a permit to appropriate water. Eighteen months later Cantlin submitted proof of completion of the diversion works and sought to submit proof of application of water to beneficial use. Nevertheless, it is quite clear that any property right granted by Cantlin's permit had not vested, because the State Engineer revoked the permit upon determination that all the water in the particular source had already been appropriated, i.e. the permit should not have been issued in the first place.

River Grove also cites to *Crane Falls Power & Irrig. Co., Ltd. v. Snake River Irrig. Co., Ltd.*, 24 Idaho 63, reh'g granted 24 Idaho 77, 81 (1913); *Furey v. Taylor*, 22 Idaho 606, 610-11 (1912); *Nielsen v. Parker*, 19 Idaho 727, 731 (1911); *Sandpoint Water & Light Co. v. Panhndle Dev. Co.*, 11 Idaho 405, 413 (1905). All of these cases make

statements which are intended to compare the two methods previously available to appropriate water in the State of Idaho (i.e. through the permit process or by the constitutional method of diversion and application to beneficial use). River Grove's assertion that a water right vests upon application to beneficial use, and not upon issuance of a license by IDWR, may well be a correct statement of the law as to water appropriations made under the constitutional method (versus the permit method) and made prior to the 1971 statutory amendments making the permit process the exclusive method of appropriation. To the extent that the cases cited by River Grove correctly state the law as it existed prior to 1971, this aspect of these cases was legally altered by the legislature upon enactment of the aforementioned statutory amendments. Furthermore, the cases cited by River Grove are limited in that they all deal with some aspect of the constitutional method of appropriation, whereas River Grove's water right was acquired solely under the permit system. As discussed in detail below, it is clear that the legislature intended the issuance of the license to mark the point at which a water right becomes vested. Therefore, this Court holds that River Grove's water right could not have vested until IDWR issued the license on April 3, 1991. The following reasons support this holding:

i. Statutory Scheme. In 1971 the legislature amended I.C. §§ 42-103 and 42-201 to the effect that surface water rights could thereafter only be acquired by following the application, permit, and license procedures set forth in Title 42 of the Idaho Code. Chapter 2 of Title 42 sets forth the steps that must be completed before a water right comes into existence. Briefly, one who wishes to appropriate the unappropriated waters of this state must first make application to IDWR for a permit, and include certain information such as the source, point of diversion, purpose of use, etc. I.C. § 42-202. IDWR then publishes notice of the proposed diversion, inviting interested parties to protest the application. I.C. § 42-203A(1)-(4). IDWR then considers the application, protest or not, and makes various findings as to whether (a) the proposed diversion will reduce the quantity of water for existing water rights, (b) the water supply is sufficient for the proposed use, (c) the application is made in good faith, (d) the applicant has sufficient financial resources, (e) the proposal will not conflict with the local public interest, and (f)

the proposal is not contrary to conservation of water resources. I.C. § 42-203A(5). Depending upon these findings, IDWR can approve, partially approve, approve upon conditions, or reject the application. *Id.* Upon approval, the applicant has a specified period of time to construct the proposed diversion works. I.C. § 42-204. Once the works are completed, the applicant must file proof of completion with IDWR, and IDWR will conduct a field examination thereof. I.C. § 42-217. IDWR is to then carefully examine the evidence proving beneficial use, and if satisfied, issues a license confirming the water right. I.C. § 42-219. If IDWR finds that the applicant has not fully complied with the law and the conditions of the permit, **IDWR may refuse to issue the license**. I.C. § 42-219(6). Once the license is issued, I.C. § 42-220 states that "[s]uch license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right . . .." It is clear from this statutory scheme that it is the intent of the legislature that all of the steps -- **including issuance of the license** -- be completed before the water right vests, and until such time the right to the use of water remains an inchoate right. Because I.C. § 42-219(6) gives IDWR the responsibility to find the facts as to whether the permit conditions were complied with, it is untenable to assert that a water right may vest prior to this step in the permit and licensing process.

