

**SWAN FALLS IN 3-D: A NEW LOOK AT
THE HISTORICAL, LEGAL AND
PRACTICAL DIMENSIONS OF IDAHO'S
BIGGEST WATER RIGHTS CONTROVERSY**

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SWAN FALLS IN 3-D: A NEW LOOK AT THE HISTORICAL, LEGAL AND PRACTICAL DIMENSIONS OF IDAHO'S BIGGEST WATER RIGHTS CONTROVERSY

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I. INTRODUCTION

Ask 'most any irrigator in Southern Idaho: bar none, the most aggravating water rights dispute in anyone's memory was the Swan Falls controversy, in which the State of Idaho, Idaho Power Company, Idaho Power ratepayers, and Snake River Basin irrigators were cast into a seven-year legal and legislative battle. In its simplest terms, the controversy was about whether Idaho Power Company, holding senior rights for its Swan Falls powerplant on the Snake River, would be able to block future diversions by junior upstream irrigators. After various court actions and two inconclusive legislative sessions, the dispute was settled on terms that many saw as representing significant changes in Idaho water policy.

Under the arrangement, Idaho Power retained all of its Swan Falls water rights, although a portion was deemed subordinate to existing irrigators and another portion was made subject to subordination in the future as the State might grant new rights upstream. Idaho Power also secured assurance that those proposed new rights that would have a significant effect on its hydropower production would be granted only after the Idaho Department of Water Resources (Department) subjected them to additional "public interest" scrutiny. As to a third por-

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tion of Idaho Power's Swan Falls water rights—the amount remaining after an agreed limit on new development was reached—there is no subordination, and Idaho Power would maintain its prerogative to assert its senior priority. These terms were ratified by the Idaho Legislature in what the authors refer to as the Swan Falls statutes.¹

This article tells the story of the Swan Falls controversy and describes its effects on Idaho water policy. The article does not elaborate on what is undeniably one of the most significant outcomes of the controversy, the institution of the adjudication of all water rights in the Snake River Basin.² Rather, it focuses on how the Swan Falls statutes and the Department's rules affect both flows in the Snake River and the granting of new water rights. The central conclusion of this article is that the Department is implementing the Swan Falls statutes in ways that involve novel approaches to water law and policy that are not compatible with either the Swan Falls statutes, the traditional principles of the prior appropriation doctrine or, in all likelihood, the expectations of irrigators and other appropriators whose new appropriations are made possible by the settlement. The authors also point out that the Swan Falls arrangement ratified past understandings that the Snake River should be operated so as to administer water rights situated above Milner dam separately from those situated below Milner dam. They conclude that new irrigation development made possible by the Swan Falls settlement likely will not have significant effects on river flows supplying Idaho Power's rights at Swan Falls, at least not within the foreseeable future.

II. LOOKING DOWN: THE SNAKE RIVER AND THE SNAKE PLAIN AQUIFER

In 1989, the Idaho Centennial Foundation published an infrared satellite image of the State of Idaho entitled "All of Idaho: A View From Space."³ This poster shows with unprecedented clarity the broad, semicircular sweep of the Snake River and the Snake River Plain across southern Idaho.

Beginning near the Centennial Mountains in Eastern Idaho, the Snake River Plain curves southwestward nearly seventy-five miles to-

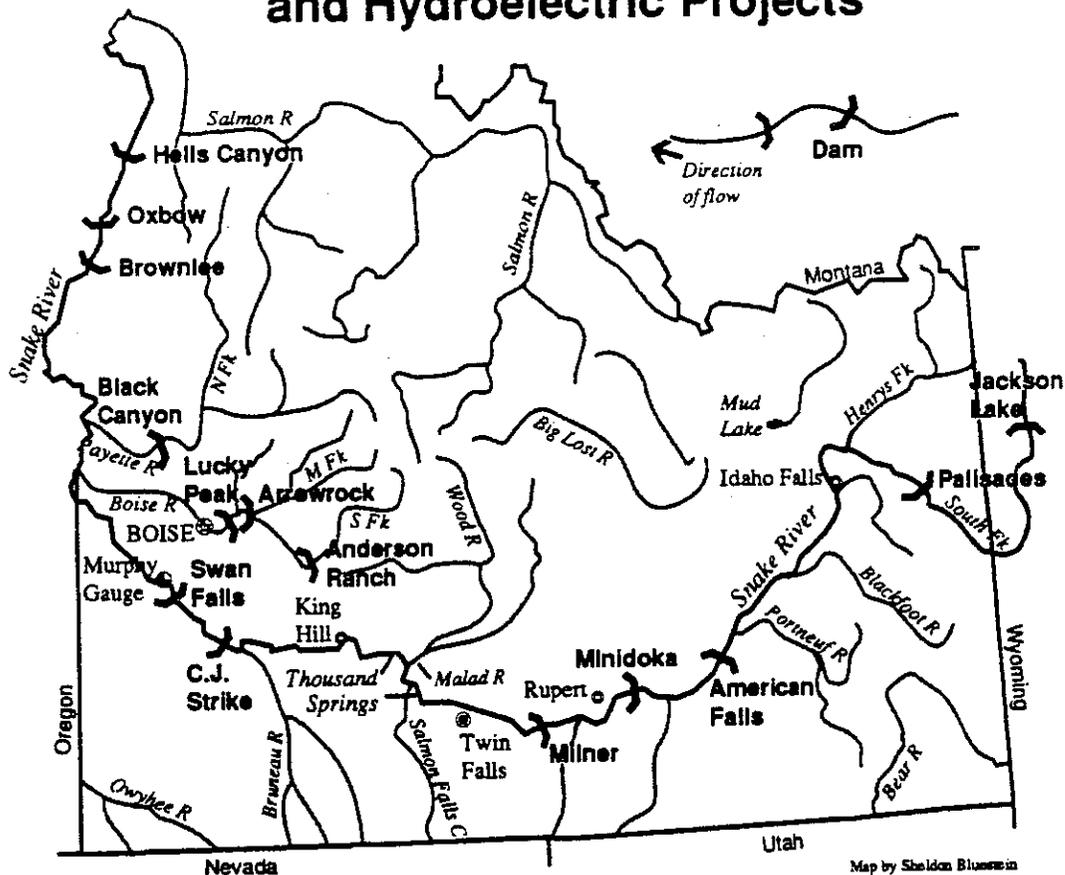
1. IDAHO CODE §§ 42-203B, 203C, 203D (1990).

2. The Idaho Legislature ordered this massive adjudication by means of a 1985 act, which also rightly could be called one of the Swan Falls statutes. H.B. 70, 1985 Idaho Sess. Laws 27 (codified at IDAHO CODE § 42-1406A (1990)).

3. Idaho Centennial Foundation (1989). This beautiful graphic, which is a mosaic of infrared satellite imagery, was designed and compiled by Tony Morse of the Idaho Image Analysis Facility of the Idaho Dept. of Water Resources.

ward American Falls, taking successively tangential courses from the northern extensions of the Snake River, Caribou, and Portneuf mountain ranges. Below American Falls Dam, the river itself serves as the Plain's southern boundary for nearly twenty-five miles until the river begins a more westerly course toward the city of Twin Falls. Beginning well upstream from Twin Falls, the Snake River has cut an impressive series of gorges that range in depth from 200 to 600 feet. Near King Hill, just south of the Mount Bennett Hills, the Snake River Plain constricts to a width of about thirty miles. The U.S. Geological Survey considers this site the boundary between the eastern and western portions of the Snake River Plain.⁴

Selected Snake River Irrigation and Hydroelectric Projects



4. SALLY A. GOODELL, WATER USE ON THE SNAKE RIVER PLAIN, IDAHO AND EASTERN OREGON. U.S.G.S. REGIONAL AQUIFER SYSTEM ANALYSIS, PROFESSIONAL PAPER 1408E at 3 (1988) [hereinafter GOODELL].

Below King Hill, the Snake River and the Snake River Plain share a course more or less to the northwest. In this region, the Plain is crowded on the south by the Owyhee Mountain Range; to the north, the Plain extends just far enough to include Boise—Idaho's largest metropolitan area—and the farming community of Emmett, which is located on the Payette River near its confluence with the Snake. The western Snake River Plain continues northwest from there, constricting dramatically until it terminates near Weiser, Idaho. From the base of the Centennials to the farms at Weiser, the Plain slopes downward about 4,000 vertical feet. The entire Snake River Plain encompasses 15,600 square miles.⁵

Due south of Boise in one of the Snake River's deep basalt gorges is Idaho Power's Swan Falls dam. The steady hum of its generators and its almost quaint, turn-of-the-century, factory-style architecture belie the role that this power plant has played in the most convulsive water conflict in Idaho's history. A little over five river miles downstream from the dam on the river's north side stands the Murphy gauge, a water measuring device from which the State has obtained flow records since 1902.

From the satellite's perspective, among Idaho's most easily recognized land forms are the exposed lava flows of the Great Rift area—including Craters of the Moon National Monument south of Arco and large areas west of both Idaho Falls and American Falls Reservoir. These flows are vast by nearly any standard, but their impressive showing on the surface offers only a hint that below lie many more layers of basalt several hundred feet deep. Together they comprise one of the world's largest complexes of lava flows.⁶ And they are full of water. The aquifer beneath the Snake River Plain, comprised of successive basalt flows interbedded with sedimentary rocks in a layer cake effect, holds between 200 and 300 million acre-feet⁷ (MAF) of water within its upper 200 to 500 feet.⁸ The aquifer discharges approximately

5. GERALD F. LINDHOLM, SNAKE RIVER PLAIN AQUIFER SYSTEM STUDY,—AQUIFERS OF THE WESTERN MOUNTAIN AREA, AMERICAN WATER RESOURCE ASS'N, MONOGRAPH 14 at 3 (1987) [hereinafter LINDHOLM].

6. J.A. SHIMER, FIELD GUIDE TO LANDFORMS IN THE UNITED STATES (1972).

7. An acre-foot of water is 325,851 U.S. gallons. It covers one acre of land to a depth of one foot. One acre-foot of water generally is considered sufficient to provide for the domestic needs of a family of four for one year. Most calculations presume that from 1.5 to three acre-feet are consumed each season for each acre of irrigated cropland, depending on soil type, annual precipitation, cropping patterns and other factors. See IDAHO DEPT. OF WATER RESOURCES, IDAHO WATER LAW HANDBOOK, Appendix III.

8. U.S. DEPT. OF ENERGY, GEOHYDROLOGIC STORY OF THE EASTERN SNAKE RIVER PLAIN AND THE IDAHO NATIONAL ENGINEERING LABORATORY 2 (D.C. 1982) [hereinafter U.S. DEPT. OF ENERGY]; LINDHOLM, *supra* note 5, at 1.

ten MAF annually through spring flows into the Snake River, underflows, groundwater pumpage and evapotranspiration.⁹ The Snake River in turn ultimately contributes nearly thirty-seven MAF to Columbia River flows annually.¹⁰

The Snake Plain Aquifer, particularly that portion underlying the eastern Snake River Plain, is one of the most prolific and productive groundwater systems in the world.¹¹ Although basaltic lava is relatively impermeable, the lava of the eastern Snake River Plain accumulated as relatively thin overlapping flows that contain large, hollow caverns and lava tubes up to thirty feet in diameter. Shrinkage during cooling also caused the basalt to fracture into large blocks.¹² The fractures and caverns hold great volumes of water and allow it to move rapidly downgradient toward discharge points along the Snake River.

The recharge, water bearing and transmissive capacities of these formations are so great that reports exist of fence posts being dropped into wells in the Mud Lake region and disappearing laterally, headed off downgradient, and of farmers pumping green leaves from wells located many miles from the trees.¹³ The aquifer of the western Snake River Plain is significantly less prolific and more variable in its geology and water-yielding characteristics.¹⁴

The "View From Space" captured a moment when snow covered the rugged, high borderlands of the Snake River Plain. This snow is the source for much of the water that feeds the Snake River and the Snake Plain Aquifer. Both the eastern and western portions of the Snake Plain Aquifer are recharged by percolation of runoff from the mountain ranges, mainly those to the north, excess irrigation water, seepage from canals and surface streams,¹⁵ underflow of water derived from the adjacent tributary drainage basins¹⁶ and, to some extent, by

9. GOODELL, *supra* note 4, at 3.

10. IDAHO DEPT. OF WATER RESOURCES, STREAM FLOWS IN THE SNAKE RIVER BASIN: 1989 CONDITIONS OF USE AND MANAGEMENT, OPEN FILE REPORT 27 (June 1989).

11. U.S. DEPT. OF ENERGY, *supra* note 8, at 70; See also HYDROSPHERE, WATER SUPPLIES TO PROMOTE JUVENILE ANADROMOUS FISH MIGRATION IN THE SNAKE RIVER BASIN, A REPORT TO THE NATIONAL MARINE FISHERIES SERVICE 2-4 (Jan. 1991).

12. HAROLD T. STEARNS, LESTER L. BRYAN AND LYNN CRANDALL, GEOLOGY AND WATER RESOURCES OF THE MUD LAKE REGION, IDAHO, U.S.G.S. WATER SUPPLY PAPER 818, at 36 (1939).

13. *Id.* The significance of these facts is that the Snake Plain Aquifer is extremely permeable in places, so much so that water moves into aquifer storage and downgradient with remarkable rapidity.

14. GOODELL, *supra* note 4, at 3.

15. *Id.* at 3.

16. LINDHOLM, *supra* note 5, at 2.

precipitation that occurs over the Plain itself.¹⁷ The Department has estimated that the annual recharge to the Snake Plain Aquifer is nearly eight MAF per year, or approximately 250,000 acre-feet less than the discharge to the river.¹⁸

The majority of the water in the eastern Snake Plain Aquifer moves in a southwest direction. Groundwater discharges from the aquifer at several locations, but mostly in two widely separated reaches—near American Falls, and in the Milner-to-King Hill reach. Approximately 2,500 cubic feet per second (cfs) discharge to the river in the American Falls reach. The rate of aquifer discharges in the Milner-to-King Hill reach have been estimated at about 6,000 cfs, or over four MAF per year.¹⁹

Four distinct areas of irrigated farmland within the plain are apparent on the "View From Space." Appearing as large red clusters in the infrared photo-imagery, these irrigated areas contrast with the grey/green of the surrounding arid sagelands. The first and smallest cluster appears as a distinct red ring encircling Table Butte near Mud Lake in the extreme northeast reach of the Plain.²⁰ Another large red cluster located in what is known as the "Upper Snake River" extends south from the Henry's Fork of the Snake, through the Egin Bench, the lower Teton River Valley and Idaho Falls, and then to the southwest where it terminates abruptly at American Falls Dam. A third cluster represents Idaho's Magic Valley, which occupies the center of the Snake River Plain extending from the lower end of Lake Walcott west to the mouth of Salmon Falls Creek, a major southside tributary. The fourth large cluster of irrigated land in the Snake River Plain lies within the Boise River Valley. If the "View from Space" included the eastern portion of Oregon, it would show that this cluster takes in the agricultural lands of the lower Owyhee and Malheur River valleys as well.

17. Because average annual rainfall across the Snake River Plain ranges between only six and twelve inches, direct precipitation accounts for little of the total annual recharge to the aquifer. GOODSELL, *supra* note 4, at 8.

18. IDAHO DEPT. OF HEALTH AND WELFARE AND IDAHO DEPT. OF WATER RESOURCES, SNAKE PLAIN AQUIFER TECHNICAL REPORT 14 (1985).

