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

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

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

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

I. APPEARANCES

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

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

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

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

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

II. SRBA PROCEDURAL BACKGROUND

Consolidated Subcase 00-92023 (also listed on the Court's registry of actions as 92-23)[1] is a consolidation of common issues raised with respect to the meaning and application of the terms of the "Swan Falls Agreement" as applied to twenty-six water right claims filed by Idaho Power Company ("Idaho Power").[2] The claims were originally scheduled to be assigned, or were already assigned and pending, before the three different special masters. For purposes of judicial economy, the common issues were separated from the individual subcases and consolidated. *See* ***Order Granting In Part, Denying In Part Motion To Dismiss; Consolidating Common Issues Into Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference*** (July 24, 2007).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. MATTER DEEMED FULLY SUBMITTED FOR DECISION

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

IV. MOTION TO STRIKE

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

V. FACTUAL BACKGROUND

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

not until the 1980's that matters came to a head. Throughout the first half of the 20th century, diversions from the Snake River for irrigation and other consumptive uses paralleled the development of hydropower projects without any apparent consequence. In the 1950's and 1960's, however, with the advent of deep well groundwater irrigation from sources hydraulically connected to the Snake River and high lift pumping from the river, along with increased demand for electric power — some of it for pumping — and new hydropower projects constructed to meet that demand, it became obvious that downstream, unsubordinated use of water for hydropower production would soon hinder development of upstream consumptive use of water or *vice versa*. A brief but comprehensive history of the conflict and some of its causes and effects are set forth in the first few pages of *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983). It was that case that set the stage for the Swan Falls Agreement which is the subject of this decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Company's Water Right[8]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [Exhibit] 7B is the one that would impose this new trust concept on the portion of the hydropower right that is in excess of the minimum flow, and we wanted to keep this as far from being a transfer as we could. So it's being imposed by operation of law through this rather than the power company agreeing to it by contract . . . .

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

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

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

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[9] It was important that Idaho Power not be perceived to have voluntarily transferred its water rights because such transfer could have subjected Idaho Power to additional claims that it did not protect its water rights. *See,* I.C. § 61-539, enacted in 1983 pursuant to the S.B. 1180 contract and the Framework, discussed herein.

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

> **§ 42-203B. Authority to subordinate rights--Nature of subordinated water right and authority to establish a subordination condition--Authority to limit term of permit or license**
>
> (1) The legislature finds and declares that it is in the public interest to specifically implement the state's power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.
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> (2) A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established shall be held in trust by the state of Idaho, by and through the governor, for the use and benefit of the user of the water for power purposes, and of the people of the state of Idaho; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake River or its tributaries downstream from Milner dam, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner dam shall be considered. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.
>
> (3) Water rights for power purposes not defined by agreement with the state shall not be subject to depletion below any applicable minimum stream flow established by state action. Water rights for power purposes in

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

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

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

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

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

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

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

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

> the term of power purchase contracts as administered by the IPUC under and pursuant to the authority of the public utility regulatory policy act of 1978 (PURPA);
>
> (c) The term of any federal energy regulatory commission (FERC) license granted, or which reasonably may be granted, with respect to any particular permit or license for power purpose;
>
> (d) Existing downstream water uses established pursuant to state law.
> The term of years shall be determined at the time of issuance of the permit, or as soon thereafter as practicable if adequate information is not then available. The term of years shall commence upon application of water to beneficial use. The term of years, once established, shall not thereafter be modified except in accordance with due process of law.

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

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

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

> A. A declaration that there was no "Trust Water" available when the Swan Falls Agreement was executed in 1984, and therefore no trust *res* and no valid trust established under the Swan Falls Settlement.
>
> B. A reformation of the Swan Falls Settlement based on mutual mistake of fact regarding the existence of Trust Water, eliminating any asserted trust while retaining provisions unrelated to the purported trust.
>
> C. A declaration that to the extent there is a valid trust, the trust *res* is water and not water rights, the State of Idaho does not hold legal title to

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

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

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

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

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

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

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

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

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

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

VI. STANDARD OF REVIEW

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

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

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

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

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

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

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

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

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

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

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

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

VII. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the state may regulate and limit the use thereof for power purposes.*

(emphasis added).

