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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**

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| | ) | Consolidated Subcase no. 92-23 |
| In Re SRBA | ) | |
| | ) | **MEMORANDUM IN SUPPORT** |
| Case No. 39576 | ) | **OF STATE OF IDAHO'S** |
| | ) | **MOTION FOR PARTIAL** |
| | ) | **SUMMARY JUDGMENT** |
| _____ | ) | |

## INTRODUCTION

This consolidated subcase presents important questions regarding the Legislature's exercise of its constitutional authority to "regulate and limit" hydropower water rights under landmark legislation that was enacted to settle the Swan Falls water rights controversy. These are questions of great significance for Idaho water policy,

because the legislation was intended not only to resolve the Swan Falls matter, but also to provide a balanced and comprehensive solution to the underlying problem: the recurring conflict between the in-stream use of water for hydropower generation, and the needs of agriculture and other uses to divert water out of the stream. The Swan Falls controversy was a symptom of an Idaho water policy conundrum that is more than a century old.

The Legislature resolved the Swan Falls controversy and the underlying problem by exercising the State's authority under section 3 of article XV of the Idaho constitution to "regulate and limit" the use of water for power purposes. The resulting legislation balanced the competing interests of hydropower uses and other uses by providing that when the State establishes minimum in-stream flows, any hydropower water rights that exceed the minimum flows are held in trust by the State. The hydropower water rights held in trust by the State are subordinated to future uses of water when the State determines that is in the public interest to do so. The trust arrangement thus protects hydropower uses through the establishment of a minimum flow, while also allowing for judicious development of alternative uses of the water in excess of the minimum flow.

Idaho Code § 42-203B is the vehicle through which the Legislature accomplished these purposes. The statute's plain language unambiguously provides that the State holds legal title to the hydropower water rights in this consolidated subcase that exceed the minimum flows the State established at the Murphy Gage below Swan Falls dam, and that the water rights held in trust by the State are subordinate to junior water rights acquired pursuant to State law.

The Legislature was so committed to establishing a conclusive record of legislative intent on these points that it purposefully created an extensive legislative

history demonstrating that the State holds legal title to the water rights in trust and subordinates them to new uses approved by the State. The Senate unanimously adopted the detailed "Statement of Legislative Intent" that the Senate Resources and Environment Committee had drafted for the Swan Falls trust and subordination legislation specifically to assist courts in resolving questions such as those presented in this consolidated subcase. The Statement of Legislative Intent expressly provides that section 42-203B "results in the State of Idaho holding legal title to all water rights previously claimed by Idaho Power Company" above the minimum stream flows established at the Murphy Gage.[1] This intent is further confirmed by the testimony memorialized in the minutes of the Senate Resources and Environment Committee and the House Resources and Conservation Committee of the representatives of the Governor, the Attorney General and Idaho Power, who drafted the Swan Falls Agreement and the implementing legislation—including Idaho Code § 42-203B.

The State is therefore entitled as a matter of law to summary judgment that the State holds legal title to any portion of the hydropower water rights subject to the Swan Falls settlement in excess of the minimum flows established at the Murphy Gage, and that the water rights held in trust are subordinate to junior water rights approved pursuant to State law. Idaho Power Company's contractual and equitable claims correspondingly fail as a matter of law because they rely on the erroneous premise that the trust is a contractual arrangement under the Swan Falls Agreement rather than a statutory relationship created and defined by the Legislature.

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[1] Appendix C at 3 ("Statement of Legislative Intent – S 1008"); *see also* Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("Orr Aff.") at Exhibit 28, p.5 (certified copies of excerpts of the Senate Journal, including "Statement of Legislative Intent – S 1008").

## STATEMENT OF UNDISPUTED FACTS

The following description of the Swan Falls controversy, the resulting settlement, and the subordination and trust legislation proposed thereunder and enacted by the Legislature—Idaho Code § 42-203B—relies on Idaho Supreme Court cases, certified copies of the legislative record of the statute, and other certified government records referenced herein.

## I. THE SWAN FALLS CONTROVERSY

The Swan Falls controversy of the late 1970s and early 1980s resulted from competition between the interests of those seeking to use water for hydropower generation and those seeking to use water for agriculture and other uses.[2] This competition is rooted in the fact that hydropower relies on in-stream flows, while agriculture and other beneficial uses require that water be diverted out of the stream. The latent tension between these conflicting needs fueled public debate and political intrigue long before the Swan Falls controversy.

In the 1889 debates over the water rights provisions of section 3 of article XV of the Idaho constitution, delegates to Idaho's constitutional convention recognized that if hydropower uses were not limited, such uses could potentially preclude agricultural development.[3] In the 1920s, when a number of new hydropower facilities were being proposed, the concern over the potential for hydropower uses to preclude future development re-surfaced.[4] The State Commissioner of Reclamation urged the Governor

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[2] *Idaho Power Co. v. State*, 104 Idaho 575, 578, 661 P.2d 741, 744 (1983).

[3] II PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 (I.W. Hart ed., 1912) at 1125-26.

[4] Orr Aff. at Exhibit 17, attachment to committee minutes of Jan. 17, 1985 entitled "Historical Outlines of the Swan Falls Controversy," p.1 ("1926 – Citizen concern with the use of a downstream non-consumptive right preventing future development.")

to support the passage of a constitutional amendment allowing the State to deny hydropower applications, advising him that in the absence of such authority, "[t]he State was not in a position to protect its own interests . . . in the event these rights to the use of Snake River for power matured, the State would have been prevented from making any future consuming use in irrigation or otherwise . . ."[5] As a consequence, a constitutional amendment to section 3 of article XV of the Idaho constitution was adopted in 1928, which provides that "the state may regulate and limit the use [of water] for power purposes."[6]

The divide between power generation and agricultural development re-appeared again in the 1950's, when Idaho Power Company ("Idaho Power" or "the Company") sought the support of Governor Len Jordan and Idaho agricultural interests for the Company's Hells Canyon project against a competing federal proposal. The Company obtained their support only after agreeing to unconditionally subordinate its water rights at its Hells Canyon and C.J. Strike facilities to future upstream depletions.[7]

Despite Governor Jordan's efforts to lay to rest the question of whether Idaho Power's hydropower water rights were subordinated, the issue surfaced again in the 1970s with the Swan Fall controversy. The controversy arose when a group of Idaho Power Company's ratepayers filed a complaint with the Idaho Public Utilities Commission ("IPUC"). The ratepayer complaint alleged that Idaho Power had wasted assets, overstated capital, and overcharged ratepayers by failing to preserve and protect

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[5] Orr Aff. at Exhibit 64, p. 3 (letter from Commissioner of Reclamation W. G. Swendsen to Governor C.C. Moore, dated August 18, 1924).

[6] Idaho CODE – GENERAL LAWS OF IDAHO ANNOTATED – CONSTITUTIONS ETC. 410 (2004) (Article XV § 3 of the Idaho Constitution, including "Compiler's notes" for the 1928 amendment); s*ee* Donald Crowley & Florence Heffrom, THE IDAHO STATE CONSTITUTION: A REFERENCE GUIDE 231 (1994 Greenwood Press); Dennis C. Colson, IDAHO'S CONSTITUTION – THE TIE THAT BINDS 173 (1991 University of Idaho Press).

[7] *Idaho Power Co. v. State*, 104 Idaho at 580, 661 P.2d at 746.

its water rights at the Swan Falls dam against depletions in the flows of the Snake River resulting from consumptive uses under junior priority water rights located above the dam.[8]

The IPUC denied the Company's motion to dismiss the ratepayer complaint,[9] and the Company responded by suing the Idaho Department of Water Resources ("the Department") and several other defendants, seeking a determination that the Company's water rights at its Swan Falls facility were valid and not subject to future depletions in the flows of the Snake River.[10] The defendants asserted, among other defenses, that the State is authorized to regulate and limit water rights for power purposes under the 1928 amendment to section 3 of article XV of the Idaho constitution, that the subordination provision in the Company's federal license for the Hells Canyon project subordinated the Swan Falls water rights, and that Idaho Power had lost its water rights by adverse possession, forfeiture, and abandonment.[11]

The district court granted the summary judgment against the Company based on the subordination language in Article 41 of the Federal Energy Regulatory Commission ("FERC") license for Idaho Power's Hells Canyon hydropower complex. The district court held that Article 41 effectively subordinated all of the Company's water rights upstream of Hells Canyon, including those at Swan Falls, to future depletions in the flows of the Snake River.[12] The Idaho Supreme Court reversed, holding that the FERC license

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8 *Idaho Power Co. v. State*, 104 Idaho at 582, 661 P.2d at 748.

9 *Idaho Power Co. v. State*, 104 Idaho at 582, 661 P.2d at 748.

10 *Idaho Power Co. v. State*, 104 Idaho at 582, 661 P.2d at 744. The IPUC allowed the ratepayer action to remain inactive pending the outcome of the district court litigation. Orr Aff. at Exhibit 65, p. 2 (IPUC order no. 19590 (April 11, 1985)).

11 *Idaho Power Co. v. State*, 104 Idaho at 582, 661 P.2d at 748.

12 *Idaho Power Co. v. State*, 104 Idaho at 583, 661 P.2d at 749. At the time, FERC was known as the Federal Power Commission.

subordination provision did not apply to any facilities or water rights upstream of Hells Canyon.[13]

The Supreme Court remanded the case for factual findings on affirmative defenses alleging that the Company had lost its water rights through abandonment, forfeiture or other means.[14] The Company responded by filing a second lawsuit claiming unsubordinated water rights at Swan Falls and a number of other Company facilities below Milner dam, naming the State and approximately 7,500 water right holders in the Snake River basin as defendants ("the 7500 Case").[15] This prompted the Department to impose a moratorium on new water right applications upstream of the Swan Falls dam.[16] The lawsuits and the moratorium spawned a subordination controversy that expanded into the Legislature, where several unsuccessful attempts were made in the 1983 and 1984 sessions to resolve the matter through legislation.[17]

## II. THE SETTLEMENT NEGOTIATIONS.

Idaho Power sought a compromise with the State after the 1984 legislative session to avoid litigation between itself and thousands of water right holders.[18] The ensuing settlement discussions in the summer and fall of 1984 led to the "Framework for Final Resolution of Snake River Water Rights Controversy," which the Chief Executive Officer of Idaho Power, the Governor, and the Attorney General signed on October 1,

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13 *Idaho Power Co. v. State*, 104 Idaho at 586, 661 P.2d at 752.