19. See IDAHO DEPT. OF WATER RECLAMATION, WATER INFORMATION BULLETIN No. 6, RECORDS OF NORTH-SIDE SPRINGS AND OTHER INFLOW TO THE SNAKE RIVER BETWEEN MILNER AND KING HILL, IDAHO 1948-1967 1 (Aug. 1968); M.J. MUNDORFF, GROUND WATER IN THE VICINITY OF AMERICAN FALLS RESERVOIR, IDAHO, U.S.G.S. WATER SUPPLY PAPER 1846 at 14 (1967) [hereinafter MUNDORFF].

20. Although it represents the smallest of the four clusters, as of 1980 approximately 180,000 acres of land were irrigated in the Mud Lake area.

The irrigated lands of the Snake River Plain account for the major portion of Idaho's agricultural wealth, and the River itself accounts for the majority of the hydroelectric power upon which Idaho's economies have come to depend.

III. LOOKING BACK: HISTORY OF WATER RESOURCE DEVELOPMENT AND THE SWAN FALLS DISPUTE

A. Water Resource Development in the Snake River Basin

The history of water use in southern Idaho has been irrigation history. Irrigated agriculture proceeded on the Snake River Plain in four phases, each of which had its own distinct effects on the water regime in the Snake River Basin. This section discusses how these effects influenced the amount of water available to Idaho Power at its Swan Falls plant and how they ultimately precipitated the Swan Falls dispute.

1. Phase One: Appropriation of Snake River Basin Natural Flows

Development of Idaho's water resources for irrigation began as early as 1843 on the western Snake River Plain with direct diversions from the Boise River.²¹ Irrigation in the eastern Snake River Plain began in the 1860s by means of direct diversions from the Snake River or its tributaries.²² Like irrigation development throughout the West, early diversions for irrigation typically were small, relatively easy to build and capable of providing water to lands located adjacent to the streams that could be served by short canals and ditches.²³ This supply of readily accessible water fostered a dramatic development of irrigated acreage in the eastern Snake River Plain between 1880 and 1899.²⁴ By the turn of the century, approximately 211,000 acres, virtually all of

21. H.H. CALDWELL AND MERLE WELLS, BOISE POST-AUDIT STUDY, ECONOMIC AND ECOLOGICAL HISTORY SUPPORT STUDY, A CASE STUDY OF FEDERAL EXPENDITURES ON A WATER AND RELATED LAND RESOURCES PROJECT, MOSCOW, IDAHO WATER RESOURCES RESEARCH INSTITUTE 31 (1974). The earliest recognized water rights on the Boise River have priorities of 1864. L. SISCO, BOISE RIVER WATER MASTER, ANNUAL REPORT (1990).

22. See, e.g., SNAKE RIVER TECHNICAL ADVISORY COMMITTEE, NEEDED WATER RESOURCES PROGRAMS IN THE SNAKE RIVER BASIN 3 (Nov. 1983) [hereinafter SNAKE RIVER T.A.C.]. Although the historians doubtlessly are correct to report eastern Idaho diversions as early as the 1860s, the earliest recognized water right in the Upper Snake carries a priority of 1874, and this is not on the river itself but on Willow Creek, a tributary. RONALD CARLSON, WATERMASTER'S REPORT, WATER DISTRICT No. 1 at A-23 (1986).

23. GOODSELL, *supra* note 4, at 12.

24. U.S. BUREAU OF RECLAMATION, THE COLUMBIA RIVER—COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF THE WATER RESOURCES OF THE COLUMBIA RIVER BASIN 104 (1947) [hereinafter USBR COMPREHENSIVE PLAN].

the lands above American Falls that were then susceptible to irrigation by gravity diversions, had been put under cultivation.²⁵ During average water years thereafter, the river's summer flows typically were fully appropriated in the reach above American Falls.²⁶ By 1900 in the western Snake River Plain, approximately 148,000 acres of irrigated land had been developed by gravity methods in the Boise and Payette valleys.²⁷

The Snake River's hydroelectric generation potential began to be realized at nearly this same time. Built in 1901, the privately-owned Swan Falls Dam was the first hydroelectric facility on the mainstem of the Snake River.²⁸ Idaho Power was formed fourteen years later through the merger of five smaller companies and became the owner of the Swan Falls Dam and power plant.²⁹ Idaho Power holds four water rights at Swan Falls: three separate rights with a 1900 priority—2,150 cfs, 1,840 cfs and 1,460 cfs, respectively—and a 1919 priority right for 4,000 cfs. Although these rights total 9,450 cfs on paper, Idaho Power's Swan Falls rights actually can be no more than 8,400 cfs, which is the installed capacity of the Swan Falls power plant.³⁰ The power plant enjoyed average August flows of about 6,800 cfs during the years 1914 through 1920.³¹ Accordingly, and on average, Idaho Power's Swan Falls rights were fully filled during the irrigation season through 1918.

25. MUNDORFF, *supra* note 19, at 14.

26. State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information 2, in the Matter of Petition for Declaratory Order by Idaho Power Company, No. EL85-38-000 [hereinafter Idaho Response to FERC] (1987). See also GERALD F. LINDHOLM AND SALLY A. GOODELL, IRRIGATED ACREAGE AND OTHER LAND USES ON THE SNAKE RIVER PLAIN, IDAHO AND EASTERN OREGON, U.S.G.S. HYDROLOGIC INVESTIGATIONS ATLAS HA-691 (1986) [hereinafter LINDHOLM & GOODELL].

27. U.S. WATER AND POWER RESOURCES SERVICE, PACIFIC NORTHWEST REGION, PROJECT DATA BOOK, BOISE PROJECT 1 (undated publication) [hereinafter WPRS, BOISE PROJECT].

28. The first federal hydroelectric powerplant on the Snake River (and in the Pacific Northwest) was installed in 1907 at Minidoka Dam, a Bureau of Reclamation project near Rupert, Idaho.

29. For a fascinating history of Idaho Power Company and the events that led to its creation, see SUSAN M. STACY, LEGACY OF LIGHT: A HISTORY OF IDAHO POWER COMPANY (1991) [hereinafter STACY].

30. The measure of a water right is the amount that actually is placed to beneficial use. Thus, Idaho Power's right at Swan Falls cannot exceed the facility's flow capacity. In *Idaho Power Co. v. State of Idaho*, 104 Idaho 575, 578, 661 P.2d 741, 744 (1983), the court noted that it was undisputed that the capacity is 8,400 cfs. It has been described elsewhere as being 8,000 cfs. COLUMBIA RIVER WATER MANAGEMENT GROUP, COLUMBIA RIVER WATER MANAGEMENT REPORT FOR WATER YEAR 1990 at 159 (Mar. 1991).

31. IDAHO DEPT. OF WATER RESOURCES, HISTORIC DISCHARGE SNAKE RIVER NEAR MURPHY (1990) [hereinafter IDWR SNAKE HISTORIC DISCHARGE—MURPHY] (data on computer file with the Idaho Dept. of Water Resources, Boise, Idaho). Even the earliest Department records of flows at the Murphy gauge indicate that a portion of Idaho Power's

2. Phase Two: Irrigation Development Under the Federal Reclamation and Carey Acts

As the first surge of irrigation development peaked above American Falls at the turn of the century with the completion of natural flow diversion works, what could be called "phase 2" began on the arid lands of the Magic Valley near Twin Falls pursuant to the Federal Carey Act³² and the Reclamation Act of 1902.³³ As part of this effort, the privately-financed Milner Dam was completed in 1905 downstream from the town of Burley, Idaho.³⁴ Water diverted from the Milner pool is directed through literally thousands of miles of canals and laterals on both the north and south sides of the Snake River. Because Milner Dam is located just above the point where the Snake River drops into a deep basalt canyon, it is the last point on the river at which large-scale gravity diversions are feasible.

In all, over 414,000 acres of public land near Twin Falls were brought under irrigation under the Carey Act—an accomplishment that has been represented as the largest privately constructed reclamation project in the United States.³⁵ The Twin Falls South Side Project,

1919 rights was not being filled in the summer months. Today, it is not possible to determine the extent to which the reduced flows at Swan Falls during this period may have been attributable to diversions by upstream junior appropriators that should have been subject to Idaho Power's call, or whether they merely reflected the overall unavailability of water in the Snake River. The authors use the term "call" broadly to refer to a senior appropriator's entitlement to enforce his or her water right against juniors, in court or through state administrative action. The authors do not mean to imply that the below-Milner portion of the Snake has been adjudicated, because it has not been and therefore has no water master through which a traditional call might be implemented.

32. 43 U.S.C.A. §§ 641-648 (1986). Under the Carey Act of 1894, the federal government segregated federal lands in each of the desert lands states and made them available to the states to be held in trust while private construction companies built diversion works under the states' supervision. The construction companies contracted with settlers for the purchase of water rights. Upon proof of successful irrigation of the lands, the state issues a final certificate to the settler and requests the federal government to patent the land to the settler. Operating companies then were authorized to organize and take over the operation and maintenance of the irrigation works. Ultimately, 618,000 acres were patented under the Carey Act in Idaho—more than in any other western state. See IDAHO DEPARTMENT OF RECLAMATION SPECIAL REPORT, THE HISTORY OF DEVELOPMENT AND CURRENT STATUS OF THE CAREY ACT IN IDAHO 15 (Mar. 1970) [hereinafter IDR CAREY ACT REPORT].

33. 43 U.S.C.A. §§ 371-431 (1986) (as amended).

34. Milner Dam was constructed to raise the surface level of the Snake River approximately 40 feet so that water could be diverted through canals to serve the Twin Falls South Side Project. Milner Dam also now serves as the diversion facility for the North Side Twin Falls Canal, the Milner Low-Lift Canal (which involves pumping from the Milner pool), and the Milner-Gooding Canal.

35. IDR CAREY ACT REPORT, *supra* note 32, at 69.

in which patents were issued for over 192,000 acres, was the most successful of the Idaho Carey Act projects,³⁶ the majority of which were largely operational by 1930.

Coincident with the Carey Act developments which used waters diverted at and upstream from Milner, federal water storage projects began on the mainstem Snake River and its tributaries above Twin Falls to provide irrigation water, power and flood control pursuant to the Federal Reclamation Act of 1902.³⁷ Early federal storage projects in the Upper Snake River included Minidoka Dam east of Rupert, Idaho, which was completed in 1906, and Jackson Lake on the uppermost reaches of the Snake in Wyoming's Grand Teton National Park, completed in 1916.³⁸ Additional Bureau of Reclamation projects subsequently were constructed at and above American Falls both to provide supplemental water supplies to existing irrigated lands and to irrigate new lands on the Snake River Plain.³⁹ Current reservoir storage capacity serving the entire Snake River Plain exceeds nine MAF,⁴⁰ approximately fifty percent of which is located above Milner Dam.

3. Effect of Early Irrigation Developments on the Snake River Basin Hydrologic System

The increase in irrigated acreage throughout the Snake River Plain that resulted from developments prior to 1900, and from the Carey Act and Reclamation developments prior to World War II, significantly changed the hydrologic system of the Snake River Plain. Because of the water seeping from the miles of primary canals and many more miles of laterals and head ditches in the gravity systems,

36. *Id.*

37. 43 U.S.C. §§ 371-431 (1986).

38. Minidoka Dam, which creates Lake Walcott east of Rupert, Idaho, also was originally built to raise the water level of the Snake River to permit gravity flow irrigation through the Minidoka North Side and South Side Canals. U.S. BUREAU OF RECLAMATION, PACIFIC NORTHWEST REGION PROJECT DATA BOOK, MINIDOKA PROJECT 1 (U.S. Government Printing Office 1984) [hereinafter USBR, MINIDOKA PROJECT].

39. These projects include the construction of American Falls Dam (1926); the 70-mile long Milner-Gooding Canal, which diverts from the Milner pool (1928); Island Park Dam and Reservoir on the Henry's Fork of the Snake (1939); Grassy Lake Dam and Reservoir (1940); Palisades Dam and Reservoir on the South Fork of the Snake (1957); and Ririe Dam and Reservoir on Willow Creek (1975). Large increases in irrigated acreage also occurred in the western Snake River Plain after 1900 with the construction of Lake Lowell (1911), and the Arrowrock (1915) and Anderson Ranch (1950) dams as part of the Bureau of Reclamation's Boise Project on the Boise River system. WPRS, BOISE PROJECT, *supra* note 27.

40. GOODELL, *supra* note 4, at 21. The active storage volume above Milner is about 4.5 MAF.

the volume of natural flow and storage water diverted to the fields often far exceeds the amount actually consumed by the crops. The excess seeps from the canals and laterals or percolates below the plant root-zone to recharge the aquifer.⁴¹ Spreading literally millions of acre-feet of unconsumed water across the Snake River Plain caused a significant increase in groundwater levels throughout the aquifer and a corresponding increase in aquifer discharges into the Snake River, particularly in the reach below Milner.⁴²

For example, discharge measurements for the river reach between Milner and King Hill show that between 1902 and 1930, the period corresponding to major Carey Act and Reclamation developments, the average annual discharge from the aquifer on the north side of the Snake River rose from approximately 4,200 cfs to approximately 5,900 cfs.⁴³ As measured at the Murphy gauge near Swan Falls, the average August water flows in the Snake River increased from approximately 7,000 cfs in 1935 to approximately 8,300 cfs in 1953.⁴⁴ Thus, despite the increase in irrigated lands upstream and the near total depletion of river flows at Milner during the irrigation season, Idaho Power actually experienced a trend of increasing flows at Swan Falls in the years prior to World War II due to the increased aquifer recharge and surface return flows resulting from flood irrigation.

4. Phase Three: Post-World War II Development of the Groundwater Resource

Only minimal amounts of water development occurred in the Snake River Plain during the Great Depression and through World War II, particularly in comparison with the impressive growth of irri-

41. For example, the U.S. Geological Survey has estimated that of the 12.7 MAF withdrawn from surface water supplies for irrigation on the Snake River Plain, only about 3.5 MAF is consumptively used by the crops through evapotranspiration. The balance is either lost through evaporation from the canals or the soil, or is available for recharge. GOODELL, *supra* note 4, at 23.

42. Groundwater levels at one well in the Twin Falls area rose 200 feet within five years after the Twin Falls South Side Carey Act Project became operational. See LINDHOLM, *supra* note 5, at 8. Increased recharge between 1890 and 1952 caused an average rise in groundwater levels in the eastern Snake Plain Aquifer of 50 feet and an increase in total aquifer storage of 24 MAF. GOODELL, *supra* note 4, at 48. Similarly, aquifer discharge in the Milner-to-King Hill reach also increased. *Id.*

43. CECIL A. THOMAS, INFLOW TO THE SNAKE RIVER BETWEEN MILNER AND KING HILL, IDAHO, IDAHO DEPT. OF RECLAMATION, WATER INFORMATION BULLETIN NO. 9 at 26-27 (1969). See also LUTHER C. KJELSTROM, FLOW CHARACTERISTICS OF THE SNAKE RIVER AND WATER BUDGET FOR THE SNAKE RIVER PLAIN, U.S. GEOLOGICAL SURVEY ATLAS HA-680 (1986).

44. See IDWR SNAKE HISTORIC DISCHARGE—MURPHY, *supra* note 31.

gated agriculture under the Carey and Reclamation Acts. However, not long after World War II, technology, agricultural demand and a burgeoning supply of electricity converged to advance the third phase of agricultural growth and water resource development on the Snake River Plain. Unlike earlier periods that relied almost exclusively on natural flow diversions from the Snake River or reservoir storage, post-war agricultural developments increasingly were supported by groundwater pumping from the Snake Plain Aquifer.