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

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

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

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

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

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

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

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

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[14] *See* ***Order Designating Basin-Wide Issue Re: To What Extent, If Any Should the Swan Falls Agreement be Addressed In the SRBA or Memorialized in a Decree.***

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

Paragraph 19 of the Agreement provides the following:

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

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

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

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

7. Company's Water Right

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(emphasis added).

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

The use of the phrase "water rights" and reference to the legal term "trust" in Exhibit 7B is entirely consistent with the body of the Agreement. As stated previously, Paragraph 4 of the Agreement requires that the State "shall assert the existence of water rights held in trust by the State." Although Paragraph 7 of the Agreement (which defines Idaho Power's rights) does not mention a trust arrangement, the rights are defined so as to reconcile with the application of the terms set forth in Exhibit B.

Idaho Power argues that it would never have entered into an agreement where it assigned or transferred its water rights to the State. See *Affidavit of Greg Panter*.[16] In response, the Court makes the following findings. First, the Agreement was carefully drafted so that Idaho Power would not be directly assigning or transferring its water rights to the State. *See supra* fn 9. Rather, than transferring or assigning the rights, they were placed in trust pursuant to the State's regulatory authority. Idaho Power was simply conceding to and agreeing not to challenge the State's regulatory authority. In addition to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> So [the trust] simply was a mechanism to sever, in lawyer's terms, to sever the legal and equitable title to the water immediately so there is some immediate change in position of the parties, that as soon as the agreement becomes binding and this statute takes effect, legal title to the water will go to the state, and the company retains beneficial use of the water as long as the trust lasts.
>
> Chairman Noh: Mr. Kole and Mr. Nelson, do you concur with that interpretation?

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

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

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

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

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

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

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

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

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

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

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

At a February 11, 1985, meeting before the House Resources and Conservation Committee, in which all three negotiators were present, Mr. Costello explained, "Hydropower rights in excess of such flows will be held in trust by the state and are subject to subordination and depletion by lawful beneficial uses." *Orr Aff.,* Exh. 20, p. 2. In the same meeting, Representative Little asked: "[I]f the bills are passed as written and fulfill the agreement made between the power company and then decide two years from now we don't like it and parts are repealed, will that affect the agreement between the power company and the state." Mr. Nelson responded:

> [T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the

> legislature does not have the power to do, would be to change the contractual recognition of the company's water rights at Murphy gage.

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

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

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

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

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

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

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

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

Panter Aff., at 6-7.

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

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

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

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

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

A. Yes.

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

A. That's correct.

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

A. That's correct.

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

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

. . .

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

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

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

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

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

The argument that the trust contains a "block of water" instead of a water right does not make sense. First, the way in which water flows are encumbered in Idaho is through a water right, not a "block of water." Exhibit 7B to the Agreement and I.C. § 42-203B do not refer to the creation of a new or separate water right to be placed in trust. Rather, both clearly state "Any portion of the *water rights for power purposes* in excess of the level so established *shall be held in trust* . . . ."

Next, in order for the State to impose the public interest criteria restrictions on the appropriation of future water rights and avoid the risk of Article 15 § 3 challenges, the river had to be considered a fully appropriated source. Previously, the river was fully (or over) appropriated based on Idaho Power's unsubordinated water rights. By placing the portions of Idaho Power's water rights exceeding the minimum flows in trust, and making the rights "subordinatable" to future uses, the river would still maintain the status of being fully appropriated. This enabled the State to impose the public interest criteria in conjunction with issuing new rights.[17] A straight subordination of Idaho Power's

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

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

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

The Agreement made Idaho Power's rights "subordinatable" to future uses. Paragraph 7B to the Agreement provides that Idaho Power has the right to use the entire flow of the river at its various facilities up to the amounts stated in the water licenses for the facilities, but the right to use the flows is subordinate to subsequent future uses as those uses are approved by the State. However, the State was required to apply the public interest criteria in conjunction with approving any new rights. Idaho Power also retained the right to contest any new appropriations. The somewhat confusing part is that the new appropriators were not receiving a transfer of an actual portion of Idaho Power's water right held in trust, but rather a portion of the water freed up and encumbered as a result of the trust arrangement. This is where the reference to "trust water" comes from and support for the argument that the *res* of the trust is water, not water rights. Nonetheless, the Court does not find the use of the term "trust water" to create an ambiguity regarding the *res* of the trust. Again, the only way the use of the water could be encumbered is via a water right. This becomes particularly apparent when taking into account the underlying purposes for which the Agreement was carefully structured to achieve. Mr. Panter acknowledges in his affidavit that "[d]uring the discussions and development of this trust water component, the terms water and water rights were used interchangeably." *Panter Aff.*, at 5.