14 *Idaho Power Co. v. State*, 104 Idaho at 588-89, 661 P.2d at 754-55.

15 *In re Snake River Basin Water System*, 115 Idaho 1, 3, 764 P.2d 78, 80 (1988) (citing *Idaho Power Co. v. Idaho Dept. of Water Resources*, Ada County Case Number 81375). This case was also sometimes known informally as "Idaho Power vs. The World."

16 *See* Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("Orr Aff.") at Exhibit 8, p.1 (committee minutes of Jan. 18, 1985) ("Since the Swan Fall's [sic] lawsuit the Director has been imposing a moratorium . . .").

17 Orr Aff. at Exhibit 41, Track 1 at 1:44 – 2:15 (Costello statements in public information meeting, Oct. 25, 1984); *see also id.* at Exhibit 44, p. 3 (transcript) ("We fought that [subordination] battle over two years in the Idaho legislature, and fought it to a bloody standstill"); *see also* Affidavit of Kristin M. Ford, Legislative Librarian, Legislative Services Office ("Ford Affidavit").

18 *Miles v. Idaho Power Company*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989).

1984 ("Framework").[19] The Framework "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."[20] These actions included, among other things, increasing the State Water Plan's minimum stream flows for the Murphy Gage below Swan Falls dam from 3,300 c.f.s. year-round to 3,900 c.f.s. during the irrigation season and 5,600 c.f.s. during the non-irrigation season, and requiring that new water rights applications be scrutinized under "public interest criteria."[21]

The parties continued working towards a final settlement, but the negotiations stalled on the question of whether Idaho Power's claimed water rights for flows above the new minimums for the Murphy Gage would be immediately "subordinated" by the settlement agreement, or only "subject to subordination" at some point in the future, as new uses were approved under the "public interest" analysis. This was not a trivial disagreement. The Attorney General formally advised the Governor not to sign the agreement if it provided for "subordinatable" rather than "subordinated" water rights,[22] and the entire settlement was thrown into doubt. The trust concept resolved this impasse on the question of "subordinated" versus "subordinatable" water rights.

As Idaho Power's attorney and negotiator Tom Nelson explained to the Senate Resources and Environment Committee ("Senate Resources Committee") during its first substantive hearing on the legislation that produced Idaho Code § 42-203B: "In the course of the negotiations, in the final stages, we were 'laugerheaded' on the question of

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19 Orr Aff. at Exhibit 29, Exhibit 32.
20 Orr Aff. at Exhibit 29, p. 2 ("Framework").
21 Orr Aff. at Exhibit 29, p. 2-4 ("Framework").
22 Orr Aff. at Exhibit 69 (letter from Attorney General Jim Jones to Governor John Evans, Oct. 17, 1984).

whether the Company's water rights above the minimum flow would be immediately subordinated by implementation of the agreement or remain in place unsubordinated until such time as the state permitted that water to someone else's use. . . . It became somewhat of a political problem."[23] The Attorney General's written testimony for the same hearing also explained that "the parties encountered [difficulty] in defining Idaho Power Company's Swan Falls water rights," citing the State's rejection of a "subordinatable" water right and the Company's objection to "the State's insistence on complete subordination."[24]

"The trust concept was adopted to get around" this problem, as Tom Nelson testified to the Senate Resources Committee on January 18, 1985.[25] Mr. Nelson again explained to the Senate Resources Committee on February 1, 1985: "The trust provision could get us around the subordinated versus the subordinatable nature of the water above the minimum flow. It remains unsubordinated, but it's held in trust by the state, and it neatly sidestepped the problem . . . ."[26] The Attorney General's written testimony also stated that the "[t]he trust approach embodied in these subsections is an outgrowth of the difficulty the parties encountered in defining Idaho Power Company's Swan Falls water rights."[27]

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[23] Orr Aff. at Exhibit 8, p. 3 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 33, Track 2 at 9:48-10:40 (recording); *see also* Exhibit 37, pp. 21-22 (transcript).

[24] Orr Aff. at Exhibit 8, attachment to committee minutes of Jan. 18, 1985 entitled "Prepared Testimony of Jim Jones, Idaho Attorney General on Senate Bills 1006 and 1008," p. 2.

[25] Orr Aff. at Exhibit 8, p. 3 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 33, Track 2, 10:41-10:45, 11:36-11:45 (recording); *see also id.* at Exhibit 37, p.22 (transcript).

[26] Orr Aff. at Exhibit 11, p. 5 (committee minutes of Feb. 1, 1985); *see also id.* at Exhibit 36, 27:03-27:28 (recording); *see also id.* at Exhibit 40, p. 24 (transcript).

[27] Orr Aff. at Exhibit 8, attachment to committee minutes of Jan. 18, 1985 entitled "Prepared Testimony of Jim Jones, Idaho Attorney General on Senate Bills 1006 and 1008," p. 2.

The trust concept addressed the State's concern "that leaving ownership in the Company did not provide adequate protection for the citizens of Idaho"[28] by putting control of the subordination of the water rights in the State's hands. Tom Nelson testified to the Senate Resources Committee that the trust "makes clear the State's control of the allocation of the water."[29] Pat Kole, the Attorney General's counsel and negotiator, similarly explained that "[this package] restores control over Idaho waters to members of the legislature."[30]

Tom Nelson further explained to the Senate Resources Committee:

> Part of this was kind of a put up or shut up situation on both sides. The Company said it didn't want to be watermaster; **the state said OK, then take yourself totally out of any vestige of control over the rights that you have defined. We said alright,** but if you are going to be the watermaster then you get out and you take care of it. . . . The trust provision was I think an idea of the state. I seized upon it because it filled what I saw as a major problem from our side, which was we can get the state to sign, but how did we get the state to live up to what they said they would do and that was a major problem from our side.[31]

The trust arrangement also satisfied Idaho Power's concern that the water rights for the flows above the new minimums remain unsubordinated until new uses were approved under the "public interest" criteria. The Attorney General's written testimony to the Senate Resources Committee explained that the trust arrangement allowed the State to approve only those water permit applications that were deemed to be in the public interest: "The trust concept, thus, permits the state to assert that the stream is fully

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[28] Orr Aff. at Exhibit 8, attachment to committee minutes Jan. 18, 1985 entitled "Prepared Testimony of Jim Jones, Idaho Attorney General on Senate Bills 1006 and 1008," p. 3

[29] Orr Aff. at Exhibit 8, p.3 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 33, Track 2, 10:56 – 11:11 (recording); *see also id* at Exhibit 37, p.22 (transcript).

[30] Orr Aff. at Exhibit 9, p. 2 (committee minutes of Jan. 21, 1985); *see also id.* at Exhibit 34a, 14:48 – 15:00; *see also id.* at Exhibit 38, pp.12-13 (transcript) "And that's the important element of this package. It restores control over Idaho water to you, members of the Legislature.")

[31] Orr. Aff. at Exhibit 11, pp. 4-5 (committee minutes of Feb. 1, 1985) (emphasis added); *see also id.* at Exhibit 36, 25:26 – 27:01(recording); *see also id.* at Exhibit 40, pp. 23-24 (transcript).

appropriated because of an existing claim while at the same time making water available to those uses that create a net benefit to the State."[32]

Thus, the trust was a compromise that satisfied both parties' concerns on the question of "subordinated" versus "subordinatable" water rights. Pat Kole summed up the arrangement during an Idaho Water Resource Board public information meeting on the settlement: "And what we ended up agreeing to was to, in essence, have the water right placed in trust in the ownership of the state in exchange for which we went with the concept of the subordinatable water right."[33] The parties quickly finalized the settlement agreement after the trust proposal resolved the problem of "subordinated" versus "subordinatable" water rights. The final settlement agreement, which was simply entitled "Agreement," was executed on October 25, 1984.[34]

## III. THE SWAN FALLS SETTLEMENT

Consistent with the "Framework," 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. [35] The parties agreed that the State Water Plan should be

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[32] Orr Aff. At Exhibit 8, attachment to minutes entitled "Prepared Testimony of Jim Jones, Idaho Attorney General on Senate Bills 1006 and 1008," p. 3.

[33] Orr Aff. at Exhibit 43b, Track 1 at 10:36-10:58 (recording of public information meeting of Nov. 1, 1984); *see also id.* at Exhibit 46, pp. 45-46 (transcript); *see also* Affidavit of Patsy McGourty, Secretary, Idaho Water Resource Board ("McGourty Affidavit").

[34] *Miles*, 116 Idaho at 636-37, 778 P.2d at 758-59 (referring to the Swan Falls Agreement); *In re Snake River Basin Water System*, 115 Idaho at 2-3, 764 P.2d at 79-80 (same); *see also* Orr Aff. at Exhibits 30-32. The parties executed on the same day the "Contract to Implement Chapter 259, Sess Laws, 1983." Orr Aff. at Exhibit 31. This contract was also known as the "1180 Contract" because it was authorized by legislation proposed under 1983 Senate Bill 1180. *See* 1983 Idaho Session Laws 689-91; Complaint at 7 ¶ 20.

[35] *See* Orr Aff. at Exhibit 30 ¶ 13 ("Conditions on Effectiveness") *id.* at Exhibit 30 ¶ 16 ("Termination of Contract"); *id*. at Exhibit 29, p.2 ("Framework") (". . . would resolve the outstanding legal issues to our mutual satisfaction.")

amended to increase the minimum flows for the Murphy Gage from 3,300 c.f.s.[36] to 3,900 c.f.s. during the period from April 1 to October 31, and to 5,600 c.f.s from November 1 to March 31.[37] The parties also agreed that the Legislature should enact "subordination legislation"[38] and adopt new "public interest criteria" to guide the re-allocation of water from hydropower uses under the water rights held in trust to other uses under more junior water rights.[39] The legislative program the parties proposed also included funding for hydrologic and economic studies of the Snake River basin and a general adjudication of the same, limitations on IPUC jurisdiction to hear claims that Idaho Power had failed to preserve or protect its hydroelectric water rights, and authorization for the Department to promulgate administrative rules and regulations to implement the "public interest" criteria.[40]

The parties appended the proposed legislation and amendments to the State Water Plan to the Agreement in nine numbered exhibits.[41] The proposed legislation and water plan amendments had been negotiated and approved by the parties and were intended to be enacted as a package,[42] substantially as proposed by the parties.[43] The Agreement

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[36] *Idaho Power Co. v. State*, 104 Idaho at 590, 661 P.2d at 756.