Prior to about 1946, the inadequacy of knowledge about the hydrogeology of the Snake Plain Aquifer was matched by a lack of technology to exploit groundwater supplies in any significant way. Indeed, as late as 1947 the Bureau of Reclamation maintained that the groundwater resource of the eastern Snake River Plain was "of comparatively little use within the basin because of the great depth at which it lies under most of the plains."⁴⁵ Ironically, that same year the Bureau became one of the first to exploit the groundwater resource on a large scale when it developed the North Side Pumping Division, a project designed to irrigate nearly 77,000 acres in the area near Burley, Idaho.⁴⁶

Between 1945 and 1966, irrigated acreage throughout the Snake River Plain increased from approximately 2.5 million acres to some 3.2 million acres.⁴⁷ And by then approximately 700,000 acres of this total, or about twenty-two percent, were irrigated by means of pumped groundwater.⁴⁸

Electricity was required to run the pumps, and a large portion of it came from Idaho Power's hydroelectric plants on or near the Snake River from American Falls to Hells Canyon. Within three years after a Rupert, Idaho area farmer named Julion Clawson first introduced Idaho Power officials to the logical union of irrigation pumps and electrical power in 1948, the Company spent close to a million dollars building power lines and substations to bring electricity to the growing number of groundwater pumps and to its newly "electrified" rural constituency.⁴⁹ Between the end of World War II and 1952, Idaho Power

45. USBR COMPREHENSIVE PLAN, *supra* note 24, at 100.

46. The North Side Pumping Division consists of 177 deep wells and a high-lift pump that draws directly from the Snake River eight miles west of Burley, Idaho. These wells and pumps provide water to 76,796 acres. USBR, MINIDOKA PROJECT, *supra* note 38, at 4.

47. LINDHOLM & GOODSELL, *supra* note 26.

48. *Id.*

49. STACY, *supra* note 29, at 134.

had installed an additional 274,500 kilowatts of capacity to its system—more than double its 1945 capacity.⁵⁰

An Idaho Power brochure of the era urged “the people and the nation to do everything possible to encourage men of vision who will continue the expansion of irrigation pumping.”⁵¹ The near-exponential growth of Idaho’s electrical demand in much of the post-war era, attributable primarily to the prodigious expansion of southern Idaho’s agricultural economy, justified construction in the 1960s of Idaho Power’s three-dam Hell’s Canyon complex—Brownlee, Oxbow and Hells Canyon.⁵²

The massive increase in groundwater diversions altered the water budget of the Snake Plain Aquifer. On the long-term hydrographs maintained by the U.S. Geological Survey, 1953 marks the end of a long trend of increasing aquifer discharges to the Snake River below Milner. The increases had resulted from expanded flood irrigation up-gradient; the trend in the other direction that began in 1953 reflected the fact that agricultural expansion now was being served chiefly by pumping from the aquifer.⁵³ Accordingly, as Idaho Power promoted and then served irrigation pumping demand, its ability to produce electricity with Snake River flows was reduced.⁵⁴ Although few likely noticed it at the time, the basis for the hydrological cordiality between

50. Idaho Power’s Upper Salmon plant was completed in 1945 with a capacity of 16,500 kilowatts (KW). Other Idaho Power projects included the Upper Malad (1948, 9,000 KW); Lower Malad replacement (1948, 10,000 KW); Lower Salmon (1949, 70,000 KW); Bliss (1950, 80,000 KW); and C.J. Strike (1952, 89,000 KW).

51. STACY, *supra* note 29, at 135 (quoting Idaho Power Company’s FREDRICK J. COCHRANE, *WATER ON THE LAND: PRIVATE ENTERPRISE DEVELOPMENT IN THE SNAKE RIVER VALLEY*).

52. STACY, *supra* note 29, at 137. By the 1960s, Idaho Power had a summertime peak demand due to irrigation pumping. *See id.* at 182.

53. GOODSELL, *supra* note 4, at 48. Discharges of groundwater from the north side of the Snake River between Milner and King Hill peaked at 6,900 cfs in 1953 and have followed a generally declining trend since then. *Id.*

By 1980 an estimated 5,300 wells annually pumped 2.3 MAF of groundwater to irrigate approximately one million acres of land in the Snake River Basin. *Id.* at 23. Moreover, by 1980, discharges from all sources were estimated to exceed recharge by 400,000 acre-feet per year. LINDHOLM, *supra* note 5, at 6-7. Discharges to the Snake River below Milner decreased by approximately 600 cfs between 1951 and 1980. GOODSELL, *supra* note 4, at 36.

54. While Idaho Power theoretically might have had grounds to challenge upstream diversions by those having rights junior to the Company’s 1919 priority right, the outlook well into the 1950s hardly gave it a reason to do so. Technically speaking, many upstream diversions doubtlessly do deplete more senior Swan Falls entitlements. But as the 1953 August flows indicate, the return flow bonus, some of which undoubtedly accrued from rights senior to those at Swan Falls, limited any injury to Idaho Power’s rights. Moreover, the trend indicated increasing flows at Swan Falls. Continued coopera-

the Upper Snake and Idaho Power's below-Milner rights was beginning to erode.

5. Phase Four: Increased Efficiencies and the Advent of the High-Lift Pump

Driving on Interstate 84 between Idaho's farming communities of Rupert and Twin Falls on a summer evening, one cannot help but be impressed by the spectacle of sunlight refracted through the spray from hundreds of center-pivot and sideroll sprinklers. These systems symbolize the era of increased efficiency and reduced farm labor costs in irrigation that began on the Snake River Plain in the mid-1950s. Sprinklers, lined ditches, laser-leveled fields and gated pipe have significantly reduced the amount of surface water applications on many areas of the Snake Plain, and consequently have reduced the amount of water available to recharge the aquifer. While some of these systems used groundwater, many involved conversions of surface, flood-type irrigation techniques to sprinkler pumping from canals.

Throughout the Snake River Basin, approximately 200,000 acres of land had been converted to sprinkler irrigation between 1966 and 1976.⁵⁵ The Department estimates that nearly 1.5 million acres had been converted from flood to sprinkler irrigation by 1990.⁵⁶ In addition, following a year of severe drought in 1977, Upper Snake River canal companies and irrigation districts instituted tighter regulation of water deliveries among their water users and adopted more efficient canal management procedures.⁵⁷ In a recent study of several irrigated areas of the Upper Snake, the Soil Conservation Service estimated that between 1977 and 1987, farm deliveries of irrigation water decreased by a

tion between the power company and upstream irrigators seemed a natural and logical course.

55. U.S.D.A, SNAKE RIVER BASIN, IDAHO AND WYOMING, COOPERATIVE STUDY, LAND RESOURCE DATA 7 (1976). During the period when these conversions were taking place, the volumes of surface diversions also were increasing, thus tempering, to some degree, the effects of sprinkler conversions and water-conserving measures elsewhere. Moreover, the time lag between greater diversions (or implementation of conservation measures) and aquifer discharge further obscures these effects. Interview with Alan Robertson, Idaho Dept. of Water Resources, in Boise, Idaho (Feb. 18, 1992), and unpublished charts, based on data in District 1 Watermaster's reports, showing trends of increasing diversions above Milner through 1976.

56. Telephone Interview with Tony Morse, Idaho Dept. of Water Resources, Remote Sensing Bureau, in Boise, Idaho (Jan. 10, 1992).

57. Telephone Interview with Ron Carlson, Idaho Dept. of Water Resources, District 1 Watermaster, in Boise, Idaho (Feb. 14, 1992).

factor of between forty-three to fifty-one percent.⁵⁸ In part as a result of these increasing efficiencies, diversions of surface water from natural flows and storage also had declined by nearly one MAF by 1983.⁵⁹

During the period of expanding groundwater diversions and increasing irrigation efficiencies, and as a result of increasingly powerful pumping systems, diversions of surface flows directly from the Snake River below Milner Dam also began to occur. Historically, the lands adjacent to the deep Snake River Canyon were not irrigated because water could not be delivered by gravity and the technology did not exist to overcome the 200 to 600 foot pump-lift required to bring the water out of the canyon. However, beginning in the 1960s with new high-lift pump technology, diversions from the Snake River increased significantly. High farm commodity prices between 1970 and 1974 gave rise to numerous new applications to the Bureau of Land Management (BLM) for the settlement and sale of public desert lands in Southwest Idaho for agricultural development under the Desert Land Entry Act⁶⁰ and again under the Carey Act.⁶¹ These lands appeared ideally suited to irrigation using the new high-lift technology.

A 1976 Department of Water Resources study demonstrated that, in the decade ending in 1974, over 95,000 new acres were developed using water pumped from the river in the Milner to Murphy reach. By mid-1974, over 450,000 additional acres in the same area were covered by either undeveloped water right permits or applications to divert water directly from the below-Milner reach of the Snake River.⁶² The study estimated that if all permits were fully developed, Swan Falls flows during August of a normal year would be reduced to 4,000 cfs; if

58. U.S.D.A., SOIL CONSERVATION SERVICE, SNAKE RIVER IRRIGATION WATER REPORT 3 (Mar. 25, 1988).

59. SNAKE RIVER T.A.C., *supra* note 22, at 39. Some of the decline in surface water diversions may also be attributed to temporary withdrawals of irrigated land from production under federal set-aside programs and the declines in surface flows themselves due to drought in southern Idaho.

60. 43 U.S.C.A. §§ 321-339 (1986).

61. 43 U.S.C.A. §§ 641-648 (1986).

62. R.J. SUTTER, EFFECTS OF FULL DEVELOPMENT OF EXISTING WATER RIGHT PERMITS AND APPLICATIONS BELOW MILNER DAM ON FLOWS OF SNAKE RIVER, TECHNICAL STUDIES REPORT NO. 3, Idaho Dept. of Water Resources 3, Table 1 (Jan. 1976) [hereinafter SUTTER STUDY]. The Sutter Study presumed an average 2.58 acre-feet of diversions per acre for the irrigation season and presumed return flows of 15%. *Id.* at 6. Accordingly, some 208,000 acre-feet were calculated to have been removed from river flows at Murphy annually due to just one decade's development. The pending applications and undeveloped permits would have involved another 932,000 acre-feet, and presumably would have reduced Swan Falls flows by nearly 800,000 acre-feet (presuming 85% percent consumptive use).

all applications also were developed, the Swan Falls flows would drop to 2,600 cfs. For a dry year the numbers were estimated to be 3,400 cfs and 1,900 cfs, respectively.⁶³

Reacting to the spate of new applications for desert land development—and to greater public concern about maintaining hydropower capacity⁶⁴—the BLM began work in 1977 on an environmental impact statement to evaluate the potential impacts of irrigation of some 111,000 new acres of public desert land in Idaho's Elmore, Owyhee and Twin Falls counties over the following five years.⁶⁵ If developed, this new land would have required high-lift pumping of some 250,000 acre-feet from the Snake River below Milner.⁶⁶ The BLM estimated that this would reduce flows at the Murphy gauge during the peak irrigation season by a monthly average of between 774 and 975 cfs.⁶⁷ By 1980 an additional 150,000 acres of desert lands had been converted to cropland by high-lift pumping from the Snake River downstream from Milner;⁶⁸ direct-pumped diversions by then accounted for 2,200 cfs,⁶⁹ or ninety percent of all diversions below Milner.⁷⁰

Although groundwater pumping and increased irrigation efficiencies had an effect on river flows, they were somewhat delayed in time and intensity. The aquifer is vast and has a dampening effect upon any particular withdrawal. On the other hand, the effects, as measured at the Murphy gauge, of high-lift diversions below Milner were direct, im-

63. *Id.* at 7, 9.

64. See generally Ed CHANEY, *THE DESERT LAND AND CAREY ACTS IN IDAHO: IMPLICATIONS FOR EXISTING FARMERS AND RANCHERS*, IDAHO CONSERVATION LEAGUE AGRICULTURAL LANDS PROJECT, SUMMARY REPORT (June 1977).

65. U.S. DEPT. OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, BOISE DISTRICT OFFICE, FINAL ENVIRONMENTAL STATEMENT, AGRICULTURAL DEVELOPMENT FOR SOUTHWEST IDAHO (1979) [hereinafter AGRICULTURAL DEVELOPMENT ES].

66. *Id.* at 3-11.

67. *Id.*

68. State of Idaho Response to Federal Energy Regulatory Commission Request for Additional Information 15, In the Matter of Petition for Declaratory Order by Idaho Power Company, No. EL85-38-000 (FERC 1987). The Department estimates that 3.25 million acres of land currently are irrigated in the Snake River Basin. Personal Interview with Tony Morse, Idaho Department of Water Resources, Remote Sensing Bureau, in Boise, Idaho (Jan. 10, 1992). By comparison, the U.S. Geological Survey estimated that 3.2 million acres of land in the Snake River Basin were under irrigation in 1966. LINDHOLM & GOODELL, *supra* note 26. Interestingly, despite the optimistic projections for increased agricultural development that prevailed at least until the late 1970s, and despite significant increases in irrigated acreage in particular areas, a correspondingly significant amount of land has been idled from production so that between 1966 and 1991, the amount of irrigated acreage in the Snake River Basin increased very little.

69. SNAKE RIVER T.A.C., *supra* note 22, at 9.

70. GOODELL, *supra* note 4, at 16.

mediate and significant.⁷¹ Between 1955 and 1981, a period when direct diversions from the river below Milner were increasing, average August flows at Swan Falls fell from 8,500 cfs to below 6,500 cfs. Thus, by the late 1970s, as a result of increased groundwater diversions, decreased irrigation recharge and return flows, and especially the increased direct diversions from the River below Milner, Idaho Power was beginning to feel a bite into its Swan Falls flows. And the predictions were for a continuation of the trend of conversion of desert lands to irrigated agriculture. Despite these trends, through the 1960s and into the 1970s Idaho Power continued its tradition of encouraging, or at least acquiescing to, additional irrigation, even large new proposals for below-Milner high-lift pumping.⁷²

6. The Two-Rivers Concept

Any attempt to describe the historical underpinnings of the Swan Falls controversy must include at least a brief discussion of how, over the decades, the Upper Snake Basin effectively came to be treated as separate from the portion located downstream from Milner for purposes of water delivery and administration of rights. Idaho Power's rights at Swan Falls and other power plants are senior to many above-Milner natural flow rights and most of the storage rights, but the Company never took any action to curtail above-Milner rights to serve these priorities. As indicated above, at least until the changes in aquifer discharge that began in the 1950s, the Company likely would have

71. Not until 1986 did the Idaho Department of Water Resources adopt a rule that presumes that further direct diversions from the Snake River between Milner and Swan Falls Dam are not in the public interest. Idaho Dept. of Water Resources, Water Appropriation Rule 5,3,9.

72. See, e.g., Letter from James E. Bruce, Idaho Power Secretary, to Bell Rapids Irrigation Company (Apr. 6, 1967):

In response to your oral request, this is to advise you that Idaho Power Company will permit Bell Rapids Irrigation Company to install two pumping stations for the purpose of diverting up to 600 cfs of water from the backwaters of the Company's Lower Salmon power plant for the irrigation of certain lands. . . . Our position with respect to this permission is in conformity with the Company's long established policy of subordinating the need of water for power to that of water for irrigation.

The Lower Salmon project is located near Hagerman in the Thousand Springs reach of the Snake River. After the Swan Falls controversy began, the Company withdrew this permission from Bell Rapids and three other large proposed pumping projects to whom it had been given (Green Valley Mutual Irrigation Company, Twin Buttes Mutual Canal Company and Grindstone Butte Mutual Irrigation Company). Complaint, Idaho Power Co. v. Idaho Dept. of Water Resources, No. 81375, Ada County District Court for the Fourth Judicial District 261-63 (filed Mar. 30, 1983).

had no reason to do so. Furthermore, substantial amounts of flow actually did pass Milner during most irrigation seasons. However, by the time of the Swan Falls controversy the Company would have found it difficult to compel the continuation of these past-Milner flows, partly because of the Company's own actions.