ii. Idaho Case Law. The following cases further support the proposition that a right to use the waters of this state remains inchoate until a license is actually issued by IDWR. *Hardy v. Higginson*, 123 Idaho 485 (1993)(Director can properly impose conditions on request to amend water permit, because permittee only has an inchoate right, not a vested right); *Hidden Springs Trout Ranch v. Allred*, 102 Idaho 623 (1981)(Director could consider the "local public interest," even though authority to do so was not granted by legislature until after applicant had applied for permit, because vesting of applicant's right was "contingent upon future statutory adherence and issuance of a license"); *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927)(statutory amendments, which increased the time allowable to submit proof of application to beneficial use, were not unconstitutionally retroactive, because permittee has an inchoate

right, not a completed appropriation); *see also Keller v. Magic Water Co.*, 92 Idaho 276 (1968).

iii. Authority from other jurisdictions. The Supreme Courts in Utah and Oregon have both reached the conclusion that a water right does not vest until the license is issued. *Little v. Greene & Weed Investment*, 839 P.2d 791 (Utah 1992); *Green v. Wheeler*, 458 P.2d 938 (Oregon 1969). The issue in *Little* was at what point in the statutory process for acquiring a water right does the right become appurtenant to land. In order to decide this question, the Utah Supreme Court had to decide whether the water right at issue became perfected at the point in time when the diversion works were completed and the water was put to beneficial use, or rather when the state engineer issued the certificate of appropriation (license). The Utah Supreme Court held that the water right remained inchoate until all of the statutory steps had been completed, including issuance of the certificate of appropriation.

The Supreme Court of Oregon reached the same conclusion in *Green v. Wheeler*, 458 P.2d 938. Green's predecessor-in-interest (Redwine) had a permit to appropriate groundwater. Redwine had completed the construction of the well and applied the water to a beneficial use (irrigation), but failed to properly notify the state engineer (Wheeler) of such completion. After the time for completion had elapsed, the state engineer implemented the statutory process for canceling the permit. Green argued that because the water had been applied to beneficial use, the right had vested and could not be cancelled. The Oregon Supreme Court disagreed, holding that "the legislative assembly intended the water right certificate, not the permit, even when followed by a beneficial use, to mark the point at which a water right becomes vested." *Id.* at 940.

In conclusion, for all these reasons, it is clear that a right to use the waters of this State remains inchoate until a license is actually issued by IDWR. Furthermore, River Grove could have sought some form of remedy such as a writ of mandamus back in 1985 if it thought it was being injured by IDWR's delay in issuing a license.

2. Conveyance Loss

River Grove asserts that the Special Master erred in recommending the water right as 1.92 cfs measured at the place of use (i.e. the penstock). River Grove argues that a conveyance loss of 0.59 cfs should be added to the water right, for a total of 2.51 cfs. The State argues that River Grove is bound by the terms of its license, and that because administrative remedies were not sought, judicial modification of the license to increase the quantity element in the SRBA is inappropriate. Furthermore, the State asserts that because the Application for Permit sought to appropriate 2.0 cfs (measured at the point of diversion), and the permit was approved for 2.0 cfs (measured at the point of diversion)[12], the maximum possible quantity that can be lawfully decreed in the SRBA is 2.0 cfs (measured at the point of diversion). River Grove agrees that Idaho law mandates that a water right is to be measured at the point of diversion, but that IDWR erred when the license was issued with the quantity of 1.92 cfs measured at the place of use rather than the point of diversion, and therefore the quantity element needs to be increased to provide a sufficient amount of water for conveyance loss to be able to get the 1.92 cfs at the penstock.

River Grove is correct in its assertion that a water right is to be measured at the point of diversion, not at the place of use. *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900)(to prevent waste, water must be measured at the point of diversion); *Bennett v. Nourse*, 22 Idaho 249, 125 P 1038 (1912); *Glenn Dale Ranches, Inc., v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972). Despite this longstanding Idaho law, IDWR issued the license for 1.92 cfs, which is the quantity that was measured by the IDWR field examiner as the quantity "going into pipeline used for power." *See* Trial Exhibit 1 (Beneficial Use Field Report).

[12] The Application for Permit requested 2 cfs from Billingsley Creek, to be diverted at "existing headgate/diversion to Barlogi ditch to owners ditch." Although not expressly stated therein, the 2 cfs requested would have to be the quantity which the permitee sought to appropriate from Billingsley Creek at the point of diversion. When IDWR approved the permit, it inserted a condition that "[t]he permit holder shall either install a measuring device or an access port or provide a certified measurement or computation of flow based upon system design to be prepared by a professional engineer." It is unclear from the face of the Permit as to whether this condition was for the purpose of measuring the water at the place of use or at the point of diversion. If this condition was intended to provide a measurement at the place of use, then it would necessarily have to be in addition to the required measurement at the point of diversion.