[37] Orr Aff. at Exhibit 30, at Exhibit 6 to Swan Falls Agreement.

[38] Orr Aff. at Exhibit 30 ¶ 13(A)(vii) (Swan Falls Agreement).

[39] Orr Aff. at Exhibit 30 ¶ 13 (Swan Falls Agreement); *id.* at Exhibit 30 at Exhibit 1 to Swan Falls Agreement.

[40] Orr Aff. at Exhibit 30 ¶ 13 (Swan Falls Agreement); Exhibit 30 ¶ 6 (Swan Falls Agreement); *see also id.*at Exhibit 8, p.1 (minutes of Jan. 18, 1985); *see also id.* at Exhibit 10, p.5 (Dunn testimony in minutes of Jan. 25, 1985); *see also id.* at Exhibit 20, p.2 (Costello testimony in minutes of Feb. 11, 1985).

[41] Orr Aff. at Exhibit 30, at Exhibits 1-6, 7A, 7B, and 8 to Swan Falls Agreement.

[42] Orr Aff. at Exhibit 9, p. 2 (committee minutes of Jan. 21, 1985).

[43] Orr Aff. at Exhibit 9, p. 2 (Nelson testimony in minutes of Jan. 21, 1985) ("Remember it was negotiated by us and approved by the principals as a package and should be accepted or rejected as a package")); *see also id.* at Exhibit 8, p. 6 (Nelson testimony in minutes of Jan. 18, 1985) ("We are tied to this program and are committed to it and if we start amending it, we will be in a real mess"); *see also id.* at Exhibit 9, p.1 (Costello testimony in minutes of Jan. 21, 1985) ("the bills are part of a larger compromise packages that was arrived at last fall between the Governor and Idaho Power and Attorney [General] Jim Jones this summer and fall . . . the five pieces of legislation that have been introduced so far . . . are the core of the agreement that was entered into"); *see also id.* Exhibit 33, Track 3 at 9:44 - 9:55 (Nelson); *see also*

provided that "each party agrees to actively and in good faith support such legislation or action."[44]

The Agreement was also contingent on the issuance of "appropriate" orders by the IPUC and FERC regarding the effect of the settlement.[45] The parties agreed to meet on May 15, 1985, to determine whether to continue the Agreement or to terminate it.[46]

On the day the Agreement was signed, the Idaho Water Resource Board, at the request of the Governor, sponsored the first of several "public information meetings" on the settlement at various locations in the southern part of the State.[47] The attorneys who negotiated the settlement on behalf of Idaho Power, the Governor and the Attorney General—Tom Nelson, Pat Costello and Pat Kole, respectively—jointly explained the settlement at these meetings and took questions from legislators, the public and the members of the Water Board.[48]

The various pieces of proposed legislation required to implement the settlement were introduced into the Legislature in the 1985 session under separate bills,[49] but were generally recognized as components of an integrated package, all of which had to be enacted to resolve the controversy.[50] The Water Board held hearings on the proposed

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*id.* at Exhibit 34a, 4:27 - 6:40 (Costello), 15:27 – 15:57 (Nelson); *see also id.* at Exhibit 37, p.32 (transcript) (Nelson); *see also id.* at Exhibit 38, p.6 (transcript) (Costello), p.13 (Nelson).

[44] Orr Aff. at Exhibit 30 ¶ 4 (Swan Falls Agreement).

[45] Orr Aff. at Exhibit 30 ¶ 12 (Swan Falls Agreement).

[46] Orr Aff. at Exhibit 30 ¶ 16 (Swan Falls Agreement).

[47] Orr Aff. at Exhibit 32, p.1 ("Currents," Nov. 1984) (reference to "public information meetings"); *see also id.* at Exhibit 33, Track 1, 14:51 – 15:04; *see also id.* at Exhibit 37, p.13 (transcript); *see also id.* at Exhibit 41, Track 1, 00:50 – 1:10 (Costello opening remarks in public information meeting); *see also id.* at Exhibit 44, p.2, (transcript).

[48] Orr Aff. at at Exhibits 41, 42, 43a & 43b (recordings of public information meetings); *see also generally id.* at Exhibits 44-46 (transcripts of the public information meetings); *see also* Orr Aff. at Exhibit 71, p.2 (Water Board minutes of Nov. 2, 1984); *see also* McGourty Affidavit.

[49] *See, e.g.,* Orr Aff. at Exhibit 3 (Senate Bill 1008 and Statement of Purpose); *id* at Exhibit 4 (Senate Bill 1005 and Statement of Purpose).

[50] *See* Orr Aff. at Exhibit 9, p. 2 (Nelson statements in Senate Resources Committee minutes of Jan. 21, 1985 ); *see also id.* at Exhibit 6 (Costello statements in Senate Resources Committee minutes of Jan.

amendments to the State Water Plan and passed the amendments proposed by the settlement on March 1, 1985.[51] Idaho Power filed petitions with IPUC and FERC seeking declaratory orders accepting the settlement.[52] The Legislature enacted the proposed legislation and ratified the State Water Plan amendments,[53] and the IPUC dismissed the ratepayer complaint against Idaho Power under the newly enacted jurisdictional limitations protecting the Company from such claims.[54] All contingencies except the required FERC order had been satisfied by May 15, 1985, and on that date the Governor, the Attorney General and Idaho Power Company executed an "Affirmation of Continuation of Agreement."[55]

Also in May 1985, the Department began holding hearings and soliciting public comment on the issues to be addressed in the administrative rules that would implement the "public interest" criteria legislation.[56] Idaho Power submitted written comments the following month.[57] The Department subsequently promulgated proposed "water allocation rules" and again held hearings and solicited public comment.[58] Idaho Power submitted additional written comments, and in April 1986 also challenged the proposed

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11, 1985); *see also id.* at Exhibit 34a, 00:19 – 00:56 (recording of Chairman Noh's opening remarks in Senate Resources Committee "public hearing" of January 21, 1985); *see also id.* at Exhibit 38, p.3 (transcript of same).

[51] Orr Aff, at Exhibit 66, p.1 ("Currents," Jan. 1985); *Id.* at Exhibit 15, attachment to committee minutes of March 4, 1985 entitled "A Resolution" before the Idaho Water Resource Board.

[52] *See* Orr Aff. at Exhibit 9, p. 2 (Nelson statements in Senate Resources Committee minutes of Jan 21, 1985); *see also id.* at Exhibit 34a, 15:01 – 17:35 (recording); *see also id.* at Exhibit 38, p. 13-15 (transcript).

[53] *See* 1985 Idaho Session Laws chapters 14-19, 162, 204; *see also Miles*, 116 Idaho at 637, 778 P.2d at 759 ("Subsequently, our legislature enacted legislation to implement the agreement.")

[54] Orr Aff. at Exhibit 65, p. 2 (IPUC order no. 19590 (April 11, 1985)).

[55] Orr. Aff. at Exhibit 47 ("Affirmation of Continuation of Agreement.").

[56] Orr. Aff. at Exhibit 48 (News Releases) and at Exhibit 49 (Notice); *see also* 1985 Idaho Session Laws 22 (authorizing the Director to promulgate rules and regulations).

[57] Orr. Aff. at Exhibit 50 (Idaho Power Company comments of June 13, 1985).

[58] Orr Aff. at Exhibit 51 (acknowledging receipt of Idaho Power comments); *id.* at Exhibit 52 ("Currents," October 1985).

rules in a declaratory judgment action in the District Court for Twin Falls County.[59] The Company dismissed the lawsuit later that year.[60]

The final contingency for resolving the Swan Falls controversy was satisfied in 1988. FERC complied with a Congressional directive to issue a declaratory order on the Swan Falls settlement on March 25, 1988,[61] and the "Joint Agreement Regarding Fish and Wildlife Studies" required under the FERC order was filed on May 25, 1988.[62]

## IV. THE SUBORDINATION LEGISLATION.

### A. The Senate And House Committee Hearings.

The "subordination legislation"[63] required to implement the settlement was set forth in Exhibits 7A and 7B to the Agreement[64] and was introduced into the Legislature in Senate Bill 1008.[65] Senate Bill 1008 proposed to codify Exhibit 7B in a new statute, Idaho Code § 42-203B.[66] The bill was often referred to as the "centerpiece" of the legislation required to implement the settlement.[67]

Senate Bill 1008 was the principal subject of four Senate Resources Committee hearings and a hearing before the House Resources and Conservation Committee (the

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[59] Orr Aff. at Exhibit 56 ("Petition for Declaratory Judgment"). Idaho Power also filed an "Objection" and "Petition" with the Department on the same day. Orr Aff. at Exhibit 58 ("Petition") and Exhibit 59 ("Objection").

[60] Orr. Aff. at Exhibit 57 ("Notice of Dismissal").

[61] *See* Public Law 100-216 (Dec. 29, 1987); *see also* Orr. Aff. at Exhibit 67 (FERC order).

[62] Orr. Aff. at Exhibit 68.

[63] Orr Aff. at Exhibit 30 ¶ 13(A)(vii) (Swan Falls Agreement).

[64] Orr Aff. at Exhibit 30, at Exhibits 7A and 7B to Swan Falls Agreement.

[65] *Compare* Orr Aff. at Exhibit 30, at Exhibit 7B to Swan Falls Agreement *with id.* at Exhibit 3 (SB 1008).

[66] Orr Aff. at Exhibit 3, p.2-4 ("a NEW SECTION, to be known and designated as Section 42-203B").

[67] Orr Aff. at Exhibit 8, attachment to committee minutes of Jan. 18m, 1985 entitled "Prepared Testimony of Jim Jones, Idaho Attorney General on Senate Bills 1006 and 1008," p. 2; *id.* at Exhibit 27, attachment to minutes entitled "Statement of Legislative Intent – S.B. 1008," p. 1; *id.* at Exhibit 20, p.3 (committee minutes).