Milner Dam was built in 1905 at the western most point in the upper Snake at which significant amounts of water could be diverted from the river by gravity systems. The large canals on the north and south sides of the river at Milner divert under water rights carrying priorities ranging from 1900 to 1939.⁷³ Over the period from 1914 to about 1923, these diversions had drastically reduced the average August flows past Milner from over 2,000 cfs to less than 100 cfs.⁷⁴ Still, some water almost always passed American Falls, where Idaho Power had an early power plant, and Milner during the irrigation season.⁷⁵ But the long list of senior natural flow appropriations on the Upper Snake River guaranteed that these amounts would be small in most years.⁷⁶ From 1924 through the late 1970s the average August flows were as low as approximately fifty cfs in the irrigation season, and overall averages during that period were about 150 cfs.⁷⁷ By the time the high-lift pumping technology arrived that would allow irrigation of the fertile plateau lands above the Snake River Canyon downstream from Milner, other physical and institutional barriers to the delivery of water below Milner already were in place. These barriers have resulted in what one commentator has referred to as the "fractured river syndrome."⁷⁸

73. The Milner diverters include A & B Irrigation District, Milner Low Lift Canal Company, American Falls Reservoir District No. 2, Northside Canal Company (a/k/a Northside Twin Falls Canal Company), and Twin Falls Canal Company. Of this group, Northside and Twin Falls hold rights carrying the earliest priorities—October 11, 1900. WATERMASTER'S REPORT, WATER DISTRICT NO. 1 at A-28, A-49 (1986).

74. See Idaho Response to FERC, *supra* note 26, Figure 3.

75. Idaho Dept. of Water Resources River Discharge Reports for the Snake River show that on the average, anywhere from 0.5 to 3.8 MAF of water was measured past Milner between 1910 and 1940. IDAHO DEPT. OF WATER RESOURCES, HISTORIC DISCHARGE, SNAKE RIVER AT MILNER (1990) [hereinafter IDWR SNAKE RIVER HISTORIC DISCHARGE—MILNER] (data on computer file with Idaho Department of Water Resources).

76. According to the District 1 Watermaster's records, there are 395 water rights, comprising several thousand cfs, with priority dates earlier than 1900. WATERMASTER'S REPORT A-28 (1986), WATER DISTRICT 1.

77. IDAHO DEPT. OF WATER RESOURCES, TRENDS IN SUMMER FLOWS AND INDICATORS OR CAUSES, SNAKE RIVER NEAR MURPHY (SWAN FALLS), AS ILLUSTRATED BY FIVE YEAR RUNNING AVERAGES OF AUGUST FLOWS (chart on file with the Idaho Dept. of Water Resources).

78. TIM PALMER, THE SNAKE RIVER: WINDOW TO THE WEST 163 (1990).

One of the institutional barriers to below-Milner deliveries arose out of an arrangement that Idaho Power entered with the federal government in the 1920s. After having endured several years of drought in that era, Upper Snake irrigators were determined that the federal government build a reservoir at American Falls as insurance against the water shortages.⁷⁹ When the Bureau of Reclamation received authorization to build American Falls Dam and Reservoir in 1923, Idaho Power entered into a contract with the Bureau that effectively subordinated the Company's American Falls hydropower right to the federal government. The contract specified that, in exchange for one million dollars, Idaho Power would relinquish much of its right to exercise its American Falls priority against the government's junior storage rights provided that Idaho Power would have the right to generate power at the new American Falls Dam and would be provided 45,000 acre-feet of primary storage space in the reservoir.⁸⁰

The 1923 contract provided some security for Idaho Power's hydroelectric base by entitling the Company to call for non-irrigation season deliveries of its American Falls storage to serve its hydropower projects at Shoshone Falls and Twin Falls, both of which are below Milner.⁸¹

Another motivation for the contract probably was Idaho Power's desire to avoid a confrontation with the irrigators. Although the 1923 contract did not purport to affect the Company's rights and priorities at Swan Falls, it undoubtedly helped give rise to a view that, except for its rights under the 1923 contract, Idaho Power had no claim on any flows in the Snake River above Milner Dam.⁸² It also helped further

79. STACY, *supra* note 29, at 74.

80. See Contract Between the United States and Idaho Power Company Relative to Power Rights at American Falls, Idaho (June 15, 1923) [hereinafter 1923 Contract]. Idaho Power reserved, among other rights, a summer power right for use at American Falls of up to 2,500 cfs of water from May 1 through September 15 each year. Idaho Power also was granted 45,000 acre-feet of primary storage and 255,000 acre-feet of secondary storage in American Falls Reservoir to be used for power generation downstream from Milner. Idaho Power subsequently obtained the right to use all the water that passed American Falls for power generation. See U.S. Dept. of Interior, Bureau of Reclamation Contract with Idaho Power Company (Oct. 1, 1934).

81. 1923 Contract, *supra* note 80, at 21-22.

82. Arguably, this view, if it actually had been taken by Idaho Power, was not correct. The Company's deal with the Bureau of Reclamation did not mention Swan Falls, nor did it purport to affect Idaho Power's right to call for, or litigate to assure natural flow deliveries under its Swan Falls rights. Again, the Company simply was choosing not to enforce its rights as against upstream irrigation development. In any event, the 1923 agreement represents perhaps Idaho Power's earliest expression of a *de facto* policy of conciliation to upstream irrigation development. Had Idaho Power not followed this policy, it surely would have had a showdown with irrigators early on, undoubtedly in court,

the pattern of cooperation between Idaho Power and upstream irrigators. In any event the arrangement had the physical effect of limiting irrigation season flows past Milner, and is one of the factors that discourages the delivery of Upper Snake River flows to rights diverting below Milner Dam. Waters that otherwise would have flowed past Milner to support Idaho Power's hydroelectric rights now are held as far upstream as possible to serve upper Snake irrigation and power generation at American Falls.

Indeed, Bureau of Reclamation policy in the late 1940s was to develop new irrigation projects in the Upper Snake River Basin so as to ensure that their return flows would be tributary to the Snake River above Milner.⁸³ In addition, to obtain the additional storage needed above Milner to provide power to run the irrigation pumps in the Minidoka Project, the Bureau negotiated agreements with, among others, the water users from the North Side and South Side Twin Falls Carey Act project lands whereby the irrigators would curtail their traditional winter domestic and stockwater diversions. These agreements resulted in an estimated 435,000 acre-feet of water saved overwinter that then could be stored upriver. Coincidentally, this amount approximated the 433,000 acre-feet of storage proposed for the Palisades Project that was built in 1957 on the South Fork of the Snake River near the Wyoming border.⁸⁴ The winter water saved at Milner became, in effect, new storage in Palisades.⁸⁵

While these developments were aimed at holding more water upstream for diversion and use above Milner, some water continues to flow past Milner, but the amount is quite variable. From 1981 through 1991, flows past Milner have ranged from about 20,000 acre-feet to 100,000 acre-feet in each of the peak irrigation season months of June through September. The amounts of flow past Milner are difficult to predict or interpret because substantial portions of these probably are

over whether additional irrigation development, including important storage projects, could occur upstream.

83. USBR, COMPREHENSIVE PLAN, *supra* note 24, at 119.

84. See U.S. BUREAU OF RECLAMATION, WATER SUPPLY FOR PALISADES RESERVOIR PROJECT, IDAHO: A GENERAL PLAN FOR THE ELIMINATION OF WINTER DIVERSIONS, COORDINATED OPERATION OF RESERVOIRS AND DEVELOPMENT OF NEW LAND, PROJECT PLANNING REPORT 1-5.17-1 at 10 (Oct. 1946).

85. Under a traditional application of water law, this new storage would have been junior to, and subject to call by, Idaho Power's Swan Falls water rights, at least to the extent of any return flows or aquifer discharge that resulted historically from the Milner diverters' winter use. See, e.g., *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). Nonetheless, there is no indication that Idaho Power objected to the arrangement.

attributable, not to natural flow, but to storage releases delivered to Idaho Power downstream.⁸⁶

Subsequent state policies have further institutionalized the two-rivers concept. One of these is the State Water Plan. For example, Policy 5A of the version of the plan approved by the Idaho State Legislature in 1987 states that "[i]t is the policy of Idaho that the ground water and surface water of the [Snake River] basin be managed to meet or exceed a minimum average daily flow of zero at the Milner gauging station"⁸⁷

More recently, and in anticipation of the Snake River Basin Adjudication, the State of Idaho and Upper Snake River irrigators negotiated an agreement with the Shoshone-Bannock Indian Tribes of the Fort Hall Indian Reservation that honors the two-rivers concept by restricting the transferability of a substantial portion of Indian reserved water rights. Under the Agreement, the Tribes' storage entitlements may be placed in a tribal water bank, but those stored in Palisades

86. State records indicate that the average annual flow past Milner is some 2.5 MAF. ALAN ROBERTSON, ET AL., IDAHO DEPT. OF WATER RESOURCES, STREAM FLOWS IN THE SNAKE RIVER BASIN, 1989 CONDITIONS OF USE AND MANAGEMENT 8 (June 1991). See also IDWR SNAKE RIVER HISTORIC DISCHARGE—MILNER, *supra* note 75. This latter table, which does not distinguish between natural flow and storage releases, shows that the lowest monthly flow ever recorded past Milner was about 100 acre-feet in June 1990, which is less than 2 cfs on a daily basis and which, in the rocky river bed downstream from Milner Dam, looks like the proverbial "zero flow." This amount is inadvertent seepage through or around the dam, not an amount that is purposely released. The Milner Dam recently has been rehabilitated so that it likely allows even less seepage than this. However, the average June volume past Milner for the years 1928-1990 is 214,000 acre-feet, and was nearly 18,000 acre-feet in June of 1989. For this 62 year period, the average volumes past Milner in August, the driest month on average, is over 20,000 acre-feet, or about 326 cfs of flow on an average daily basis. Compared to the capacity of the river in that reach, this amount also is meager. Before the delivery of flows below Milner from the District 1 rental pool in 1979, August flows past Milner in the post-war period ranged from 200 acre-feet (virtually "zero flow" on an average daily basis) up to about 36,000 acre-feet. *Id.*

87. STATE OF IDAHO, STATE WATER PLAN (1987). The Idaho Water Resource Board since has adopted the following new language in this respect:

It is the policy of Idaho that the Swan Falls Agreement between the State and Idaho Power Company establishes the framework for water management in the basin. Central to the agreement is the assumption that the Snake River is fully appropriated upstream from Swan Falls Dam except for trust water held by the State and occasional flood waters. The State recognizes that the exercise of water rights above Milner Dam has and may reduce the flow at the dam to zero.

IDAHO WATER RESOURCE BOARD, STATE WATER PLAN—DRAFT PROPOSED POLICY CHANGES 17. (released November 5, 1991, adopted by the Idaho Water Resource Board January 3, 1992). This latest version of the State Water Plan became final in 1992 by the legislature's failure to take action on it within 60 days. IDAHO CONST. art. XV, § 7.

Reservoir may not be rented or delivered for use anywhere below Milner Dam.⁸⁸

Another recent manifestation of the two-rivers concept appears in the current procedures for the Water District 1 water rental pool, which is a creature of Idaho's water bank statute and whose operation is facilitated by the Committee of Nine.⁸⁹ These rules place restrictions on, or impose sanctions to discourage, the rental of rights from the water bank for uses below Milner.⁹⁰

Without question the most significant act toward solidifying the two-rivers concept was the Legislature's 1986 amendment to Idaho's water appropriation statutes.⁹¹ This new language forbids the consideration of above-Milner waters in the determination or administration of any Snake River water rights downstream from Milner.⁹²

A detailed analysis of the two rivers concept is beyond the scope of this article, but this brief background is necessary to understand why various interests, including the Idaho Legislature, responded as they did to the Swan Falls controversy.

B. The Swan Falls Controversy

There is no shortage of opinions regarding the efficacy or propriety of the two-rivers approach to managing the Snake River. But regardless of how one might view this management scheme, or Idaho Power's

88. 1990 Fort Hall Indian Water Rights Agreement, By and Between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, The State of Idaho, The United States, and Certain Idaho Water Users § 7.3.4(i) (1990). This Agreement also provides in Article 7.9 that "[e]xcept as provided in Article 7.3, no Tribal water rights or water may be sold, leased, rented, transferred or otherwise used off the Reservation." Similarly, Article 7.5 of the Agreement limits transfers of tribal water rights "to any place of use within the Reservation." The lands of the Fort Hall Reservation are located above Milner.

89. Idaho's water bank statute is IDAHO CODE §§ 42-1761 to 1766 (1990). The Committee of Nine is comprised of representatives of nine of the large irrigation water delivery organizations in the Upper Snake who have contracts with the Bureau of Reclamation for storage water in Upper Snake reservoirs. The Committee of Nine has been designated by the Idaho Water Resource Board, pursuant to IDAHO CODE § 42-1765 (1990), as the "local committee" whose job is "to facilitate the rental of stored water" from the District 1 rental pool.

90. Rental Pool Procedures for Water District 01, Rule 3.6. The local rules also provide that "[t]he operation of the rental pool shall in no way recognize any obligation to maintain flows below Milner Dam or to assure the minimum stream flows established at the USGS gaging [sic] station on the Snake River near Murphy unless specific arrangements to do so are made under these procedures." Rule 3.3. A higher rate is charged for water leased from the rental pool for use below Milner. *Id.* Rule 8.2.

91. IDAHO CODE § 42-203B(2) (1990).

92. This issue is discussed further in section C(4) below.

role in furthering it, one thing is clear: by the time the various phases of Snake River irrigation development had been played out, Idaho Power could expect little in the way of guaranteed flows from above Milner, particularly during the summer, which was the Company's peak electricity demand period. Rather, it would have to look primarily to discharges from the Snake Plain Aquifer in the Milner-to-Swan Falls reach and to surface inflows from below-Milner tributaries. By the early 1970s, Idaho Power thus faced a new challenge to its ability to provide adequate electricity in its service area: new agricultural development, particularly that relying on high-lift pumps in the reach downstream from Milner, would increase water diversions and diminish power-producing flows in the River.

Idaho Power's response, at least in part, was its proposal to build the Pioneer coal-fired power plant near Boise. The debate over Pioneer led to serious scrutiny of the connections between agricultural land development, water flows and hydroelectric power, and the implications of a continuation of substantial new agricultural diversions from the river. Perhaps the most important of these implications was the higher electrical rates that would occur if the Company encouraged irrigation pumping, allowed its hydroelectric base to be diminished, and began to rely more on substantially more expensive thermal power, such as Pioneer.⁹³

These were the elements that provided the foundation for the Swan Falls dispute, when for the first time, Idaho's irrigators, state government and Idaho Power found themselves embroiled in what appeared to most observers as a desperate conflict to determine how, or whether, irrigation water development would continue to occur on the Snake River Plain. To paraphrase then-Governor Evans, the question was whether Idaho Power would control the Snake River upstream from Swan Falls.⁹⁴

The Swan Falls controversy formally began when several Idaho Power ratepayers, their positions informed by the just completed Pioneer controversy,⁹⁵ brought a complaint in June 1977 against the Company before the Idaho Public Utilities Commission (PUC) alleging that

93. The Pioneer plant controversy is documented in Pat Ford, *During the Boom, Idaho Succumbed to Good Sense*, HIGH COUNTRY NEWS, Sept. 12, 1988, at 19, and in STACY, *supra* note 29, at 177-189.

94. "I want Idaho to become the Snake River water master, not the Idaho Power Company." *Quoted in* STACY, *supra* note 29, at 197.