On the other hand, the State is correct in its assertion that the maximum quantity that can be decreed to River Grove is 2.0 cfs, because this is the maximum amount asked for in the application for permit. An SRBA decree which exceeded this amount would implicate significant due process concerns in that the permit process is designed to allow interested parties to protest the issuance of a permit. In other words, it is unknown whether there may have been interested parties who would have protested the application for permit if the permit had sought more than 2.0 cfs. This Court cannot bypass the statutory permit process by awarding more water than was initially requested.

Because Idaho law directs that this water right should be measured at the point of diversion, and because this water right cannot be decreed for more than 2.0 cfs, this Court holds that the water right should be decreed in the SRBA as 2.0 cfs measured at the point of diversion.

VIII.
CONCLUSION

River Grove was issued a permit to appropriate water for hydropower purposes with the condition that any rights acquired under the permit would be subordinated to future rights for any other purpose. River Grove constructed its diversion works and hydropower facility in light of this condition. If River Grove was aggrieved by IDWR's action, it should have protested this action when the permit was issued, and certainly before it broke the first soil in construction. It would be unfair to other water users who

may be affected by River Grove's appropriation if the terms and conditions of the permit are disregarded after its issuance.[13]

As to the license, River Grove complains that IDWR improperly delayed issuance of the license until after IDWR was given the specific authority to subordinate hydropower water rights under I.C. § 42-203B. If this complaint has merit, the appropriate remedy would have been for River Grove to file a writ of mandamus in 1985 compelling IDWR to issue the license at that point in time. However, given the Swan Falls litigation then in progress, and considering the subordination condition in the permit, it may have been quite difficult to demonstrate an abuse of discretion on the Director's part in delaying issuance of the license.

As to the conveyance loss issue, this Court agrees that the license should have been issued with the water being measured where it is diverted from Billingsley Creek. However, because the permit sought to appropriate 2.0 cfs, this is the maximum that can be decreed for this right. As explained in this opinion, one of the functions of the permit process is to safeguard the rights of other water users who may be affected by new appropriations. Such water users need to rest assured that a water right acquired under a permit will not exceed the terms and conditions of that permit. It is the State's duty as trustee of the waters of this state to ensure that the permit process is strictly complied with.

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[13] Although not raised by the State, it appears to this Court that the evidence of River Grove's conduct in this case may satisfy the elements of quasi-estoppel. *See Obray v. Mitchell*, 98 Idaho 533, 567 P.2d 1284 (1977); *Keesee v. Fetzek*, 111 Idaho 360, 723 P.2d 904 (1986). The elements of quasi-estoppel are (1) a change in position by the party against whom quasi-estoppel is being asserted, (2) which reaps an unconscionable advantage for that party, or imposes an unconscionable disadvantage upon another, and (3) reliance on the position formerly taken. In the case at bar, River Grove has clearly changed its position regarding the subordination of its water right. The fact that River Grove did not object to the inclusion of the subordination provision in the permit and that the hydropower facility was subsequently constructed in light of the subordination condition in the permit, demonstrates that River Grove initially accepted the condition. As to an unconscionable disadvantage to another and reliance on the former position, River Grove's failure to timely raise objections enabled River Grove to bypass the due process protections implicit in the process. Accordingly, prejudice and reliance may be presumed where the State holds the waters in trust for the benefit of its citizens, and where it is the notice requirements in the permit process that allow others to evaluate whether they will protest an application, and it is unknown whether any particular individual may have been disadvantaged by relying on River Grove's former position regarding subordination. Further, under *Cantlin v. Carter*, 88 Idaho 179, interested parties could have sought to have the permit vacated.

IT IS SO ORDERED:

DATED: JANUARY 11, 2000.

BARRY WOOD
ADMINISTRATIVE DISTRICT JUDGE
AND
PRESIDING JUDGE OF THE
SNAKE RIVER BASIN ADJUDICATION