"House Resources Committee"). [68] The two resources committees and the Senate State Affairs Committee also briefly considered the legislation in several other hearings.[69] The tape recordings of the four principal hearings of the Senate Resources Committee were preserved as part of the legislative record at the instruction of the Chairman of the committee, Senator Laird Noh.[70]

The three attorneys who negotiated the Agreement jointly attended three of the principal Senate Resources Committee hearings on Senate Bill 1008, and also the principal House Resources Committee hearing on the bill.[71] Idaho Power's attorney Tom Nelson also attended the fourth major Senate Resources Committee hearing on SB 1008.[72] The first and second Senate Resources Committee hearings opened with the negotiators jointly providing summary explanations of the proposed legislation and the overall settlement.[73] The committee members questioned the negotiators at length on the proposed legislation and the overall settlement in each of the principal hearings.[74]

Pat Costello, the Governor's counsel and Swan Falls negotiator, opened the first major Senate Resources Committee hearing by providing a section by section summary of Senate Bill 1008. He explained the "trust" provisions of the bill to the Senate Resources Committee as follows:

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[68] The dates for the Senate Resource Committee hearings were January 18, 21, 25 and February 1, 1985; for the House Resource Committee, the hearing dates were February 1, 11 and 13, 1985. *See* Orr Aff. at Exhibits 8-11 and 19-21 (committee minutes). Members of the House Resources Committee also attended some of the Senate Resources Committee hearings. *See* Orr Aff. at Exhibit 34a, 1:50 – 2:10 (recording of hearing of Jan. 21, 1985) ; *see also id.* at Exhibit 38, p.4 (transcript).

[69] *See* Orr Aff. at Exhibits 6, 19, 21, 26, and 27 (committee minutes).

[70] Affidavit of Laird Noh.

[71] *See* Orr Aff. at Exhibits 8-10 and Exhibit 20 (committee minutes).

[72] *See* Orr Aff. at Exhibit 11 (committee minutes of Feb. 1, 1985).

[73] *See* Orr Aff. at Exhibits 8-9 (committee minutes).

[74] *See* Orr Aff. at Exhibits 8-11, 20 (committee minutes); *see also id.* at Exhibits 33-36 (recordings of the four principal Senate Resources Committee hearings); *see also id.* at Exhibits 37-40 (transcripts).

> [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** . . .[75]

Later in the hearing, in response to questions from committee members, Mr. Costello further explained that:

> [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**.[76]

The Attorney General's written testimony to the Senate Resources Committee on Senate Bill 1008 at the same hearing also stated that "[a]s drafted, the State possess[es] legal title to all waters previously claimed by the Company above 3,900 c.f.s."[77]

Idaho Power's attorney Tom Nelson was present at this hearing and did not disagree with, object to, or attempt to qualify Mr. Costello's statements or the Attorney General's written testimony. Rather, Mr. Nelson told the Senate Resources Committee that "[t]he 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."[78]

Idaho Power's subsequent written statement in support of Senate Bill 1008 to the Senate Resources Committee further explained that "[t]he state, as trustee, can protect

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[75] *See* Orr Aff. at Exhibit 33, Track 1, 2:19 – 2:47 (recording of committee hearing of Jan. 18, 1985); *see also id.* at Exhibit 37, pp. 4-5 (transcripts) (emphasis added).

[76] Orr Aff. at.Exhibit 33, Track 5, 6:36 – 6:59 (recording of committee hearing of Jan. 18, 1985); *see also id* at Exhibit 8, p. 11 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 37, p. 53 (transcripts) (emphasis added).

[77] Orr Aff. at Exhibit 8, attachment to committee minutes of Jan. 18, 1985 entitled "Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008," p. 3.

[78] Orr Aff. at Exhibit 8, p. 3 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 33, Track 2, 10:57 – 11:53 (recording); *see also id.* at Exhibit 37, p. 22 (transcript).

those [water] rights, and so also can Idaho Power Company, as beneficiary of the trust and as user of the unsubordinated water right."[79] Idaho Power's written statement also explained to the committee that rather than providing for "a voluntary transfer of [the Company's] water rights," that "the basis for [Idaho Code § 42-203B] is the State's power to 'regulate and limit' the use of water for power purposes."[80]

This new "regime" under which the State would hold in trust hydropower water rights for flows above State-designated minimum flows[81] was not to be limited to the Swan Falls matter, however. The Attorney General explained in his supplemental written testimony to the Senate Resources Committee that the legislation was structured not simply to resolve the Swan Falls lawsuits but also "to prevent future Swan Falls types of situations from arising . . . The negotiators believed and still believe that a mechanism must be created in state law to provide a resolution process for addressing these problems."[82] Pat Kole similarly explained to the committee that "[w]e were trying to address two issues, first [the lawsuit], and secondly, more importantly, providing a mechanism in state law so that Swan Falls-type problems could be resolved without expensive litigation."[83]

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79 Orr Aff. at Exhibit 10, attachment to committee minutes of Jan. 25, 1985 entitled "Statement of Idaho Power Company in Support of Senate Bill 1008," p. 1.

80 Orr Aff. At Exhibit 10, attachment to committee minutes of Jan. 25, 1985 entitled "Statement of Idaho Power Company in Support of Senate Bill 1008," p. 1.

81 Orr Aff. at Exhibit 8, p.8 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 33, Track 4, 4:45 – 5:27, (recording); *see also id.* at Exhibit 37, p. 40 (transcript).

82 Orr Aff. at Exhibit 10, attachment to committee minutes of Jan. 25, 1985 entitled "Supplemental Testimony of Attorney General Jim Jones Before the Idaho Senate Committee on Resources and Environment," pp.1-2.

83 Orr Aff. at Exhibit 35, Track 1, 4:03 – 4:17 (recording of committee hearing of Jan. 25, 1985); *see also id.* at Exhibit 39, pp.5-6 (transcript).

B. The "Statement of Legislative Intent."

From the outset of the committee hearings on the Swan Falls legislation, there was "more than the usual interest in establishing background as to what might be legislative intent."[84] In the third Senate Resources Committee hearing on Senate Bill 1008 (January 25, 1985), then-State Senator Mike Crapo stated that the hearings had helped him understand the intent of the proposed legislation, but "if this ever gets to court or the Department of Water Resources needs guidance . . . it would be very beneficial if we, as a committee, develop a statement of legislative intent or purpose to accompany this."[85] There was general agreement among the committee members that it was important to establish the legislative intent of Senate Bill 1008 and to create a thorough legislative record, and Senator Crapo's proposal sparked an extended discussion on whether to draft a separate statement to establish the legislative intent of the bill.[86] Ultimately the committee voted to hold the bill in committee for a week to give Senators Crapo and Peavey time to prepare a formal statement of legislative intent.[87]

Senator Crapo distributed the final version of the "Statement of Legislative Intent – S.B. 1008" at the next Senate Resources Committee hearing on the legislation. He explained that he had prepared the initial draft, discussed it with representatives of Idaho

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[84] Orr Aff. at Exhibit 34a, 2:25 – 2:39 (recording of committee hearing of Jan. 21, 1985); *see also id.* at Exhibit 38, p.4 (transcript).

[85] Orr Aff. at Exhibit 10, p. 8 (committee minutes of Jan. 25, 1985); *see also id.* at Exhibit 35, Track 2, 11:10 – 12:00; *see also id.* at Exhibit 39, p.36 (transcript).

[86] Orr Aff. at Exhibit 10, pp. 8-9 (committee minutes of Jan. 25, 1985); *see also id.* at Exhibit 35, Track 2, 11:10 – 31:48 (recording) *see also id.* at Exhibit 39, pp. 36-54 (transcript).

[87] Orr Aff. at Exhibit 10, pp. 8-9 (committee minutes of Jan. 25, 1985); *see also id.* at Exhibit 35, Track 2, 11:10 – 31:48 (recording) *see also id.* at Exhibit 39, pp. 36-54 (transcript).

Power, the Governor's office and the Attorney General's office, revised the document, circulated it again, and made some further minor revisions.[88]

The final Statement of Legislative Intent described SB 1008 as the "centerpiece" of the Swan Falls legislation.[89] With respect to section (2) of the bill, which became Idaho Code § 42-203B, the statement provided that "[t]his 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."[90] The statement further provided that "**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. . . . ."[91] Further, the statement explained that the trust was keyed to the established minimum flows "rather than any estimates of how much water may be available above such minimum flows."[92]

The statement also explained the intended effect of the statute with respect to the Swan Falls controversy:

> 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. . . . 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.[93]

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88 Orr Aff. at Exhibit 36, 00:10 – 1:03 (recording of committee hearing of Feb. 1, 1985); *see also id.* Exhibit 40, pp. 3-4 (transcript); *see also id.* at Exhibit 11, p. 1 (minutes).

89 Orr Aff. at Exhibit 11, attachment to committee minutes of Feb. 1, 1985 entitled "Statement of Legislative Intent – S.B. 1008," p. 1.

90 *Id.* at 2.

91 *Id.* at 3. (emphasis added).

92 *Id.* at 3.

93 *Id.* at 4 (emphasis added).

The Statement of Legislative Intent also addressed Section 3 of Senate Bill 1008, which provided the "public interest" analysis to be codified in Idaho Code § 42-203C: "This section specifies the criteria which must be met to appropriate waters which are subject to the trust established in [Idaho Code § 42-203B]."[94] The statement explained that these criteria were "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 hydropower use."[95] The statement further explained that the legislation

> 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 necessary, without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation.[96]

C. Enactment and Amendment of the "Subordination Legislation."

The Senate Resources Committee voted to adopt the final Statement of Legislative Intent, and consented to Chairman Noh's request for authorization to circulate the statement to the full Senate prior to a floor vote.[97] The Senate passed SB 1008 on February 6, 1985, and immediately after doing so, unanimously approved Senator Noh's request that the full text of the Statement of Legislative Intent be placed in the Senate Journal.[98] Senate Bill 1008 and the new section 42-203B became law under chapter 17 of the 1985 Idaho Session Laws.[99]

The Legislature amended Idaho Code §§ 42-203B, 42-203C and 42-203D the following year to address certain issues raised by the administrative rules the Department

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94 *Id.* at 4.
95 *Id.* at 6.
96 *Id.* at 6.
97 Orr Aff. at Exhibit 11, p. 2 (committee minutes of Feb. 1, 1985); *see also id.* at Exhibit 36, 10:47 – 13:30 (recording); *see also id.* at Exhibit 40, pp. 12-14 (transcript).
98 Orr Aff. at Exhibit 28 (Statement of Legislative Intent approved and set forth the Senate Journal).
99 1985 Idaho Session Laws 23-27.

had promulgated to implement the "public interest" criteria.[100] Senator Crapo and Idaho Power Company attorney Tom Nelson explained to the Senate Resources Committee and the House Resources Committee that the amendments only clarified the previous legislation and did not change the settlement.[101] No other changes have been made to Idaho Code § 42-203B since its enactment. Copies of the current version of Idaho Code § 42-203B, Senate Bill 1008 as enacted under 1985 Idaho Session Laws, and the Senate Journal pages containing the "Statement of Legislative Intent – S 1008," are appended hereto as Appendices A, B, and C.