95. The leaders in this effort were State Senator John Peavey, a rancher from Carey, Idaho, and Boise lawyer Matt Mullaney, former legal counsel to Governor Cecil Andrus. The Idaho Public Utilities Commission [hereinafter PUC] denied a certificate of public convenience and necessity for Pioneer in September 1976. Much information

the Company had failed to protect its water rights at Swan Falls.⁹⁶ The matter ultimately found its way to court in what was without question the most controversial water rights litigation in the state's history.

1. The Swan Falls Litigation

When confronted with the ratepayers' petition at the PUC, Idaho Power effectively took the side of the petitioners as to the seniority of its water rights. In January 1978, in an effort to block approval of new water rights that would further deplete flows at Swan Falls, Idaho Power filed with the Department a protest against "all past and future water applications filed with the Department which contemplate diversion and consumptive use of waters from the surface and subterranean tributaries of the Snake river . . . between Milner Dam, the Snake River east of Twin Falls and the Hells Canyon Dam"⁹⁷ Thus, in its blanket protest, Idaho Power remained true to the tradition of not attempting to call for deliveries past Milner.

Idaho Power then filed a declaratory judgment action in district court asserting that its Swan Falls water rights were unsubordinated and valid as against upgradient juniors.⁹⁸ The defendants, including the Department and several water right holders or applicants,⁹⁹ responded by claiming, among other things, that Idaho Power's Swan Falls water rights had been subordinated to junior rights as part of

about river flows and Idaho Power's Swan Falls rights emerged in the PUC proceedings on Pioneer.

96. *Mullaney v. Idaho Power Co.*, No. U-1006-124, Idaho Public Utilities Commission (filed June 15, 1977).

97. Protest of Idaho Power Company to Applications for Permit to Divert and Consumptively Use Water. In the Matter of Applications Filed for Water Diversions for Consumptive Use on the Surface and Subterranean Tributaries of the Snake River Between Milner Dam and Hells Canyon (Dec. 30, 1977, filed with the Idaho Dept. of Water Resources Jan. 5, 1978). Deposition of Thomas G. Nelson, Higginson v. United States, No. 39576, District Court of the Fifth Judicial District in and for the County of Twin Falls 53 (1987) [hereinafter T. Nelson Deposition]. Mr. Nelson, who since has become a judge on the Ninth Circuit Court of Appeals, was Idaho Power's outside counsel for many years, and was a principal player in the Swan Falls controversy.

98. Amended Complaint, *Idaho Power Co. v. State of Idaho*, No. 62237, In the District Court for the Fourth Judicial District, in and for the County of Ada (filed Nov. 8, 1977). Idaho Power, realizing the potential power impacts of continued large depletions, reportedly had prepared such a lawsuit even before the ratepayers' petition, but "[t]he ratepayers beat us to the courthouse, in the sense that they got to the PUC before we got to district court." T. Nelson Deposition, *supra* note 97, at 17.

99. The water right holders all apparently were high-lift pumpers, or applicants for such water rights, located downstream from Milner. The ratepayer petitioners also were defendants, but their position was the same as that of Idaho Power as to the unsubordinated nature of the Company's Swan Falls rights.

federal licensing of Idaho Power's Hells Canyon complex. The district court ruled in favor of the defendants, but in a 1983 decision the Idaho Supreme Court reversed, finding that Idaho Power's senior rights at Swan Falls were not affected by the subordination of its Hell's Canyon water rights.¹⁰⁰ The court remanded the case for a determination of the defendants' arguments that Idaho Power had abandoned, forfeited or waived that portion of its Swan Falls rights that effectively had been taken by junior diversions upstream, or that in any event Idaho Power should be estopped from asserting any right to protect these rights because it had acquiesced to upstream depletion over the course of many years.¹⁰¹

In 1983, Idaho Power filed a second lawsuit in state court against the State and several thousand water right holders upstream, asserting that its Swan Falls water rights were senior to those of the defendants, and seeking injunctive relief.¹⁰² This second suit, which came to be known as "Idaho Power versus the World" or the "7,500 suit" because of the approximate number of defendants that had been joined, completed the picture of what at least appeared to be the full face-off between Idaho Power and Snake River irrigation interests, including the State. A great deal of debate ensued, in the public press and elsewhere.¹⁰³

2. Initial Attempts at a Legislative Solution

The Legislature's primary reaction to the Swan Falls crisis was to attempt to enact legislation simply subordinating Idaho Power's Swan Falls water rights.¹⁰⁴ Eight bills aimed at this result were introduced in

100. *Idaho Power Co. v. State of Idaho*, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983).

101. *Id.* at 588, 661 P.2d at 754.

102. *Idaho Power Co. v. Idaho Dept. of Water Resources*, No. 81375 (Ada County District Court, filed Mar. 30, 1983). This suit did not state claims against any above-Milner diverters, permittees or applicants. It attacked only those diversions from the river itself between Milner and Swan Falls, and from sources, such as large portions of the Snake Plain Aquifer, that were tributary below Milner.

103. *See, e.g., Swan Falls Issue Rightly Not Added to Special Session*, THE POST-REG. (Idaho Falls, Idaho), Apr. 26, 1983, at A4.

104. Subordination was seized upon as a possible remedy in part because of the 1928 amendment to Article 15, section 3 of Idaho's constitution. This section guarantees that the right to divert and appropriate the unappropriated waters "shall never be denied"; the 1928 amendment added the clause, "except that the state may regulate and limit the use thereof for power purposes." The 1928 amendment presumably provides the State with authority to subordinate or otherwise limit any water right granted for hydropower purposes, and this has been done with several of Idaho Power's other water rights, such as that for the powerplant at C.J. Strike Dam, which was completed in 1952

the 1983 legislative session; none became law.¹⁰⁶ While subordinating all of Idaho Power's Swan Falls rights probably was a majority position in the legislature, many legislators reportedly were concerned about the potential fiscal impact on the State if such legislation were deemed a taking, which it likely would have been, at least as to that portion of its rights that Idaho Power could show it still was entitled to assert.¹⁰⁶

The one Swan Falls bill that did pass in 1983 was Senate Bill 1180,¹⁰⁷ which authorized the governor and the attorney general to negotiate a contract with Idaho Power settling the controversy under certain terms. The bill also removed the PUC's jurisdiction to hear the ratepayers' petition that had been filed against Idaho Power.¹⁰⁸

In 1983 the Legislature also enacted Senate Concurrent Resolution 110, which established an interim committee of legislators—the Legislative Council Committee on Water Rights, or “Water Rights Committee”—to study water needs and the current status of water rights in the Snake River and its tributaries, including the Snake Plain Aquifer.¹⁰⁹ An immediate concern of the Water Rights Committee was the potential impact on electrical power rates that might result from subordination of Idaho Power's water rights at Swan Falls.¹¹⁰ The Water Rights Committee established a fifteen-member “Technical Committee” of experts representing state and federal water resource agencies to evaluate current water use, determine insufficiencies in the database and specify the types of technical studies necessary to sort out the relationships between all users of water in the Snake.

upstream from Swan Falls. But since Idaho Power's Swan Falls rights predate the 1928 amendment and carry no limitation in any event, the retroactive application of a subordination condition would have been problematic for the State, and obviously would have given rise to a claim of taking without compensation, a point that Idaho Power made repeatedly during the public debates over Swan Falls. See, e.g., Jim Taney, *Guest Editorial Opinion*, IDAHO PRESS TRIB., Aug. 2, 1984.

105. LEGISLATIVE COUNCIL COMMITTEE ON WATER RIGHTS, FINAL REPORT 3 (undated report).

106. Interview with Patrick Costello, former attorney for Governor John V. Evans, in Boise, Idaho (Dec. 4, 1991).

107. 1983 Idaho Sess. Laws 689 (codified at IDAHO CODE § 61-540 (1990)). The same legislative session saw the issuance of a Joint Memorial by both assemblies which requested the Idaho Congressional Delegation to “use their influence to seek subordination of Idaho Power's water right at Swan Falls (and other Snake River hydrogenerating facilities) as a condition to relicensing by the Federal Energy Regulatory Commission.” 1983 Idaho Sess. Laws 756, H.J.M. No. 7.

108. 1983 Idaho Sess. Laws 756 (codified at IDAHO CODE § 61-539 (1990)).

109. 1983 Idaho Sess. Laws 726.

110. The Water Rights Committee's work was funded by Idaho Power and carried out under the auspices the University of Idaho's Water and Energy Resources Research Institute.

At this point, Idaho Power faced a substantial threat that the district judges in either of its pending lawsuits would find that at least those conflicting rights already established and diverting upgradient were beyond Idaho Power's ability to curtail due to one or more of the defendants' theories. Idaho Power's situation was complicated substantially by the history of the river's development and the Company's part in it. Over the years high officials in the Company, and their outside water counsel, had assured irrigators that the Company's water rights would not be used to block irrigation development.¹¹¹ Logically, these assertions raised a credible possibility that the Company would be deemed estopped to assert—or to have waived—its Swan Falls rights against existing upgradient rights, and there at least was some risk that the same would hold true as to future depletions.¹¹² On the other hand, if Idaho Power prevailed, even only on the theory that its rights were

111. The State Attorney General's office compiled an analysis entitled "The State of Idaho's Position on the Subordination of Hydropower Water Rights on the Snake River" (Sept. 1984), which catalogues several statements by Idaho Power—including assurances to irrigators, the Federal Power Commission and state officials—declaring that the Company had traditionally followed a policy of *de facto* subordination of its Snake River hydropower rights to future upstream irrigation development. For example R.P. Parry, an attorney representing the Company with regard to licensing the Hells Canyon complex in the 1950s, reportedly testified at a Federal Power Commission hearing that "[h]istorically, [Idaho Power] has always conceded that water rights for future irrigation development shall have precedence over their hydroelectric water rights" Minutes of Federal Power Commission, In the Matter of Idaho Power Company, Project Nos. 1971, 2132, 2133, 1240 (July 1953). Company president T.E. Roach testified that "[o]ur Company for a period of 37 years or more has had a very firm and fixed policy of complete coordination of the use of the Snake River waters for the development of hydroelectric power with the needs of that water for irrigation and has followed the policy of always placing the use of that water for irrigation in a prior position to the use of the water for hydroelectric development." *Id.* at 1419.

112. As a purely legal matter, the Company would have had credible arguments in favor of blocking "further depletions." For the equitable estoppel theory to apply against Idaho Power in the Swan Falls situation, a court would have to find that: 1) despite actual or constructive knowledge to the contrary, the Company had misrepresented its water rights as subordinate to potential upgradient appropriators; 2) potential upgradient water right applicants or appropriators neither knew nor had the means to acquire the true facts as to the senior status of the Company's Swan Falls rights; 3) the Company intended that new water right applicants would rely on the misrepresentation; and 4) those asserting the defense actually did rely on the misrepresentation and acted on it to their detriment. *See, e.g., Idaho Title Co. v. American States Ins. Co.*, 96 Idaho 465, 468, 531 P.2d 227, 230 (1975); *Bjornstad v. Perry*, 92 Idaho 402, 405, 443 P.2d 999, 102 (1968). Even though some of these elements evidently were present with regard to the Swan Falls rights, at least the last one—actual reliance—presumably could be found only as to those who began diverting prior to the outbreak of the controversy and the Company's actions to assert its rights. In Idaho, the Supreme Court has held that the element of detrimental reliance also should be established to make out a claim of waiver.

entitled to be protected as against future depletions, it would be in a position to block most, if not all, new water right applications and perhaps many upstream and upgradient water transfers.¹¹³

The Department reacted to the crisis by imposing a moratorium on the processing or approval of all applications seeking the consumptive use of water in the Snake River Basin upstream from Swan Falls pending the outcome of the district court litigation. Interestingly, the Department never issued an official order establishing the moratorium, but instead adopted an informal position that it would not approve any of the pending applications, thus creating a "de facto" moratorium.¹¹⁴ The Department later exempted certain domestic, commercial, municipal and industrial uses from the moratorium.

3. The 1984 Settlement

Rather than press the controversy in the district court actions, the parties entered into negotiations pursuant to the Legislature's invitation in S.B. 1180¹¹⁵ and eventually reached a conceptual basis for settlement. The core of the arrangement was that Idaho Power would agree to subordinate a portion of its Swan Falls rights so that new appropriations could be approved that would be entitled to deplete that portion. The deal would be based on increasing the 3,300 cfs minimum stream flow at Murphy gauge, established pursuant to the 1976 State Water Plan, to new average daily minimums of 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season. Applications for new rights would be evaluated as to their likely effect on

Clearwater Minerals Corp. v. Presnell, 111 Idaho 945, 729 P.2d 420 (Idaho Ct. App. 1985); Brand S Corp. v. King, 102 Idaho 731, 639 P.2d 429 (1981).

113. At least Idaho Power would have been able to argue that each new proposed water right should be denied due to injury to the Company's senior rights at Swan Falls. However, actually proving harm from any particular new irrigation well in the Snake Plain Aquifer would have been difficult; the amount of effect likely would have been so small as not to be measurable. Idaho Power's best case—and plainly one that would be factually correct—lay with placing before the Department an argument based on cumulative effects. The Swan Falls controversy provided an opportunity to do that, but perhaps Idaho Power concluded that only massive, "cumulative effects" litigation (like that presented by the Swan Falls controversy) could deliver the type of analysis necessary to provide the Company with meaningful protection of its Swan Falls rights. And of course the Swan Falls litigation would have been expensive and protracted. Under these circumstances, perhaps a legislated partial subordination with some protective language for the Company was the best it reasonably could do.

114. Telephone Interview with Norman Young, Administrator, Water Management Division, Idaho Dept. of Water Resources (March 12, 1992).

115. See *supra* note 107.

hydropower production and, in some cases, on certain "public interest" factors.

However, the parties still were at loggerheads about how the subordination should be achieved. Attorney General Jim Jones, who was a party to the negotiations, was adamant that the subordination should be immediate and complete, that it simply should state that the Company's water rights at Swan Falls are fully and instantaneously subordinated down to 3,900 cfs.¹¹⁶ The Company vigorously resisted this approach, wanting instead an arrangement where the rights would remain unsubordinated until declared so in favor of specific permits, essentially on an application-by-application basis as new rights were permitted.¹¹⁷

The reason for this point of contention is not entirely clear. Part of the problem was residual distrust between the parties.¹¹⁸ In addition, it appears that Idaho Power was concerned that an instantaneous subordination as to the "future development" component would reduce the State's resolve, or even its legal ability, to scrutinize each new right as to its impact on hydropower or its consistency with the new public interest concerns that the parties were willing to promote as part of the Swan Falls arrangement.¹¹⁹

In the late summer of 1984, the parties were running out of time on a self-imposed "agree or fight" deadline.¹²⁰ Amid some indications that the Governor might sign an agreement without the Attorney General's participation, Mr. Jones sought the assistance of Rexburg attorney Ray Rigby, a member of the Governor's Swan Falls Advisory Committee.¹²¹ The two conferred, and Mr. Rigby suggested a solution to the Governor: the State should hold in trust that portion of Idaho Power's water rights in excess of the new minimum flows, and the subordination could be recognized application-by-application with the state acting as both trustee and administrator of the application pro-

116. Interview with Jim Jones, former Attorney General for the State of Idaho, in Boise, Idaho (Feb. 18, 1992).

117. T. Nelson Deposition, *supra* note 97, at 53.

118. Interview with Patrick Costello, in Boise, Idaho (December 4, 1991).

119. *Id.*, See also T. Nelson Deposition, *supra* note 97, at 52, 54.