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

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

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

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

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

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

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

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

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

cumulative rate measured at the Murphy gauge. The Agreement did not provide for a minimum rate of flow at Idaho Power's individual upstream facilities. Accordingly, all claims should have been addressed at the same time so partial decrees could be issued in a manner which recognized the modifications to the original licenses pursuant to the Swan Falls Agreement.

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

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

Once the SRBA was commenced, all water users were required to re-file claims in the SRBA, whether the claims were previously adjudicated or not. The effect of a prior decree offered as evidence in the SRBA is binding on its parties and privies and constitutes *prima facie* weight of the elements of the water right. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740-41, 947 P.2d 409, 413-14 (1997). However, in adjudicating Idaho Power's hydropower rights, the Court cannot ignore the application of I.C. § 42-203B. The Consent Judgments were entered after the enactment of I.C. § 42-203B and thus were subject to its provisions. Idaho Code § 42-203B also specifically refers to the October 25, 1984, Agreement. The parties cannot stipulate

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

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

Further, both Consent Judgments contain non-merger clauses which state: "The Swan Falls Agreement, dated October 25, 1984, shall not be merged into nor integrated with this Judgment, but shall remain in full force and effect." As such, the Court can take into account the underlying Agreement on which the two Consent Judgments were based. To the extent there is an inconsistency between the Consent Judgments and the underlying Agreement, this Court can address that inconsistency. In this case, the Consent Judgments are wholly consistent with the Agreement. The Consent Judgemments define Idaho Power's water rights and the statute places the "subordinatable" portions of the rights in trust. There is no inconsistency between the two. Under the Agreement, the rights were to be put in trust pursuant to the State's

regulatory authority, not a transfer by Idaho Power. Idaho Power simply agreed to the State's regulatory authority as applied to its rights. Once the rights have been defined, the next step is to give effect to the statute. As discussed above the Court need not address any potential infirmities with the State's regulatory authority because Idaho Power previously agreed to the State's regulatory authority over its claims as part of the settlement despite its challenges to its authority in the context of these proceedings.

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

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

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

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

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

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

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

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

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

Further, the Agreement was structured to specifically account for uncertainty in the availability of the excess flows. No guarantees or promises were made to Idaho Power with respect to the availability of the excess flows. Rather, Idaho Power's right is defined in terms of unsubordinated minimum flows at the Murphy Gauge. Idaho Power can use the subordinated flows up to its licensed amounts at its individual facilities and the State will apply the public interest criteria in conjunction with reallocating the water available, if any, under the right(s) to future appropriators. As discussed above, based on the underlying purpose of the Agreement, Idaho Power did not have an expectation that water above the minimum flows would be available for its use for an indefinite period.

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

curtailment in order to meet the minimum flows. However, this is an issue pertaining to the administration of Idaho Power's water rights, as well as the rights of the subsequent appropriators, and needs to be brought before IDWR in the context of an administrative proceeding.

D. Remaining Causes of Action.

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

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

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

3. **Injunctive Relief**:

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

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

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

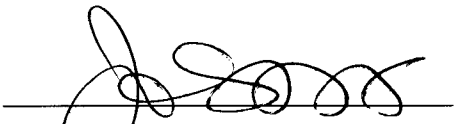
(iii) Ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple-year impacts of ground water pumping in the ESPA. This issue also pertains solely to the administration of water rights. Parties should be prepared to discuss in light of this decision and the holding in *American Falls Reservoir District No. 2 v. IDWR*, 143 Idaho 862, 154 P.3d 433 (2007), why this matter should not be addressed via an administrative action.