## V. THE COURSE OF THE PROCEEDINGS.

On December 29, 2006, the Director filed his recommendations for Basin 2 with this Court. The Director recommended that Idaho Power Company be decreed as the owner of that portion of the hydropower water rights for flows of 3,900 c.f.s. from April 1 to October 31, and 5,600 c.f.s. from November 1 to March 31, as measured at the Murphy Gage. The Director recommended that any portion of the hydropower water rights for flows above these levels be decreed with the State holding legal title in trust for the benefit of Idaho Power and the People of the State of Idaho, and with equitable title being held jointly by Idaho Power and by the State for the benefit of the People of the State of Idaho. These recommendations are summarized in Appendix D.

The Director also recommended that the decrees for all of the hydropower water rights in question—Idaho Power's water rights and the water rights to be held in trust by the State—contain remarks pertaining to subordination and the trust in the sections of the

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[100] 1986 Idaho Sess. Laws 309-12; *see also* Orr Aff. at Exhibit 60 (1986 Senate Bill 1358 and Statement of Purpose).

[101] Orr Aff. at Exhibit 61 (committee minutes of Feb. 5, 1986); *id.* at Exhibit 62 (committee minutes of Feb. 19); *see also id.* at Exhibit 63 (committee minutes of March 13).

partial decrees for the "Quantity" element and for the "Other Provisions Necessary for Definition or Administration of This Water Right."[102]

On February 20, 2007, the Director filed amended reports for water rights 37-2128, 37-2471, 37-2472, 37-20709 and 37-20710.[103] The amended reports recommended that legal title to these water rights be decreed as being held in trust by the State for the use and benefit of Idaho Power and the People of the State of Idaho. [104] The amended recommendations also contained substantially the same subordination and trust remarks as the Basin 2 recommendations.[105]

Idaho Power objected to the ownership and quantity elements in the amended recommendations for the Basin 37 water rights and to the Director's subordination and trust remarks, asserting that the water rights should be decreed in the Company's name without the subordination and trust language.[106] The State objected to the amended recommendations on the ground that under *United States v. Pioneer Irrigation District, (In re SRBA)*, 144 Idaho 106, 157 P.3d 600 (2007), the Name and Address section of the partial decrees should identify only the legal title holder, not the equitable or beneficial

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[102] *See* Director's Reports for 02-100, 02-2001A, 02-2001B, 02-2032A, 02-2032B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-4000A, 02-4000B, 02-4001A, 02-04001B, 02-10135 (hereinafter, "Basin 2 water rights").

[103] Hereinafter, "the Basin 37 water rights." These water right claims are associated with Idaho Power's upper and lower Malad River facilities.

[104] *See* Amended Director's Reports for the Basin 37 water rights.

[105] *See* Amended Director's Reports for the Basin 37 water rights. Note also that while the Basin 36 water rights covered by the Swan Falls Agreement had been previously decreed in Idaho Power's name and without any reference to the Agreement, this omission has been recognized as an oversight. Order Designating Basin-Wide Issue Re: To What Extent, If Any, Should the *Swan Falls Agreement* be Addressed in the SRBA or Memorialized in a Decree? (*In re SRBA, Basin-Wide Issue 13*) (Aug. 23, 2004) at 6 n.6.

[106] *See* Idaho Power Company's Motion to File Late Objections and Standard Form I Objection to Amended Director's Report (Subcase nos. 37-2128, 27-2471, 37-2472, 37-20709, and 37-20710) (May 1, 2007).

title holder.[107] The State also objected to correct a scrivener's error: the remarks in the amended recommendations incorrectly stated that the Swan Falls Agreement was signed in 1985, rather than 1984.[108]

Idaho Power filed a "Response" to the State's *Pioneer* objection, including a twenty-six (26) page "Counterclaim" raising a number of issues and claims.[109] Idaho Power simultaneously filed in the main SRBA case a substantially identical "Complaint and Petition for Injunctive and Declaratory Relief" ("Complaint"). Idaho Power moved to stay the subcases for the water rights subject to the Swan Falls Agreement in favor of proceeding under the Complaint, or alternatively to consolidate the subcases,[110] and the State moved to strike or dismiss the Complaint.[111]

On July 24, 2007, this Court entered an order consolidating the relevant subcases on the issues of ownership of the water rights and the interpretation and/or application of the Swan Falls Agreement, dismissing Idaho Power's claim for "repeal" of Attorney General Opinion 06-2, and separating and staying Idaho Power's claims against the Director and the Department.[112] The Court also stayed the proceedings in the consolidated subcase, with the exception of discovery, until the close of the Basin 2 objection period on December 5, 2007.[113]

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[107] *See* State of Idaho's Standard Form I Objection to Amended Director's Report (Subcase nos. 37-2128, 27-2471, 37-2472, 37-20709, and 37-20710) (May 3, 2007).

[108] *See* State of Idaho's Standard Form I Objection to Amended Director's Report (Subcase nos. 37-2128, 27-2471, 37-2472, 37-20709, and 37-20710) (May 3, 2007).

[109] *See* Idaho Power Company's Standard Form 2 Response to Objection to Amended Director's Report (Subcase nos. 37-2128, 27-2471, 37-2472, 37-20709 and 37-20710) (May 10, 2007).

[110] Idaho Power Company's Motion for Stay of Proceedings on Idaho Company Water Rights in Basins 2, 36 and 37, or Alternatively to Consolidate Proceedings. (*In re SRBA, Case No. 39576*) (May 10, 2007).

[111] *See generally* Memorandum in Support of Motion to Strike or Alternatively to Dismiss Complaint and Petition for Declaratory and Injunctive Relief (*In re SRBA, Case no. 39576*) (May 30, 2007).

[112] Order at 14-17.

[113] Order at 17. The parties have both served and responded to discovery requests, and discovery continues.

At the close of the objection period, the State and Idaho Power filed objections to the Director's Basin 2 recommendations that were substantially similar to the objections each had previously filed in the Basin 37 subcases. No other party objected to the recommendations pertaining to the consolidated subcase. On December 14, 2007, the State moved for partial summary judgment on the following three issues:

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 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 of Idaho under Idaho § 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.[114]

## ARGUMENT

### I. LEGAL STANDARDS

Summary judgment is proper 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 a judgment as a matter of law." I.R.C.P. 56(c). "All disputed facts are to be construed liberally in favor of the non-

[114] *See* State of Idaho's Motion for Partial Summary Judgment.

moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Robert Comstock LLC v. Keybank Nat'l Assn.*, 142 Idaho 568, 571, 130 P.3d 1106, 1109 (2006).

The interpretation of a statute is a question of law over which a court exercises free review. *Cowan v. Board of Comm'rs of Fremont County*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006). The objective of statutory interpretation is to give effect to legislative intent. *State v. Yzaguirre*, 144 Idaho 471, 475, 163 P.3d 1183, 1187 (2007). The best guide to legislative intent is the words of the statute itself, therefore the interpretation of a statute must begin with the literal words of the statute. *Id.* Where the statutory language is unambiguous, the Court does not construe it but simply follows the law as written. *Id.* The statutory words must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole. *Idaho Cardiology Associates, P.A. v. Idaho Physicians Network, Inc.*, 141 Idaho 223, 225, 108 P.3d 370, 372 (2005).

When a statute is ambiguous, "'it must be construed to mean what the legislature intended it to mean. To determine that intent, we examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.'" *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 398-399, 111 P.3d 73, 83-84 (2005) (internal citation omitted). In such cases, a court should consider "context in which language is used, the evils to be remedied and the objects in view." *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005).

## II. THE PLAIN LANGUAGE OF IDAHO CODE § 42-203B PROVIDES THAT THE STATE HOLDS LEGAL TITLE TO HYDROPOWER WATER RIGHTS PREVIOUSLY CLAIMED BY IDAHO POWER THAT EXCEED THE MINIMUM FLOWS ESTABLISHED AT THE MURPHY GAGE.

### A. Idaho Code § 42-203B Implements The State's Constitutional Authority To Regulate And Limit Hydropower Water Rights By Establishing A Trust In Which The State Holds Legal Title To Hydropower Water Rights That Exceed State-Designated Minimum Flows.

Idaho Code § 42-203B expressly provides that it is an implementation of "the state's power to regulate and limit the use of water for power purposes" under the Idaho Constitution. Idaho Code § 42-203B(1); *see also* Idaho Const. art. XV § 3 ("the state may regulate and limit the use [of water] for power purposes"). This exercise of constitutional authority is intended "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." Idaho Code § 42-203B(1). The statute defines the relationship as a dual-purpose trust intended to "assure and adequate supply of water for all future beneficial uses" and to protect a hydropower user's right "to continue using the water pending approval of depletionary future beneficial uses":

> 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.

Idaho Code § 42-203B(1).

Under "the trust established by subsections (2) and (3)," Idaho Code § 42-203B(1), the hydropower water rights for the flows that exceed a State-established minimum stream flow are held in trust by the State: "**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." Idaho Code § 42-203B(2) (emphasis added); *see also id.* § 42-203B(3) ("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").

It follows as a matter of law that the State holds "legal title" to the water rights held in trust under Idaho Code § 42-203B. Under Idaho law, the "separation of the legal title from the beneficial interest" is an "essential characteristic" of a trust relationship. *DBSI/TRI V v. Bender*, 130 Idaho 796, 809, 948 P.2d 151, 164 (1997). "[T]he trustee is the holder of legal title to the property subject to the beneficial interest of the beneficiary." *Id.* at 808, 948 P.2d at 163.