120. The deadline is described in Patrick Costello and Patrick Kole, *Commentary on Swan Falls Resolution*, WESTERN NAT. RESOURCES L. DIG. 11 (Summer 1985) [hereinafter Costello & Kole]. Costello and Kole then were attorneys for the governor and the attorney general, respectively. They, along with Idaho Power's outside counsel, Thomas G. Nelson, did most of the negotiating in crafting the Swan Falls settlement.

121. The Swan Falls Advisory Committee, one of several committees set up by various interests to address the Swan Falls crisis, was a group of individuals experienced in water law and policy which was set up to advise then-Governor John V. Evans.

cess.¹²² With this additional element in place, the parties proceeded toward formal settlement.¹²³

4. The Framework for Final Resolution

On October 1, 1984, Idaho Power, the Governor and the Attorney General signed the *Framework for Final Resolution of Snake River Water Rights Controversy*.¹²⁴ In the Framework—which could be described as a listing of goals toward which the parties agreed to work in good faith—the parties stated their mutual desire to avoid the uncertainties, costs and “diminishing returns” of further litigation,¹²⁵ and generally described those “judicial, legislative and administrative ac-

122. Interview with Patrick Costello, in Boise, Idaho (Dec. 4, 1991); Telephone Interviews with Jim Jones, in Boise, Idaho (Feb. 18, 1992) and Ray Rigby, in Boise, Idaho (Jan. 15, 1992).

123. The parties never explained by what documents the trust was to be evidenced. Presumably, the trust's existence is embodied in the various documents executed by the parties, as well as the Swan Falls statutes.

124. Framework for Final Resolution of Snake River Water Rights Controversy 1 (Oct. 1, 1984) [hereinafter Framework]. A copy of the Framework is on file with the Idaho Dept. of Water Resources, Boise, Idaho.

125. The arrangement providing for the eventual and sequential subordination of the Swan Falls rights down to a guaranteed summertime minimum of 3,900 cfs doubtless appeared to Idaho Power as preferable to protracted legal battles and uncertain outcomes. In an Oct. 31, 1990 deposition given in connection with a dispute in the Snake River Basin Adjudication, Thomas G. Nelson explained the Company's position as to its risks in continuing to litigate the Swan Falls suits:

Q. When you say adverse risks, what do you view as adverse risks in [the Swan Falls litigation]?

A. No. 1, [the Company] could have lost. It could have gotten a court decision that said that its conduct throughout the years had resulted in a complete estoppel to protest future development of agricultural land. It could have had an erosion of [its] political base in the legislature to the point where it got a subordination bill passed, which would have shifted the focus then from the case as structured to a probably long running issue in the courts on the constitutionality of the subordination legislation. It had the attendant financial risks that would follow from complete subordination of its water rights in the depletion of the river, together with the costs of the litigation.

Q. Were the negotiations friendly?

A. Not particularly.

T. Nelson Deposition, *supra* note 97, at 40. Mr. Nelson also observed that what the company got was absolute protection to 3,900 . . . , plus the ability to be a major player in presenting facts on the impacts of future development. In other words, it wasn't automatic. So that development would not come all at once. It would be staged and the company and other people would have an opportunity to go in and say, this development is not in the best interest of the state. That was felt to be an adequate compromise for the company to accept the 3,900.

tions which we agree should be taken in the public interest, and which would resolve the outstanding legal issues to our mutual satisfaction."¹²⁶

The Framework, which for some reason does not mention subordination, sets forth the rationale the parties used to arrive at new seasonal minimum flow levels at Murphy gauge. "The best available hydrologic data indicate that existing uses result in a potential irrigation season low flow of approximately 4,500 cfs at Murphy gauge on an average daily basis."¹²⁷ The Framework provides that the State's previously established minimum stream flow at the Murphy gauge, 3,300 cfs,¹²⁸ would be increased to 3,900 cfs during the summer.¹²⁹ This split the difference between 3,300 and 4,500, and gave rise to the presumption that the Swan Falls deal made possible the establishment of new rights equivalent to 600 cfs of flows measured at the Murphy gauge.¹³⁰

In the Framework, the parties referred to the starting point figure of 4,500 cfs as the "current actual minimum."¹³¹ While this amount certainly was a potential irrigation season low flow, it actually was thirty cfs below a very briefly felt, "lowest ever" average daily flow at the gauge that occurred June 28, 1981.¹³² The average monthly low

Id. at 53. A subordination also would be consistent with the Company's long-standing practice and public position.

126. Framework, *supra* note 124, at 1.

127. *Id.* at 2.

128. The Department had established 3,300 cfs as the minimum flow at the Murphy gauge as a result of the recommendation of such levels in the Idaho Water Resource Board's State Water Plan, adopted in 1976 and approved by the Legislature in 1978. In the Water Plan the Board had acknowledged that 3,300 cfs was "less than the amount identified as needed for fish, wildlife and recreational purposes at Swan Falls or downstream." *Id.*

129. Framework, *supra* note 124, at 3.

130. Some may conceive of this as a 600 cfs "block of water" that was made available by the Swan Falls settlement. However, such a conception is not particularly useful. The calculation of 600 cfs of flow at the Murphy gauge does little to indicate what volume of water rights may be established in the aquifer. Although the parties settled on what they agreed was a "lowest ever" summer flow of 4,500 cfs, the actual average July-August flows past the Murphy gauge are substantially in excess of that, as are most daily mean flows. As a practical matter, this implies that the room for development may be greater than 600 cfs measured at the gauge. Furthermore, calculating how much water can be consumptively used upgradient, and when, likely is a dauntingly complex task that will defy any easy presumptions about how much water was "made available" for future development under the Swan Falls settlement.

131. Framework, *supra* note 124, at 1.

132. The lowest mean daily flow ever recorded at the Murphy Gauge was 4,530 cfs, which occurred on June 28, 1981. The mean daily flow had increased to above 5,000 cfs by July 5, 1981. UNITED STATES GEOLOGICAL SURVEY, WATER RESOURCES DATA: IDAHO, WATER YEAR 1981 at 117 (1982) [hereinafter U.S.G.S. WATER RESOURCES DATA]. A

flows during the irrigation season actually were substantially greater than that—in the neighborhood of 7,000 cfs.¹³³ Although there may have been good arguments for recognizing a seasonal low flow based on a monthly average,¹³⁴ the parties clearly intended that the benchmark be established on the basis of the daily average.

Using the 4,500 cfs figure had additional rationale in light of numerous undeveloped permits and pending applications which, if developed, could have been expected to reduce the average daily flows to levels at or even below that amount.¹³⁵ Furthermore, as discussed above, there was some question as to whether Idaho Power could have protected anything above the historical low flow incident of 4,530 cfs as a daily average. In any event, the parties portrayed 4,500 cfs as the current status quo at the Murphy gauge during the irrigation season,

rounded figure of 4,500 cfs evidently came to be regarded in the negotiations as the amount that Idaho Power had not "already lost" to upstream development, even though normal irrigation season flows past the gauge were substantially in excess of that. Interestingly, the lowest *instantaneous* flow ever recorded at Murphy gauge was 3,900 cfs on July 9, 1949. UNITED STATES GEOLOGICAL SURVEY, SURFACE WATER SUPPLY OF THE SNAKE RIVER BASIN, U.S.G.S. WATER SUPPLY PAPER NO. 1153 at 33 (1952). However, the *mean* daily flow on that same date was 6,640 cfs; evidently, the river had been held back that day by an upstream facility—probably by Swan Falls Dam itself or by Idaho Power's C.J. Strike Dam, which was then under construction. *Id.*; Interview with Alan Robertson, Idaho Dept. of Water Resources, in Boise, Idaho (Feb. 18, 1992). The average flow for the month of July, 1949, was 7,702 cfs, and the minimum daily mean was 6,640 cfs.

133. IDWR, SNAKE HISTORIC DISCHARGE—MURPHY, *supra* note 31. The lowest average daily flows, of course, would have been less than 7,000 cfs. Even in the drought of 1988, the average July flow was 5,917 cfs. In July 1984, one of the wetter years in recent times, the average monthly flow was 11,361 cfs; in July 1990 the average monthly flow was 6,032 cfs. *Id.*

134. The parties did not attempt to spell out, in the Framework or elsewhere, how administration of rights would be carried out so as to avoid violating the minimum flow requirements at Murphy gauge. However, it seems obvious that it would be extremely difficult to administer rights in the Snake Plain Aquifer so as to avoid going below a particular daily mean flow at Murphy gauge—the task perhaps is analogous to trying to stop an oil tanker under full steam on short notice and at a specific spot. A minimum based on a monthly average might allow more flexibility in administration and be more feasible to meet. In addition, since the Swan Falls flows are used to produce a commodity, hydroelectric power, that is relatively fungible (except for frequent fluctuations in price on some markets), it might be feasible to shape the administration of rights in the aquifer so as to go below the minimum daily mean on occasions and make it up by curtailing rights so as to deliver, as a monthly average, what the minimum requires.

135. SUTTER STUDY, *supra* note 62, Table 2 and Figure 2. Nonetheless, by the time of the settlement, it was clear that much of the net agricultural growth anticipated in the 1970s, such as that which would occur from new land conversions in the below-Milner reach, was not likely to happen, at least not in the foreseeable future, due to questionable economic feasibility. See AGRICULTURAL DEVELOPMENT ES, *supra* note 65, at 8-44 through 8-45.

and this became the driving number in the remainder of the calculations. The use of a daily average or mean to measure required minimum flows at the Murphy gauge actually is one of the most significant, if subtle, outcomes of the Swan Falls settlement—and one that favored Idaho Power's interest in maximizing protection for in-river flows. Obviously, a system of control that aims to meet a daily average or mean flow at the gauge will subject the river, and other water rights, to much tighter control than if flows are measured according to weekly or monthly figures.

The Framework states the parties' intent that new irrigation storage projects below Milner and above the Murphy gauge should not be allowed unless they could be operated so as to mitigate depletions to hydro-producing flows.¹³⁶ However, the Framework provides that “[d]evelopment of new domestic, commercial, municipal and industrial¹³⁷ uses should proceed without further impediment because of their minimal effect on total water supply,” and called for amendment of the State Water Plan “to reserve a block of water for future consumptive DCMI development.”¹³⁸

If the calculation of new minimum flows at Murphy gauge was the most important substantive element of the Framework, probably the second most important was the provision calling for the enactment of new public interest criteria in Idaho's water appropriation statutes to apply to the granting of new water rights that would affect Idaho Power's rights at Swan Falls.¹³⁹

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 benefits to all sectors of society. Priority should be given to projects which promote Idaho's family farming tradition and which will create jobs. Because maintenance of inexpensive hydropower resources contributes to a positive economic climate for the creation of new jobs for Idahoans, future water rights allocation decisions should weigh the benefits to be obtained from each development against the

136. Not surprisingly, the Framework did not mention new storage projects above Milner, which also might deplete winter flows that normally pass Milner and provide hydroelectric flows.

137. These uses became known by the acronym “DCMI.”

138. Framework, *supra* note 124, at 4. The concept of “reserving a block of water” is discussed below in section IV.

139. The public interest review procedure that arose out of the Framework is codified at IDAHO CODE § 42-203C(2) (1990).

probable impact it will have on the Company's hydropower resources.¹⁴⁰

5. The Agreement

Later that month, on October 25, 1984, the State and Idaho Power signed a contract, entitled simply Agreement, by which the parties committed themselves to at least some of the ideas in the Framework.¹⁴¹ The Agreement names all eleven of Idaho Power's hydroelectric projects¹⁴² and their associated water rights on the mainstem Snake River and various tributaries in the reach from Shoshone Falls to Swan Falls, and provides that these rights together entitle Idaho Power to exercise fully its rights to the agreed upon 3,900 cfs and 5,600 cfs at Murphy gauge in the irrigation and non-irrigation seasons, respectively.¹⁴³ The Agreement states that these water rights in excess of these minimum flows would be "subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law . . ."¹⁴⁴ In other words, the Agreement recognizes that the Company's rights exceeding the minimum flows are not instantly subordinated, but are subject to becoming so upon state approval of "subsequent beneficial upstream uses."

The Agreement recites that Idaho Power is entitled to use the entire flow of the river at these facilities up to the extent of its water rights. This is entirely proper. Logically, even if an appropriator has

140. Framework, *supra* note 124, at 2-3. The Framework also called for a general adjudication of the Snake River, State encouragement of "an effective water marketing system," State funding of hydrologic and economic studies "to determine the most cost-effective and environmentally sound means to implement the state water plan and to augment flows in the Snake River," and legislation to clarify that proceeds from any sale of hydropower water rights by a utility would be accounted to the benefit of rate-payers. Of these additional goals, only the adjudication and the sale of utility water rights have received legislative attention.

141. Agreement Between the State of Idaho, Attorney General of Idaho and Idaho Power-Company (Oct. 25, 1984) [hereinafter the Agreement]. The parties also signed a second agreement that day, entitled "Contract to Implement Chapter 259, Sess. Laws, 1983," which provided, among other things, for dismissal of the pending lawsuits in accordance with the provisions of Senate Bill 1180, IDAHO CODE § 61-540. Chapter 259 is S.B. 1180, Ch. 259, 1983 Idaho Sess. Laws 689 (codified at IDAHO CODE §§ 42-639 and 640 (1990)).

142. Thousand Springs, Lower Malad, Upper Malad, Clear Lake, Sand Springs, Upper Salmon, Lower Salmon, Bliss, Twin Falls, Shoshone Falls, and Swan Falls. Of these, the map herein shows only Swan Falls Dam. The others in this list are located in the Snake River reach from Milner to King Hill.

143. Agreement, *supra* note 141, at 3.

144. *Id.* at 4.

subordinated his water right to upstream users, he is entitled to exercise the full right when it is available and when doing so will not deny water to one in whose favor the subordination is given. The Agreement also states that the Company retained its "right to contest any appropriation of water in accordance with State law."¹⁴⁵

The Agreement provides that the Company's water rights at these projects are subordinate to the water rights of all parties to Idaho Power's "7,500" lawsuit and also to those of upstream appropriators that had been placed to beneficial use before October 1, 1984, and for which a claim had been filed by June 30, 1985.¹⁴⁶ The parties also outlined proposed legislation¹⁴⁷ needed to implement the settlement, including proposed water code amendments that would increase the minimum stream flow from 3,300 cfs to the seasonal levels to which the parties had agreed.¹⁴⁸

C. Implementing the Swan Falls Settlement: The Legislation of 1985 and 1986

A central mechanism in the 1984 settlement was the concept that a portion of Idaho Power's Swan Falls water rights would be held in trust by the State and would be subject to subordination as new water rights were established that could be expected to deplete river flows at the Murphy gauge. This section discusses how the settlement was implemented by the Legislature—primarily by the enactment of sections 42-203B, 203C and 203D—and by the Department, through its "trust water" rules.

1. IDAHO CODE Section 42-203B

In its 1985 session, the Idaho Legislature enacted statutes which, for the most part, mirrored those the parties had drafted as part of their settlement package. Of primary interest here are Senate Bill 1008,¹⁴⁹ which amended section 42-203 and added sections 42-203B,

145. *Id.* This, too, is an appropriate feature of this type of prospective subordination arrangement. Even though Idaho Power was agreeing to a process that would subordinate its rights as to qualifying future appropriators, it was not agreeing to remain passive in the process.

146. *Id.* at 3-4.

147. Six legislative bills, including the proposed addition of IDAHO CODE §§ 42-203B, 203C, 203D, were exhibits to the Agreement.

148. At the time, a minimum flow of 3,300 cfs with a 1976 priority was in effect at the Murphy gauge. See IDAHO WATER RESOURCES BOARD, STATE WATER PLAN (1976).

149. 1985 Idaho Sess. Laws 23 (codified at IDAHO CODE §§ 42-203A, 203B, 203C, and 203D (1990)).