E. Further Proceedings and Discovery Schedule:

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

IT IS SO ORDERED

Dated April 15, 2008



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

AGREEMENT

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

1. Effective Date

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

2. Executive Commitment

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

3. Attorney General

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

4. Good Faith

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

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

5. Stay Of Current Court And Regulatory Action

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

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

EXHIBIT
1

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

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

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

6. <u>Legislative Program</u>

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

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

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

C. Establishment of an effective water marketing system.

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

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

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

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

7. Company's Water Right

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

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

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

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

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

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

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

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

8. Damages Waiver

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

9. Proposed 1180 Contract

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

10. Agreement Not An Admission

The parties agree that this Agreement represents an attempt to compromise pending litigation, and it shall not be considered an admission, waiver, or abandonment of any issue of fact or law by any party, and no party will assert or contend that paragraphs 7, 8, and 11 have any legal effect until this Agreement is implemented by the accomplishment of the acts described in paragraph 13.

11. Status of State Water Plan

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

12. Regulatory Approvals

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

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

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

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

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

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

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

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

13. <u>Conditions on Effectiveness</u>

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

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

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

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

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

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

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

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

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

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

This Agreement shall not be construed to limit or interfere with the authority and duty of the Idaho Department of Water Resources or the Idaho Water Resource Board to enforce and administer any of the laws of the state which it is authorized to enforce and administer.

15. Waiver, Modification or Amendment

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

16. Termination of Contract

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

17. Subsequent Changes In Law

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

18. Successors

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

19. Entire Agreement

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

20. Effect of Section Headings

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

21. Multiple Originals

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

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

STATE OF IDAHO

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

IDAHO POWER COMPANY

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

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

ATTEST:

PETE T. CENARRUSA
Secretary of State

(Seal of the State of Idaho)

(Corporate Seal of Idaho Power Company)

ATTEST:

Secretary of Idaho Power

CERTIFICATE OF SECRETARY

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

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

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

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

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

Paul L. Jauregui
Secretary of Idaho Power Company

CERTIFICATE OF SECRETARY OF STATE

OF THE STATE OF IDAHO

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

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

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

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

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

PETE T. CENARRUSA
Secretary of State
State of Idaho

STATE OF IDAHO)
) ss.
County of Ada)

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

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

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

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

STATE OF IDAHO)
) ss.
County of Ada)

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

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

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho

Exhibit 1

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

- -

IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

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

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

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

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

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

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

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

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

(5) Such hearing shall be conducted in accordance with the provisions of section 42-1701A(1) and (2), Idaho Code. The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. *In* all applications whether protested or *not* protested, where the proposed use is such (a~~1~~) that it will reduce the quantity of water under existing water rights, or (b~~2~~) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c~~3~~) where it appears to the satisfaction of the department that such application is not made in good faith, is made for delay or speculative purposes, or (d~~4~~) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e~~5~~) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use/; t~~T~~he director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller ~~less~~ quantity of water than applied for, or may grant permit upon conditions. The provisions of this section shall apply to any boundary stream between this and any other state in all cases where the water sought to be appropriated has its source largely within the state, irrespective of the location of any proposed power generating plant.

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

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

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

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

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

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

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

(iii) the promotion of the family farming tradition;

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

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

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

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

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

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

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

Exhibit 2

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

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IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

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

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

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

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

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

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

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

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

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

(b) defines the system boundaries;

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

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

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

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

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

~~ten dollars ($10.00)~~ fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant. ~~Provided, however, that no filing fee shall be required with any notice of claim when proceedings for adjudication involving such claim were under way when this act, Chapter 153, Laws of 1971, was enacted.~~ The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after July 1, 1985 and to adjudication proceedings for which a proposed finding of water rights has not been filed with the appropriate district court by the department of water resources prior to July 1, 1985.

A. Flat fee per claim filed:

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

2. Claims for all other rights. $50.00

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

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

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

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

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

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

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

Exhibit 3

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

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IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

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

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

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

Exhibit 4

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

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IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

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

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

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

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

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

MEMORANDUM

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

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

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

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

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

EXHIBIT 6

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

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

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

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

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

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

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

Exhibit 7A

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

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IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

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

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

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

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

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

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

Section 1:

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

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

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

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

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

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

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

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

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

Exhibit 8

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LEGISLATURE OF THE STATE OF IDAHO

Forty-eighth Legislature First Regular Session - 1985

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IN THE _____

_____ BILL NO. _____

BY _____

AN ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The foregoing is a true and certified copy of the document on file at the department of Water Resources.

Signed this 4th day of January 20 08