These principles were well established in Idaho law long before the enactment of Idaho Code § 42-203B. *See In re Eggan's Estate*, 86 Idaho 328, 337, 386 P.2d 563, 568 (1963) ("The essential characteristics of a trust are the separation of the legal from the beneficial interest and the existence of a fiduciary relationship"); *see also State v. Cosgrove*, 36 Idaho 278, 284, 210 P. 393, 395 (1922) (A trustee . . . is the owner of the property, and deals with it as principal, as owner and as master . . . ."). [115]

"Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed. The legislature is presumed not to intend to overturn long established principles of law unless an intention

[115] The principle that a trustee holds legal title to the trust *res* is well-established in the law generally. *See* Black's Law Dictionary 1546 (8th ed. 2004) ("trust, *n.* 1. The right, enforceable solely in equity, to the beneficial use of property to which another holds the legal title").

to do so plainly appears by express declaration or the language employed admits of no other reasonable construction." *McCann v. McCann*, 138 Idaho 228, 236, 61 P.3d 585, 593 (2002) (citations and internal quotation marks omitted). Thus, under long-standing principles of Idaho law, the trust established by Idaho Code § 42-203B results in the State holding "legal title" to the water rights held in trust. *See also State v. Parker*, 141 Idaho 775, 779, 118 P.3d 107, 111 (2005) ("We assume the legislature has full knowledge of existing judicial decisions and our caselaw.").

Further, and consistent with the express exercise of the State's constitutional authority to regulate and limit hydropower water rights, the State holds legal title to water rights that exceed a State-established minimum flow in trust regardless of whether the State and the hydropower user have entered into an agreement. *Compare* Idaho Code § 42-203B(2) (water rights that exceed a minimum flow held in trust when there is a subordination agreement) *with id.* § 42-203B(3) (water rights that exceed a minimum flow held in trust in the absence of a subordination agreement).

The statute expressly provides that an agreement between the State and the hydropower user may define the extent to which water rights for flows below the State-designated minimum flows are subordinated to other uses. *See* Idaho Code § 42-203B(2) (providing that water rights for power purposes that are "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"). The trust pertains to water rights that exceed State-established minimum flows, however.

In addition, the sole relevance to the trust of a subsection (2) subordination agreement is simply that the existence of such an agreement means that new uses of

waters subject to the water rights held in trust must comply with the "public interest" requirements of Idaho Code § 42-203C. Conversely, in the absence of a subsection (2) subordination agreement, new uses of waters subject to the water rights held in trust need not comply with the "public interest" analysis. *Compare* Idaho Code § 42-203B(2) ("including compliance with the requirements of section 42-203C, Idaho Code") *with id.* § 42-203B(3) ("excluding compliance with the requirements of section 42-203C, Idaho Code") (emphases added).

The trust established by Idaho Code § 42-203B thus balances the dual and often competing purposes of "assur[ing] an adequate supply of water for all future beneficial uses" while preserving the hydropower user's right "to continue using the water pending approval of depletionary future beneficial uses." Idaho Code § 42-203B(1). The statute is a constitutionally authorized and carefully considered legislative solution to the policy conundrum presented by the long running competition between hydropower and other beneficial uses for the use of Idaho's water resources.

B. Pursuant to Idaho Code § 42-203B The State Holds Legal Title To Hydropower Water Rights Previously Claimed By Idaho Power For Flows That Exceed The Minimums Established At The Murphy Gage By State Action.

Section 42-203B provides that the State holds in trust hydropower water rights that exceed "a minimum flow established by state action." Idaho Code §§ 42-203B(2), (3). The State established the minimum stream flow applicable to the water rights at issue in this consolidated subcase through amendments to the State Water Plan passed by the Idaho Water Resource Board and ratified by the Legislature.

The Idaho Water Resource Board is the "Water Resource Agency" authorized by section 7 of article XV of the Idaho constitution. *Idaho Power Co. v. State*, 104 Idaho

570, 572, 661 P.2d 736, 738 (1983); *see also* Idaho Code § 42-1734(1) ("the water resource board, herein created, is hereby constituted the [Article XV, section 7] water resource agency"). The Water Board is charged with developing and maintaining a comprehensive state water plan, Idaho Code § 42-1734A, which is subject to the Legislature's review and approval. Idaho Code § 42-1736.

On March 1, 1985, the Idaho Water Resource Board passed amendments to Policy 32 of the State Water Plan[116] that established minimum stream flows at the Murphy gaging station of 3,900 c.f.s from April 1 to October 31, and 5,600 c.f.s from November 1 to March 31. Orr. Aff. at Exhibit 15 (attachment to Senate Resources Committee minutes of March 4, 1985, entitled "In the Matter of Policy 32 of the State Water Plan – A Resolution"). The Legislature ratified the amendments by statute shortly thereafter. 1985 Idaho Session Laws 514. The minimum flows defined for the Murphy Gage by the State Water Plan, which was formulated by the Idaho Water Resource Board and ratified by the Idaho Legislature, plainly constitute a "minimum flow established by state action." Idaho Code § 42-203B(2)-(3).

Pursuant to the plain statutory language, the State thus holds in trust any portion of the hydroelectric water rights at the Idaho Power facilities located above the Murphy Gage station that exceed the minimum flows established at the Murphy Gage station by the State Water Plan. Idaho Code § 42-203B(2)-(3). This necessarily includes the water rights enumerated in the Swan Falls Agreement. This conclusion is confirmed by subsection (5) of the statute, which specifically recognizes that the hydropower water rights subject to the Swan Falls settlement are held in trust by the State pursuant to subsection (2). Idaho Code § 42-203B(5). The State therefore holds "legal title" to the

[116] The policies in the State Water Plan were later re-numbered, and Policy 32 is now Policy 5.

water rights in this consolidated subcase for flows that exceed flows of 3,900 c.f.s from April 1 to October 31 and 5,600 c.f.s from November 1 to March 31 as measured at the Murphy Gage. *See DBSI/TRI*, 130 Idaho at 808, 948 P.2d at 163.

Thus, the Director was correct in recommending that the portion of the Basin 2 and Basin 37 water rights for flows above 3,900 c.f.s from April 1 to October 31 and 5,600 c.f.s from November 1 to March 31 as measured at the Murphy Gage be decreed with the State holding legal title. The Director had no other proper option under Idaho Code § 42-203B.

## III. THE WATER RIGHTS HELD IN TRUST BY THE STATE UNDER IDAHO CODE § 42-203B ARE SUBORDINATE TO ANY USE OF WATER AUTHORIZED UNDER A WATER RIGHT ACQUIRED PURSUANT TO STATE LAW.

Idaho Code § 42-203B expressly provides that "[t]he 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." Idaho Code §§ 42-203B(2), (3). Thus, the State's issuance of a new water right in compliance with the requirements of state law has the legal effect of subordinating the water rights held in trust by the State to the newly approved water right.

This statutory subordination process authorizes the State to re-allocate water from hydropower use under the water rights held in trust by the State to alternative uses under new water rights. By subordinating the priority of the senior hydropower water rights held in trust by the State to the newer, junior water right, the State opens the door to new development or alternative uses of the water formerly used for hydropower generation. Without this statutory subordination process, the senior priority of the hydropower water

rights held in trust would effectively block new development and prevent alternative uses of the water, the very problem the Legislature sought to remedy.

While Idaho Code § 42-203B created the trust and authorizes the State to subordinate the water rights held in trust to junior water rights, it does not define what new uses will enjoy the benefit of the subordination. This determination is governed by other applicable "state law." Idaho Code § 42-203B(2), (3). The applicable "state law" includes compliance with the "public interest" requirements of Idaho Code § 42-203C only when the State and a hydropower user have entered into an agreement defining the extent to which hydropower water rights for flows below the minimum flows are to remain unsubordinated. *Compare* Idaho Code § 42-203B(2) *with id.* § 42-203B(3).

This statutory framework allows the State to modify the standards for approving new water rights and subordinating the water rights held in trust—such as the "public interest" criteria or any other applicable provisions of state law—without altering the trust itself. In short, rather than establishing favored and disfavored uses for purposes of subordinating the water rights held in trust, the Legislature created a flexible subordination scheme that focuses not on the nature of the proposed use, but whether the new water right has been approved in accordance with applicable state law. Thus, the Legislature is free to alter or modify the standards and procedures of the applicable "state law" for approving new uses, and mold state water policy to suit changing conditions and needs.

This flexibility is an integral part of the legislative determination that the "water rights subordination plan" of the Swan Falls 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." *Miles*, 116 Idaho at 640, 778 P.2d at 762; *see also* 1985 Idaho Sess. Laws 20. Thus, it would be contrary to the plain language and legislative intent of Idaho Code § 42-203B for the water rights held in trust to be decreed with any subordination limitations beyond the requirement that new water rights be acquired pursuant to state law. Idaho Code § 42-203B(2), (3).

## IV. THE LEGISLATIVE HISTORY CONFIRMS THAT IDAHO CODE § 42-203B WAS INTENDED TO GIVE THE STATE LEGAL TITLE TO HYDROPOWER WATER RIGHTS "PREVIOUSLY CLAIMED BY IDAHO POWER."

The Court need not examine the legislative history of Idaho Code § 42-203B because the plain terms of the statute compel the conclusion that the State holds legal title to the water rights in question and that they are subordinate to any junior water right acquired pursuant to applicable State law. Nonetheless, even assuming, *arguendo*, that the statute is ambiguous on the questions of the ownership and subordination of the hydropower water rights that exceed the minimum flows established at the Murphy Gage, the legislative history of the statute leads inexorably to the conclusion that the Legislature intended the statute to result in the State holding legal title in trust to such water rights previously claimed by Idaho Power, and that the water rights held in trust by the State would be subordinate to junior water rights acquired pursuant to State law.

### A. The Statement of Legislative Intent Confirms That Idaho Code 42-203B Was Intended To Place Legal Title To The Water Rights In Trust With The State And That The Water Rights Held In Trust Would Be Subordinated By The State To Any Use Authorized By A Water Right Acquired Pursuant To State Law.

Outside of the plain statutory language, the Statement of Legislative Intent is the most authoritative explanation of the legislative intent of Idaho Code § 42-203B. The statement was itself the product of a legislative-type process, having been drafted and revised by Senator Crapo with the input and comment of Senator Peavey and the negotiators of the Swan Falls Agreement, adopted by vote of the Senate Resources Committee, and unanimously approved by the full Senate. The statement fills two and a half pages of the Senate Journal and provides a detailed, section-by-section explanation of the intent of the legislation.

The Statement of Legislative Intent explains that Idaho Code § 42-203B "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." Statement of Legislative Intent at 59.[117] Specifically, "**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." *Id.* at 59 (emphasis added).