203C and 203D to the Idaho Code; and House Bill 186,¹⁵⁰ which added some additional language to section 203B.

These new "Swan Falls" code provisions began with a declaration that their purpose was "to specifically implement the state's power to regulate and limit the use of water for power purposes,"¹⁵¹ 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."¹⁵² The new provisions established the trust arrangement by stating that "water rights for power purposes in excess of" an established minimum flow

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.¹⁵³

Section 203B(2) specifically applies to those power rights, such as Idaho Power's rights listed in the Agreement, which are "defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action . . ." In turn, section 203B(3) addresses those power rights which are "not defined by agreement with

150. Ch. 224, 1985 Idaho Sess. Laws 537 (codified at IDAHO CODE §§ 42-203B (1990)).

151. This was a reference to the constitutional provision to that effect. IDAHO CONST. art. 15, § 3, which, as previously discussed, had figured prominently in the debates about how the Swan Falls controversy should be resolved, with some advocates evidently taking the position that Idaho Power's rights could be subordinated involuntarily without it constituting a taking of property for which compensation would be required. This question was not resolved because the matter was settled.

152. S.B. 1008, § 2, Ch. 17, 1985 Idaho Sess. Laws 25 (codified at IDAHO CODE § 42-203B(1) (1990)).

153. IDAHO CODE § 42-203B(2) (1990). The concept of the governor holding water rights in trust was not new with the Swan Falls statutes. In the 1920s, the legislature passed statutes directing the governor "to appropriate in trust for the people of the State of Idaho all the unappropriated water" of Big Payette, Priest, Pend d'Oreille, and Coeur d'Alene lakes. IDAHO CODE §§ 67-4301 through 4306 (1990). These statutes directed that "[e]ach succeeding governor in office shall be deemed to be a holder of such permit, in trust for the people." *Id.* However, the Swan Falls statutes introduced at least three variations on this theme that were so different as to create a completely new concept: first, the rights remain the property of the appropriator, who is entitled to exercise them whenever water is available; second, the State as trustee holds the rights both for the benefit of the public and this private appropriator; and third, the purpose of the trust is not to vest the state with water rights in perpetuity for use by the public, but to provide an orderly mechanism for subordinating the rights in trust to new private water rights as such new rights are granted.

the state.”¹⁵⁴ With language that parallels that in section 203B(2), the Legislature declared that these non-agreement rights “shall not be subject to depletion below any applicable minimum stream flow,” and it used language identical to that in section 203B(2) to declare that the portion “in excess of such minimum stream flow shall be held in trust by the state” for subordination to and depletion by “future upstream beneficial users.”¹⁵⁵ Thus, section 203B(3) presumably subordinates all existing (and future) power rights regardless of whether they are subject to a Swan Falls-type agreement, at least to the extent that they are associated with an “applicable” minimum stream flow. The statute provides no indication as to how such a minimum stream flow might be identified.

In any event, subsection 203B(3) raises an issue regarding the constitutional implications of imposing a subordination on existing power rights that are “not defined by agreement.”

Similarly, section 203B(6) authorizes the Director “to subordinate the rights granted in a permit or license for power purposes to subsequent upstream beneficial depletionary uses.”¹⁵⁶ It is uncertain whether the Legislature intended this provision, which is not limited by the minimum stream flow language, to apply only to subordinations in newly-granted hydropower permits or licenses, or whether it also applies to hydropower permits and licenses existing as of the date of the legislation. Again, unless this provision is deemed to apply only to newly-granted hydropower permits or licenses, it could raise the taking issue.

Thus, as to future upstream rights, the subordination is to be realized by the requirement in section 203B that Idaho Power’s Swan Falls water rights in excess of the Murphy gauge minimum flows would be held in trust by the executive and would be subordinated license-by-license as Swan Falls-depleting water rights are authorized upstream or upgradient. As had been guaranteed in the Agreement, the new statute recognizes, as any subordination should, that the holder of the power right “shall be entitled to use water available at its facilities to the extent of the water right, and to protect its rights . . . as provided by state law against depletions or claims not in accordance with state law.”¹⁵⁷

154. IDAHO CODE § 42-203B(3) (1990) (emphasis added).

155. *Id.*

156. IDAHO CODE § 42-203B(6) (1990).

157. Ch. 17, 1985 Idaho Sess. Laws 25 (codified at IDAHO CODE § 42-203B(4) (1990)). See also T. Nelson Deposition, *supra* note 97.

Section 203B(5) authorizes the governor to enter agreements such as that reached with Idaho Power, and expressly ratified the Agreement between Idaho Power and the State. This ratified the instant subordination of Idaho Power's rights to all pre-existing upstream rights.

2. IDAHO CODE SECTION 42-203C

Senate Bill 1008 also established the framework for implementing the parties' understandings about requiring a review of impacts on hydropower and applying a new public interest analysis in some cases. Section 42-203C provides that "[i]f 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," and if the appropriation "would significantly reduce" water flows to Idaho Power, the Director must evaluate such appropriation to determine "whether the proposed reduction is in the public interest."¹⁵⁸

This second level of evaluation, triggered only if the Department finds that there will be a significant reduction in the amount of water available to a hydropower right, scrutinizes the proposed diversion with respect to its effects on the five additional public interest criteria set forth in section 203C(2)(a). These five criteria, as set forth in section 203C(2)(a)(i-v) are:

- (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;
- (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) In the Snake River Basin above the Murphy gauge whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period.¹⁵⁹

These five criteria probably attracted the most attention in the Legislature and among irrigators because they presumably addressed

158. Ch. 17, 1985 Idaho Sess. Laws 25 (codified at IDAHO CODE § 42-203C(1) (1990)).

159. IDAHO CODE § 42-203C(2) (1990).

the conditions under which new water rights could be obtained. It is safe to say that most observers presumed that these criteria would be applied to most, if not all, applications and undeveloped permits. For example, Idaho Power's legal counsel later observed that the express grant of authority to the Department to evaluate the economic benefits of a proposed new appropriation, including the economic impact on Idaho Power's interests, was a major factor in Idaho Power's agreement to the compromise.¹⁶⁰

The 1985 legislation contained an anomaly that is worth mentioning here. The title of section 203C is "Hydropower water right—Criteria for reallocation—Weight—Burden of proof." The concept of "reallocating" water rights, presumably Idaho Power's water rights, does not appear in the Swan Falls statutes, except arguably in the use of this term in this title, and certainly does not appear in the Framework or the Agreement. Nor could such a concept coexist with the idea of placing a portion of Idaho Power's rights in trust for the purpose of subordinating them to future junior rights. Nonetheless, a reallocation concept appears in the Department's rules, as discussed below. But before addressing the problems raised by the 1986 amendments and the rules, it is useful to lay some groundwork by investigating the presumptions that may have prevailed at the time of the settlement and the enactment of the statutes.

3. Confusion About the Nature and Effect of the "Trust" and the State's Power to Impose the New Public Interest Criteria on Applicants and Permittees

The negotiators had agreed that those new water rights that would significantly deplete flows at Swan Falls would be subjected to the express "public interest" criteria in section 203C(2). But they evidently had some concern that the Department might not have the legal authority to deny new applications on these "public interest" grounds. For example, in the Framework, they had provided:

To this end, the settlement of the pending Swan Falls litigation should be structured in a way which will allow the State to utilize Idaho Power Company's asserted water right to augment the State's existing and proposed legal authority to promote beneficial development and to reject proposed development which it deems to be detrimental to the public

160. T. Nelson Deposition, *supra* note 97, at 53.

interest. This authority should extend to pending undeveloped permits as well as new applications.¹⁶¹

The negotiators may have been concerned that, if the settlement had involved a complete and instantaneous subordination down to the 3,900 cfs level, applicants would assert that waters thereby became available and that, under Idaho's constitution, their applications could not be denied.¹⁶²

For whatever reason, it appears that the negotiators came to consider the "rights in trust" concept as a way around this perceived problem. For example, in their article about the Swan Falls settlement, Costello and Kole stated that

[t]he purpose of placing the water reserved for future development in trust was to assure state ownership and control over this vital resource. Thus, the state will hold ownership of the water until such time as future depletionary uses meeting the requirements of state law are approved. [Idaho Power] has the right to use the water to generate electricity during the interim.

This arrangement has an incidental benefit. The state constitutional provision establishing the appropriation doctrine guarantees only the right to appropriate the "unappropriated" waters of the state. While the Idaho Supreme Court has upheld regulations governing the exercise of the right to appropriate water, any deviation from the first in time, first in right principle will likely be challenged as constitutionally infirm. Because the agreement recognizes the validity of the company's water right, the Snake River is fully appropriated as to proposed users not meeting the requirements of state law.¹⁶³

This passage raises several important issues that may relate to the Department's position, in its rules and policies, that special restrictions and limitations can be placed on those water rights granted pursuant to the subordination.

161. Framework, *supra* note 124, at 5.

162. IDAHO CONST. art. XV, § 3. Mr. Nelson's statements, as quoted in footnote 125, *supra*, indicate some of this concern.

163. Costello and Kole, *supra* note 120, at 17 (footnotes omitted). Thomas G. Nelson, principal negotiator for Idaho Power, stated several years later that "the new economic criteria" included in section 203C(2) obligated the Department to "consider the effect on hydropower rates [and] the effect on the economy of the state as a whole. In other words, you have a chance to weigh and balance a new use against its impact on the river, rather than simply having to automatically approve it pursuant to the constitution." T. Nelson Deposition, *supra* note 97, at 52.

First, the Swan Falls statutes do not have the effect of "placing water reserved for future development in trust." Rather, it was a portion of Idaho Power's Swan Falls water rights that were placed in trust.

Second, it appears that these negotiators also may have believed that the trust arrangement effected state "ownership and control over this vital resource"—presumably meaning the water itself—and that the statutory changes gave the State the right to "hold ownership of the water until . . . future depletionary uses . . . are approved." However, the law in Idaho is that the State already has, and cannot be divested of, both ownership and control over all waters within its boundaries, at least while they are in natural water sources, and that the "state shall equally guard all the interests involved."¹⁶⁴

It is a well-established principle that a water right differs from other species of property in that the owner of the right does not own the water itself or have any property right in the *corpus* of the water while it exists in a public source of water supply; all the right he has is to use the same for a beneficial purpose.¹⁶⁵

There is nothing in the Swan Falls statutes to suggest that the Legislature intended somehow to extend or enhance the principles of state ownership or public trust that already apply to all of Idaho's natural waters.¹⁶⁶

164. IDAHO CODE § 42-101 (1990). See also *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960) (state policy is to avoid waste of the water resource, and to secure the maximum use and benefit from it); *Walbridge v. Robinson*, 22 Idaho 236, 125 P. 812 (1912) (the state holds title to waters in its sovereign capacity as representative of all the people); Wells A. Hutchins, *Idaho Law of Water Rights*, 5 IDAHO L. REV. 1, 2-3, 6-8 (1968) [hereinafter Hutchins].

165. Hutchins, *supra* note 164, at 6-7 (citing *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418 (1924). See also *Griffiths v. Cole*, 264 F. 369, 372 (D. Idaho 1919); and *Suave v. Abbott*, 19 F.2d 619, 620 (D. Idaho 1927)). In addition, as Hutchins also notes, one can assert a private property interest in water only after it is diverted and then only with "reference to the beneficial use that he makes of it. This private property right is impressed with the public trust to apply the water to a beneficial use." Hutchins, *supra* note 164, at 8 (citing *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 588-89, 258 P. 532 (1927)). See also *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 389, 43 P.2d 43 (1935) (footnotes omitted)).

166. The question of state "ownership" of waters within its boundaries is one of those esoteric matters that occasionally attracts scholarly debate but usually yields little real-world effect. The question has been raised in litigation only rarely. However, the U.S. Supreme Court has implied that the assertion of state ownership of waters "is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979) (quoting *Toomer v. Witsell*, 334

Accordingly, the Legislature's establishment, in section 203B, of a trust containing a portion of Idaho Power's water rights presumably could not have achieved such an extension, because the *res* of this trust consists of four early-century water rights owned by Idaho Power Company, not water itself. The Swan Falls statutes do not entitle anyone to seek or obtain any portion of this *res*.¹⁶⁷

With the Swan Falls statutes, the Legislature simply offers to an applicant whose depletions would implicate Swan Falls flows an opportunity to seek the subordination of the Swan Falls rights in favor of that applicant's proposed new water right. A prospective new water right holder may be subjected to scrutiny under the additional public interest criteria in section 203C(2) only if the proposed diversion would "significantly reduce" flows at Swan Falls.¹⁶⁸

Since 1978 the Idaho water code has expressly empowered the Department to deny a proposed new water right if it would "conflict with the local public interest."¹⁶⁹ Moreover, in 1983 the Idaho Supreme Court had adopted the California approach to the "public trust doctrine," and noted that it applies to vested water rights.¹⁷⁰ Nevertheless, the negotiators' suggestion that the State might lack power to deny or limit a water right application on public interest grounds had more credence in the fall of 1984 than it likely has today; at that time the State's authority in these areas had not yet received the additional clarification provided by the Idaho Supreme Court in *Shokal v. Dunn*.¹⁷¹ That decision indicates that the Department has significant powers to condition or deny a water right on public interest grounds.

U.S. 385, 402 (1948)). However, there is no question that states exert jurisdiction over the waters within their boundaries for purposes of regulation, recognition, and denial of water rights, at least up to the point that such control conflicts with an express congressional directive. See *California v. United States*, 438 U.S. 645, 653 (1978) (Congress has followed a policy of "purposeful and continued deference to state water law"); see also Barry C. Vaughan, *Federal Nonreserved Water Rights*, 48 U. CHI. L. REV. 758, 772 (1981).

In Idaho it has been recognized that the state exercises jurisdiction and control over water on behalf of the "use and benefit of all citizens under such rules and regulations as may be prescribed from time to time by the legislature." Hutchins, *supra* note 164, at 3 (citing *Walbridge v. Robinson*, 22 Idaho 236, 241-42, 125 P. 812 (1912)). The appropriation doctrine always has placed the State in a position of trustee, with control over the resource and the obligation to serve the public interest.

167. IDAHO CODE § 42-203B(2) (1990).

168. IDAHO CODE § 42-203C(2) (1990).

169. *Id.* § 42-203A(5)(e) (1990).

170. *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 631, 671 P.2d 1085, 1094 (1983).

171. 109 Idaho 330, 707 P.2d 441 (1985).

4. The 1986 Amendments

In 1986 the Legislature amended the Swan Falls statutes.¹⁷² Many of the amendments are confusing and may be seen as blurring the picture as to what the statutes actually placed in trust. One of the reasons for the confusion probably relates to the points made above. Another may relate to a term of dubious accuracy that entered Idaho's water policy lexicon as a result of the Swan Falls statutes; the phrase evidently took on a life of its own and contributed to what appears to be a less-than-careful drafting job in the 1986 amendments. The term is "trust water."¹⁷³ A first cousin is "water held in trust by the State of Idaho pursuant to subsection (5) of section 203B."¹⁷⁴ Soon after the Swan Falls statutes were passed, "trust water" came into common usage as a shorthand reference, and to some extent it is useful shorthand. However, the term's use implies that by placing in trust a portion of Idaho Power's water rights, the Swan Falls statutes actually identified and placed in trust a special block of water, a "vital resource" just acquired by the people.