Further, the trust is keyed to minimum stream flows "**rather than any estimates of how much water may be available above the minimum flows**." *Id.* (emphasis added). Thus, "[a]ny portion of such water rights above the established minimum stream flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho." *Id.*

The Statement of Legislative Intent also succinctly sums up the intended application and effect of Idaho Code § 42-203B with regard to the Swan Falls

[117] The "Statement of Legislative Intent" is appended hereto in Appendix C; *see also* Orr Aff. at Exhibit 28. The page citations used in this discussion refer to the Senate Journal pages. The statement is set forth on pages 58-61 of the 1985 Senate Journal.

controversy: "**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**." Statement of Legislative Intent at 60 (emphasis added). With regard to subordination of the water rights held in trust, "[t]he 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 . . . . 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." *Id.* at 60.

The statement also demonstrates that Idaho Code §§ 42-203B and 42-203C were not intended to limit subordination of the water rights held in trust to any particular type of use, but rather to provide flexible subordination standards that the Legislature could change as it saw fit: "the legislation specifically ties the appropriation of water from the trust to conformance with 'state law' and not to the new public interest criteria." Statement of Legislative Intent at 60. "This provides flexibility to the state in the future to change the law . . . without modifying the operation of the trust provisions. Thus, State water policy is not frozen by this legislation." Statement of Legislative Intent at 59-61.

B. The Parties' Testimony In The Committee Hearings Is Consistent With The Statement Of Legislative Intent.

As previously discussed, Idaho Code § 42-203B began as part of the "subordination legislation" proposed by the Swan Falls Agreement. This proposed legislation was drafted and negotiated by the parties and presented to the Senate Resources Committee as a 'take it or leave it' proposition. The negotiators discouraged any amendments to the proposed legislation and testified to the Senate Resources

Committee and the House Resources Committee that the settlement depended on enactment of the language proposed in the exhibits to the Agreement.

The negotiators explained the intent of the proposed legislation to the Senate and House committees in some detail, and the committee members questioned the negotiators extensively on the legislation and the overall settlement. The negotiators' explanations and responses are part of the legislative record for Idaho Code § 42-203B, and further demonstrate the committee members' understanding of the intent of the legislation that their committees approved. The negotiators' oral and written testimony in the committee proceedings is consistent with the plain language of the Idaho Code § 42-203B and the Statement of Legislative Intent on the questions of legal title, the nature and *res* of the trust, and the standards for subordinating the water rights held in trust.

In his opening statement in the first Senate Resources Committee hearing to take up the proposed legislation in detail, the Governor's negotiator, Pat Costello, told the committee that the proposed Idaho Code § 42-203B "**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**." *See* Orr Aff. at Exhibit 33, Track 1, 2:19 – 2:47 (recording); *see also id.* at Exhibit 37, pp. 4-5 (transcripts) (emphasis added).

Tom Nelson, Idaho Power's negotiator, was present for this testimony and did not object to, qualify, or attempt to distance Idaho Power from Mr. Costello's statements, in that hearing or in any other subsequent hearing. To the contrary, Idaho Power also explained in its written statement to the Senate Resources Committee on Senate Bill

1008 that rather than providing for "a voluntary transfer of [the Company's] water rights," that "the basis for Section 2 is the State's power to 'regulate and limit' the use of water for power purposes." Statement of Idaho Power Company in Support of Senate Bill 1008 – Presented to the Senate Resources and Environment Committee January 25, 1985. Idaho Power also expressly recognized that "the state, **as trustee**, can protect those [water] rights, and so can Idaho Power Company, **as beneficiary of the trust** and as user of the unsubordinated water right." Orr Aff. at Exhibit 10 (committee minutes of Jan. 25, 1985), attachment entitled "Statement of Idaho Power Company in Support of Senate Bill 1008," p.1 (emphases added).

The Attorney General's written testimony on Senate Bill 1008 also stated that **"[a]s drafted, the State possess [sic] legal title to all waters previously claimed by the Company above 3,900 c.f.s**." Orr Aff. at Exhibit 8 (committee minutes of Jan. 18, 1985), attachment entitled "Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008," p.3. Pat Costello, the Governor's negotiator, told the Senate Resources Committee that "[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. at Exhibit 33, Track 5, 6:36 – 6:59 (recording); *see also id* at Exhibit 8, p. 11 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 37, p. 53 (transcript).

Mr. Nelson made it clear to the Senate Resources Committee that the legislation would not bar the State from any particular action or decision with respect to the water rights held in trust: "Anything above the minimum flow the state is free to do as it likes."

Orr Aff. at Exhibit 11, p. 7 (committee minutes of Feb. 1, 1985); *see also id.* at Exhibit 36, 37:23 – 37:30; (recording); *see also id.* at Exhibit 40, p. 32 (transcript). Mr. Nelson also explained to the Senate Resources Committee that:

> 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.

Orr Aff. at Exhibit 33, Track 2, 1:24 – 1:59; (recording of committee hearing of Jan. 18, 1985); *see also id.* at Exhibit 8, p. 2 (committee minutes of Jan. 18, 1985); *see also id.* at Exhibit 37, p. 15 (transcript).

Further, the Attorney General's written testimony to the Senate Resources Committee demonstrates that the statutory mechanism for subordinating the water rights held in trust was intended to provide ongoing flexibility rather than to preclude opportunities for new uses:

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

Orr. Aff. at Exhibit 8 (committee minutes of Jan. 18, 1985), attachment entitled. "Prepared Testimony of Jim Jones, Idaho Attorney General, on Senate Bills 1006 and 1008," pp. 5-6 (emphasis added).

These are just a few passages from an extensive official record on a historic piece of legislation. These passages, and the record as a whole, demonstrate that in addition to

providing a balanced solution to the larger question of resolving the tension between hydropower uses and consumptive uses, the Senate and House committees understood Idaho Code § 42-203B as giving the State legal title to any water rights previously claimed by Idaho Power Company for flows above the minimums established at the Murphy Gage, that the State would hold the water rights in trust for benefit of Idaho Power Company and the People of the State, and that the water rights held in trust would be subordinated to upstream uses and depletions under any new water rights acquired pursuant to applicable state law rather than to a laundry list of favored and disfavored uses.

## V. THE EQUITABLE DOCTRINES OF REFORMATION, MUTUAL MISTAKE, LACHES, WAIVER AND ESTOPPEL CANNOT BE INVOKED OR APPLIED CONTRARY TO THE PLAIN LANGUAGE OF IDAHO CODE § 42-203B.

Idaho Power Company seeks reformation of the Swan Falls settlement based on an alleged mutual mistake of fact, and also asserts that the State's claim of legal title to the water rights in question is barred by estoppel, laches and waiver. Complaint at 21-22. The State is entitled to summary judgment as a matter of law on these claims because reformation, mutual mistake of fact, laches, waiver and estoppel are equitable doctrines and cannot be invoked or applied to defeat the plain statutory language and legislative intent of the Swan Falls legislation. Further, the undisputed facts of this case demonstrate that the Company comes to this Court with unclean hands.

### A. Equity Must Follow The Plain Statutory Language.

Reformation, mutual mistake, estoppel, laches and waiver are all equitable doctrines under Idaho law. *See, e.g., Schneider v. Howe,* 142 Idaho 767, 773–74, 133 P.3d 1232, 1238–39 (2006) (laches, estoppel, waiver); *Holscher v. James*, 124 Idaho 443,

445, 860 P.2d 646, 648 (1993) (reformation, mutual mistake). Idaho law dictates that equitable doctrines cannot be invoked or applied to defeat legislative enactments. "Equity follows the law," as the Idaho Supreme Court has explained: "wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim 'AEquitas sequitur legem' is strictly applicable." *Allen v. Kitchen*, 16 Idaho 33, 146, 100 P. 1052, 1056 (1909). "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law." *Id.* at 145, 100 P. at 1056.[118]

As previously discussed, the plain language and legislative history of section 42-203B compels the conclusion that the State holds in a statutory trust the legal title to any portion of the hydropower water rights for flows that exceed the minimum flows established at the Murphy Gage under the State Water Plan. Similarly, the plain statutory language and legislative history demonstrate that the water rights held in trust are subordinated to any and all uses under water rights that are acquired pursuant to State law.

In short, "the rights or the situation of parties are clearly defined and established by law." *Allen*, 16 Idaho at 146, 100 P. at 1056. The questions of ownership and subordination of the water rights held in trust under Idaho Code § 42-203B thus are precisely the type of statutorily-controlled matters that equity may not invade. *See id.*

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[118] The principle that equity may not be invoked to defeat statutory language is a fundamental tenet in other jurisdictions as well. *See, e.g.*, *Ligouri v. Wyandotte Hosp. and Medical Center*, 655 N.W.2d 592, 595 n.4 (Mich. Ct. App. 2002) ("equity may not be invoked to avoid application of a statute") (*citing Stokes v. Millen Roofing Co.*, 649 N.W.2d 371, 377 (Mich. 2002) ("Courts must be careful not to usurp the Legislative role under the guise of equity")); *In re DCP*, 30 P.3d 29, 32 (Wyo. 2001) ("We must also keep in mind our longstanding principle that the exercise of equitable jurisdiction may not prevail over statutory language").

Therefore, as a matter of law, Idaho Power Company is barred from invoking the equitable doctrines of reformation, mutual mistake, laches, waiver and estoppel for purposes of asserting ownership of the water rights held in trust or for purposes of modifying the statutorily-defined subordination of those water rights.

B. Equity May Not Be Invoked In Violation Of The Principle of Separation of Powers.

It would be especially inappropriate to apply equitable doctrines in a manner contrary to statutory language in this particular case, because Idaho Power has not asked simply for judicial reformation of the Swan Falls Agreement, but rather of the entire Swan Falls Settlement. Complaint at 22 ("The Swan Falls Settlement should therefore be reformed"). This is not a trivial distinction, and Idaho Power Company is well aware that the "Settlement" involves much more than just the "Agreement." Complaint at 7 ¶ 20 (defining the "Settlement" as including, in addition to the Agreement, "subsequent implementing legislation, rules, regulations and administrative practices").

The Swan Falls controversy presented issues that were "of large significance to the majority of the people of the state. . . . the Snake River and its use has exercised and will continue to exercise an enormous influence over a very substantial portion of Idaho and its people." *Idaho Power Co. v. State*, 104 Idaho at 578, 661 P.2d at 743. These issues of great public concern were not resolved simply through the Agreement, which by its plain terms was not self-executing and only proposed a settlement. Rather, the proposed settlement required a broad range of legislative, executive, and administrative actions that together worked a fundamental change in Idaho water law and policy, not to mention public perceptions and expectations.

The parties, the Idaho Water Resource Board, and the Legislature went to great lengths to explain the proposed settlement to the public and obtain public input and comment. The legislation and the State Water Plan amendments proposed by the Agreement were subject to intense scrutiny by the Legislature and the Water Board. The settlement even had federal dimensions and required approval by FERC, an undertaking that took several years of effort and ultimately had to be forced by congressional action.

The equitable doctrines of "reformation" and "mutual mistake" authorize courts to modify contracts between private parties, not statutes enacted by the Legislature. *Thieme* v. *Worst*, 113 Idaho 455, 459, 745 P.2d 1076, ___ (1987) ("Reformation is an equitable remedy available in a limited situation when the parties, having reached an agreement, failed to express it correctly in writing"); *see also Bilbao v. Kettinger*, 91 Idaho 69, 73, 415 P.2d 712, 716 (1966) (discussing mutual mistake as to "written instrument [that] does not express the intention or agreement of the parties") (internal citation omitted).

These equitable doctrines certainly do not authorize judicial re-structuring of an intricate settlement achieved primarily by legislative and executive action, which would violate the principle of separation of powers. This is one of the lessons of *Miles v. Idaho Power Company*, 116 Idaho 635, 778 P.2d 757 (1989), in which the plaintiff sought, among other relief, judicial declarations ordering that the settlement include additional protections for utility ratepayers.

In *Miles*, the Plaintiff challenged on constitutional grounds the Swan Falls legislation that limited IPUC's jurisdiction to hear claims that Idaho Power should have more vigorously protected its water rights. Among other relief, he sought modification of the settlement via declarations that "a mechanism be established to allow for

compensation to Idaho Power ratepayers for all new or increased diversions from the Snake River system occurring on or after July 1, 1985," and that "the Department be required to condition all the water permits issued on or after July 1, 1985, by requiring the appropriator to make payment (either by purchase or rental) to Idaho Power to compensate for decreased generating capacity caused by diversion." *Miles*, 116 Idaho at 638, 778 P.2d at 760.

In its 1989 decision, the Supreme Court determined that while it could reach the question of the constitutionality of the implementing legislation, it would violate the separation of powers principle for the Court to review the merits of "the water rights subordination plan" implemented by the legislative and executive branches:

> [T]he advisability of the agreement is not a proper subject for judicial deliberation. The question involves an initial policy determination of a kind clearly for nonjudicial discretion. Determining how our scarce water resources will best serve the state, whether by increased agricultural use or increased power generation use, is a matter peculiarly within the legislative and executive branches. The executive branch, by entering into the agreement, and the legislative branch, by enacting implementing legislation, have each given approval to the water rights subordination plan. Both branches have declared that
>
> > [the Swan Falls Agreement] 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. gauging 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.

> Clearly then, it would be inappropriate for this Court to second-guess the merits of the agreement.

*Miles*, 116 Idaho at 640, 778 P.2d at 762 (quoting 1985 Idaho Sess. Laws, ch. 14, § 1) (internal quotation marks and citation omitted).

It would be similarly inappropriate to apply the equitable doctrines of reformation and mutual mistake so as to re-structure the Swan Falls settlement, but that is precisely what Idaho Power asks this Court to do. Idaho Power's claim for equitable reformation of the Swan Falls settlement is entirely contrary to plain statutory language, the *Miles* decision and the principle of separation of powers, and must be rejected as a matter of law.

C. Idaho Power Company Comes To This Court With Unclean Hands.

It is axiomatic in Idaho that a claimant seeking equitable relief must come to the court "with clean hands." *Campbell v. Kildew*, 141 Idaho 640, 648, 115 P.3d 731, 739 (2005). The undisputed facts demonstrate that Idaho Power's hands are anything but clean with respect to this matter.

The first page of the Agreement expressly provides that "the State . . . shall assert the existence of water rights held in trust by the State." Orr Aff. at Exhibit 30 ¶ 4 (Swan Falls Agreement). The State has made such assertions in, among other places and circumstances, the State's Notices of Change of Water Rights Ownership, and in this Court. Yet Idaho Power Company has brazenly claimed that such assertions are breaches of the Swan Falls Agreement. *See* Complaint at 16 ¶ 46. The Company has also sought an injunction barring the State from taking any action "on the basis of the State's asserted legal title to such water rights." Complaint at 25 ¶ 81(a). Not only do these claims fly in the face of the express language in the Agreement obligating the State to assert the

existence of water rights held in trust by the State, but they almost certainly constitute breaches of the Agreement by Idaho Power Company.

Idaho Power has also misrepresented its role in the drafting of the Swan Falls legislation. The State's first set of discovery to Idaho Power Company included many certified copies of official records provided by the Legislative Reference Library, including the certification and cover letters from the Librarian, and requested that Idaho Power admit that the certified copies were genuine, true and correct.[119] Idaho Power denied every such request.

Among the documents that were the subject of the State's requests for admission was legislation proposed to implement the Swan Falls Settlement: Senate Bills 1005 and 1008, which enacted the legislation the parties proposed under Exhibits 1, 5 and 7B to the Agreement. Idaho Power denied the State's request to admit that the certified copies of these bills were genuine, true and correct, partly on the ground that the Company "was not privy to the drafting of the attached proposed legislation."[120] This denial is simply untrue.

In 1985, Idaho Power's attorney Tom Nelson represented to the Senate Resources Committee that the legislation "was negotiated by us and approved by the principals." Orr Aff. at Exhibit 9, p. 2 (committee minutes of Jan. 21, 1985). At the same hearing, Pat Costello, the Governor's negotiator, similarly testified that "the bills are part of a larger compromise package that was arrived at last fall between the Governor and Idaho Power and Attorney [General] Jim Jones this summer and fall . . . the five pieces of legislation that have been introduced so far . . . are the core of the agreement that was entered into."

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119 Orr Aff. at Exhibit 74.

120 Orr Aff. at Exhibit 75.

Orr Aff. at Exhibit 9, p. 2 (committee minutes of Jan. 21, 1985). Plainly, Idaho Power has misrepresented its role in drafting and supporting the legislation.

Further, Tom Nelson represented to the Senate Resources Committee that the various pieces of legislation proposed by the parties "should be accepted or rejected as a package," Orr Aff. at Exhibit 9, p. 2 (committee minutes of Jan. 21, 1985), and without any amendments: "if we start amending it, we will be in a real mess." Orr Aff. at Exhibit 8, p. 6 (committee minutes of Jan. 18, 1985). Idaho Power's current claim for reformation is entirely contrary to these representations, and attempts to reconfigure or amend the same "package" settlement that the Company previously represented to the Legislature that it could not modify without unraveling the entire settlement.

Idaho Power also continues to claim that all of the water rights should be decreed in the Company's name, should recite the same quantities the Company claimed prior to the Swan Falls settlement, and should not contain any subordination or trust remarks.[121] It was precisely such claims that precipitated the Swan Falls controversy in the first place. Reasserting the same objectionable claims is a breach of good faith and contravenes the Swan Falls settlement.

Indeed, Idaho Power openly seeks to obtain exclusive ownership and control of "subordinatable" water rights, putting the subordination decision in the Company's hands rather than in the State's. *See, e.g.*, Complaint at 11 ¶ 30. This is precisely the demand the State flatly rejected in 1984, resulting in a settlement "loggerhead" that was resolved only by the parties' adoption of the trust proposal, as Idaho Power's counsel explained to the Senate Resources Committee in its hearings on the trust legislation. Orr Aff. at

[121] *See* Idaho Power's Objections to the Director's Reports for the Basin 2 water rights.

Exhibit 8, p. 3 (minutes); *see also id.* at Exhibit 33, Track 2 at 9:48-10:40 (recording); *see also* Exhibit 37, pp. 21-22 (transcript).

As Idaho Power's attorney testified, "the state said OK, then take yourself totally out of any vestige of control over the rights that you have defined. We said alright . . ." Orr. Aff. at Exhibit 11, pp. 4-5 (committee minutes of Feb. 1, 1985). Indeed, Mr. Nelson testified that one of the key points of the trust was that it "makes clear the State's control of the allocation of the water." Orr Aff. at Exhibit 8, p.3 (committee minutes of Jan. 18, 1985). Idaho Power's claim to eliminate the trust and take exclusive ownership of "subordinatable" water rights is an attempt to recover through judicial intervention a position of legal control that, as Idaho Power made clear to the Senate Resources Committee, the Company had bargained away in the settlement negotiations, while retaining the other benefits of the settlement, such as the elevated minimum stream flows and the statutory limitation on IPUC jurisdiction to hear claims against the Company.

The legislative record for the legislation implementing the settlement demonstrates that the Idaho Power's characterization of the Swan Falls settlement, and particularly the trust, is a convenient mix of fact and fiction that amounts to a self-serving narrative, a blatant attempt to revise the record—a record that Idaho Power knowingly and intentionally helped to create.

The undisputed facts conclusively establish that Idaho Power has not come to this Court with clean hands. Therefore, as a matter of law, Idaho Power may not rely on the equitable doctrines of reformation, mutual mistake, laches, waiver and estoppel.

## CONCLUSION

The plain language of the statute and its legislative history are inescapable. The Legislature, in an exercise of its authority to "regulate and limit" water rights for power purposes under section 3 of article XV of the Idaho constitution, created a statutory trust through Idaho Code § 42-203B. The statute defines the ownership and subordination of the disputed water rights. The State holds in trust the legal title to the hydropower water rights at issue in this case that exceed the minimum flows established at the Murphy Gage under the State Water Plan, and the water rights held in trust by the State are subordinated to any upstream uses of water under water rights acquired pursuant to state law. This statutory framework was enacted not simply to resolve the Swan Falls controversy, but also to develop a statewide policy to address the historic and recurring conflict between hydropower uses and other beneficial uses of Idaho's water. This resolution is a classic legislative function: the balancing of competing demands on a scarce but precious resource so as to promote the public interest. Equitable doctrines may not be invoked to defeat or modify the statutes through which the Legislature achieved this balancing.

For the reasons set forth herein, the State requests that the Court grant the State's motion for partial summary judgment.

DATED this 11th day of January 2008.

THE STATE OF IDAHO

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January 2008, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT to the following parties by the indicated methods:

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- ☒ Not Applicable

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