In any event, the 1986 amendments apparently were intended to accomplish two things, neither of which sought to change the basic terms of the Swan Falls settlement. The first of these purposes was to add language to section 42-203B establishing that, in determining how a given upstream depletion would affect flows at the Murphy gauge, the Department was not to consider the Snake River upstream from Milner Dam or the waters of any stream or aquifer that discharge to the river in that reach.¹⁷⁵ Thus, at the end of original subsection 203B(2) the 1986 amendment inserted the following:

[P]rovided, 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.¹⁷⁶

172. S.B. 1358, Ch. 117, 1986 Idaho Sess. Laws 308 (codified in IDAHO CODE §§ 42-203B to 203D (1990)).

173. This term appears in IDAHO CODE § 42-203C(1) (1990).

174. This phrase appears in IDAHO CODE §§ 42-203C(1), 42-203D (1990); 1986 Idaho Sess. Laws 311.

175. The Department has produced a map based on this legislative direction which shows the "Trust Water Area" as distinct from the non-trust water area. Water right applications in the trust water area are presumed to affect Swan Falls flows and must undergo the evaluation specified in section 203C; those outside the area do not.

176. S.B. 1358, Ch. 117, 1986 Idaho Sess. Laws 309.

In other words, new water rights from sources tributary to the river above Milner would not be entitled to benefit from the Idaho Power subordination, nor would they need to.¹⁷⁷ The next sentence in this amendment appears to confirm the two-rivers concept: "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 upstream from Milner dam shall be considered."¹⁷⁸ These provisions go beyond the terms of the Swan Falls settlement, which did not attempt to restrict the arrangement only to waters tributary below Milner. Presumably, this provision will affect determinations and administration of water rights, and disputes between water rights, involving any potential above Milner-below Milner dispute, including determinations in the Snake River Basin Adjudication. It almost certainly will inhibit or

177. Some also may argue that the amendment does not conform to hydrological reality, because substantial amounts of Upper Snake waters flow past Milner each year, or to basic principles of water law, which would not prohibit transferring points of diversion past Milner if other rights are not injured.

In addition, the supposedly insular nature of the above-Milner reach does not mean that additional depletions there may go unchallenged. In 1988, the Twin Falls and North Side Canal Companies, large above-Milner diverters, along with the American Falls Reservoir District, filed a petition with the Department seeking orders blocking further tributary groundwater diversions upstream (i.e., in the "non-trust water" area) and incorporating tributary groundwater rights into the watermaster's river administration. In the Matter of The Snake River Aquifer, Petition to Establish Moratorium Pursuant to Idaho Code § 42-1805(7) and Rule 7, before the Idaho Dept. of Water Resources (filed Mar. 10, 1988). The petition was withdrawn before any hearing was held, but it is a notice that future above-Milner diversions may be subject to challenge by these or other right holders in this same reach.

Indeed, in the 1992 Idaho Legislature, these same parties secured the introduction of a bill that would declare that the ground and surface waters tributary to the Snake River above Milner are "fully appropriated, except for flood waters, that the supply is insufficient for any new consumptive uses, and that additional diversions of such water for such new consumptive purposes . . . will cause injury to prior water rights." S.B. 1356 § 2, 51st Idaho Legislature, 2d Reg. Sess (1992). The bill also would have established a moratorium on all new ground and surface water appropriations from waters tributary to the river above Milner until lifted by the Legislature. The bill was ultimately defeated.

178. *Id.* Following suit, the Department's rules state that the Swan Falls statutory procedures do not apply to "[f]lows in the Snake River upstream from Milner Dam and all surface and groundwater tributaries to that reach. Such flows are subject to allocation under Section 42-203A, Idaho Code, without consideration of water rights existing downstream from Milner Dam (Reference: 42-203B(2), Idaho Code)." Idaho Dept. of Water Resources, Water Appropriation Rules and Regulations 1 (Adopted Oct. 8, 1986) Rule 1,5,3,5.

frustrate the approval or administration of transfers from one side of Milner dam to the other.¹⁷⁹

For purposes of this article, the greater importance of this amendment is its use of the phrase "shall not place in trust any water," a phrase that seems to proceed from the presumption that the statute contemplates the placement of certain portions of the waters of the Snake Basin in the Swan Falls trust.¹⁸⁰ Such a presumption would conflict with the express trust-creating language of section 203B(2), which expressly places "water rights" in trust. The new language did not amend that.

Furthermore, it would appear nonsensical for the Legislature to announce that any particular *waters* now are held in trust by the State. Presumably the Legislature did not question the proposition that the State already holds all of Idaho's waters in trust—including, of course, waters already subject to diversion and use under valid rights.¹⁸¹ Indeed, to the extent that this 1986 amendment might be read to imply that only these "Swan Falls waters" are held in trust, the Department may find itself with reduced powers to vindicate the public interest or to assert trust powers as to waters having no connection to the flows at Murphy gauge.

In all events, it is evident from the Framework, the Agreement and the Swan Falls statutes that Idaho Power had not agreed to deliver to the State certain waters for placement in trust. As an appropriator, the Company does not own water; it owns rights to use. Therefore, under the prior appropriation doctrine, that is all that it could have agreed to place in trust.

The third significant purpose of the 1986 amendment to the Swan Falls statutes was to add language to section 42-203C(1) which evidently was intended to provide more detail about the type of analysis in which the Director must engage to determine whether diversions or use under a proposed new water right would, to use the original lan-

179. See Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Transfers*, 27 IDAHO L. REV. 249, 263 (1991).

180. The caption of the 1986 amendment contains the following phrases that similarly confuse the issue: "Relating to trust waters on the Snake River established pursuant to agreement"; relating to certain requirements regarding an applicant who "intends to appropriate water which is held in trust by the state of Idaho pursuant to certain law"; relating to whether the proposed use "would significantly reduce the amount of trust water available to the holder of the water right used for power production"; and relating to the director's responsibility to "review all permits issued prior to July 1, 1985, which propose to divert water held in trust." S.B. 1358, Ch. 117, 1986 Idaho Sess. Laws 308.

181. See discussion *supra* at notes 165 and 166.

guage, "significantly reduce, individually or cumulatively with other uses, the amount of water available to the holder of a water right"¹⁸² that has been subordinated under this statutory scheme. The change to section 203C(1) achieved by the 1986 amendment further defined what "cumulatively with other uses" means by adding language requiring the Director to evaluate "uses reasonably likely to exist within twelve months of the proposed use."¹⁸³ This is helpful in that it provides some standard by which a cumulative effect might be determined.

However, for no apparent reason the amendment also changed other language in section 203C(1) that again muddies the "trust" issue. The most illustrative way to view this change is in the form provided by the bill:

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 held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B, Idaho Code, the director shall consider . . . whether the proposed use . . . , individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of a the water right used for power production that is defined by agreement pursuant to subsection (5) of section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest.¹⁸⁴

The legislature here struck language which was consistent with subsections 203B(2) and 203B(5): "water which is or may be available for appropriation by reason of a subordination condition" and replaced it with language that is not: "water which is held in trust by the state pursuant to section 42-203B." The amendment then inserted the nickname "trust water," a phrase which is not defined in the statute. These

182. Ch. 17, 1985 Idaho Sess. Laws 26.

183. Ch. 117, 1986 Idaho Sess. Laws 311 (codified at IDAHO CODE § 42-203C(1) (1990)).

184. *Id.* Incidentally, the caption of section 42-203C, which was not changed by the amendment, also includes curious language: "Hydropower water right—Criteria for reallocation—Weight—Burden of proof." IDAHO CODE § 42-203C (1990). Nowhere in the Swan Falls agreement documents, or in the statutes, does it appear that Idaho Power was agreeing that its water rights would be "reallocated." In fact, the record, and the statutes, show that Idaho Power's rights are not being reallocated to others. Yet as discussed below in section (C)(4), the "reallocation" concept was to appear again in the Department's rules.

changes are significant because, as discussed further below, the Department evidently has used the "water in trust" concept to conclude that "trust water" is a new "asset" that the people of Idaho just acquired as a result of the Swan Falls settlement and to which new restrictions can apply.

The final noteworthy amendment included in the 1986 bill was a change to section 42-203D, a section requiring permits existing as of July 1, 1985¹⁸⁵ to be reviewed for compliance with the section 203C(2) criteria. Sensibly enough, the amendment appears to have been intended to clarify that this review applies solely to permits having potential impacts on Swan Falls flows. However, the amendment language again inappropriately described such permits as those "which propose to divert water held in trust by the state of Idaho pursuant to subsection (5) of section 42-203B."¹⁸⁶

5. The Department's Rules

On October 6, 1986, the Department amended its Water Appropriation Rules and Regulations (Rules) in response to the Swan Falls statutes. The Rules add more confusion. Rule 1,1, the "Background and Purpose" section, provides:

The 1985 Idaho Legislature authorized reallocation of certain hydropower water rights to new upstream beneficial uses. The reallocation is to be accomplished using statutes designed to provide for the appropriation of unappropriated public water supplemented by a public interest review of those reallocations which significantly reduce existing hydropower generation. These rules and regulations provide the procedures for obtaining the right to divert and use unappropriated public water as well as water previously appropriated for hydropower use which has been placed in trust with the State of Idaho and is subject to reallocation¹⁸⁷

Thus, the Department evidently interprets the statute as authorizing the "reallocation" of Idaho Power's "water rights to new upstream beneficial uses."

185. July 1, 1985 was the effective date of the original Swan Falls statutes.

186. Subsection 42-203B(5) expressly states that water *rights* are placed in trust under this scheme, not water itself. The same is true of subsections 203B(2), (3). Subsection 203B(3) imposes the trust with respect to those hydropower rights not defined by agreement.

187. Idaho Dept. of Water Resources, Water Appropriation Rules and Regulations 1 (adopted Oct. 8, 1986) [hereinafter Rules].

Rule 6,12 provides that any amendment, transfer, or assignment of permits granted pursuant to the Swan Falls statutes also must satisfy the special public interest criteria in section 42-203C. This rule makes an exception for lenders who obtain title to the project through default if they act within a reasonable time to meet the criteria or to convey the project to a person or entity who does meet them. Interestingly, the rule mentions only "permits," and does not speak to the transfer or assignment of a license. Presumably the Department would assert that the rule applies to license transfers as well.

The Rules repeatedly refer to those applications that can benefit from the subordination with language such as "applications to appropriate water from sources on which the state holds water in trust."¹⁸⁸ The "water in trust" concept appears to be central to the Department's approach. Indeed, the Rules define "trust water" as

that portion of an unsubordinated water right used for hydro-power generation purposes which is in excess of a minimum stream flow established by state action either with agreement of the holder of the hydropower right as provided by Section 42-203B(5), Idaho Code or without an agreement as provided by Section 42-203B(3), Idaho Code.¹⁸⁹

One logical interpretation of these rules, though probably not intended by the Department, is that a successful applicant for "trust water" actually obtains a portion of Idaho Power's water right at Swan Falls, a property interest reallocated to the applicant by the Department, and that the right so obtained remains subject to additional review, at least upon transfer, under the Swan Falls special public interest criteria.¹⁹⁰ For reasons discussed below, any such conclusions about the effect of these statutes would be wrong.

6. The Department's 1988 Policies

Two years after it promulgated rules implementing the Swan Falls statutes, the Department issued a policy statement which was intended to give guidance to the Department in processing applications for

188. *Id.* Rule 1,4,2.

189. *Id.* Rule 2,17.

190. Another example is Rule 5,3,2,1, which explains that the Director may evaluate the proposed diversion's impact on electric utility rates and alternative energy sources (as contemplated by IDAHO CODE § 203C(a)(ii)) by reference to projections "from the electric utility from whose water right trust water is being reallocated." *Id.*

water subject to the Swan Falls statutes.¹⁹¹ The Policy Statement is of interest here because it purports to allow the Department to limit the duration of water rights benefiting from the subordination to a twenty-year period, or to make them subject to being reopened, at which point they would be subjected to the special public interest review contained in section 42-203C(2)(a).¹⁹² This also is discussed further below.

7. Changes in the State Water Plan to conform to the Swan Falls Statutes

The Department's approach to the Swan Falls statutes also is reflected in the State Water Plan adopted by the Idaho Water Resource Board on July 1, 1986, and approved by the Legislature in March 1987. Policies 5B, 5C, and 5D of the Water Plan repeatedly refer to "water" held in trust by the state pursuant to section 42-203B.¹⁹³ The Water Plan also asserts that Idaho Power's 8,400 cfs Swan Falls rights were "reduced by the agreement" to the 3,900 and 5,600 cfs amounts specified.¹⁹⁴ It states that "water" above the minimum flow at Swan Falls "may be reallocated to new uses by the state provided such use satisfies existing Idaho law."¹⁹⁵ The Water Plan maintains that the public interest criteria in section 42-203C "are to be used . . . for the reallocation of hydropower rights."¹⁹⁶ In another instance, the Water Plan refers to "appropriated water held in trust" as being available for "reallocation."¹⁹⁷ The Water Plan also contains the Water Board's policy that "150 cfs of water for consumptive purposes held in trust by the state pursuant to [section 203B] be reallocated to meet future DCMI uses in accordance with state law."¹⁹⁸

191. IDAHO DEPT. OF WATER RESOURCES, POLICY AND IMPLEMENTATION PLAN FOR PROCESSING WATER RIGHT FILINGS IN THE SWAN FALLS AREA (Nov. 3, 1988) [hereafter POLICY STATEMENT]. The POLICY STATEMENT is on file with the Department.

192. *Id.* at 6.

193. STATE OF IDAHO, STATE WATER PLAN (July 1, 1987) [hereinafter STATE WATER PLAN].

194. *Id.*, Policy 5B at 36.

195. *Id.*

196. *Id.*

197. *Id.*, Policy 5D at 37.

198. *Id.*, Policy 5C at 36.

IV. LOOKING IN: A CRITICAL ANALYSIS OF THE SWAN FALLS STATUTES AND THE DEPARTMENT'S IMPLEMENTING RULES

A. The Swan Falls Statutes Establish a Means of Subordinating Idaho Power's Swan Falls Water Rights; They Do Not Create a Special Class of Water Subject to Special Restrictions

The term "subordinate," most commonly used in the context of competing interests in real estate,¹⁹⁹ is a term of qualification or limitation of rights, not of relinquishment or elimination of rights.²⁰⁰ In real estate transactions "[a] subordination agreement is neither an assignment of rights nor a release from liability. Such an agreement operates solely to set the priority of liens on the subject collateral."²⁰¹

In water law, as in the real estate practice, subordination logically does not mean that the senior right holder relinquishes the right; only that he or she must refrain from enforcing the right as against those in whose favor the subordination is given.²⁰² As to all others, the senior water right is fully enforceable according to its priority.

In the resolution of the Swan Falls dispute, the subordination of Idaho Power's water rights did not eliminate, seize, or provide for the redistribution of these rights. It merely prevented Idaho Power from exercising its priorities against certain upgradient junior water rights. The Swan Falls statutes underscore this conclusion by expressly stating that the subordinated right can be used when available and protected to the extent consistent with the subordination.²⁰³

199. See GRANT NELSON & DALE WHITMAN, *LAND TRANSACTIONS AND FINANCE* 350-353 (2d ed. 1988).

200. See *Bradshaw v. Lower Colorado River Auth.*, 573 S.W.2d 880, 883 (Tex. 1978).

201. *United States v. Wilson*, 806 F.2d 171, 174 (8th Cir. 1986). "Subordination is, strictly speaking, a status . . . It refers to the establishment of priority between different existing encumbrances on the same parcel of property, by some means other than the basic priority involved in the concept of 'first in time, first in priority,' or the automatic priority accorded purchase money liens." *Middlebrook-Anderson Co. v. Southwest Savings & Loan Ass'n.*, 96 Cal.Rptr. 338, 341 (Cal. App. 1971).

202. A recent water law treatise describes subordination as an arrangement "whereby senior appropriators (e.g., irrigators) agree to subordinate their seniority to a junior appropriator (e.g., municipality) . . ." 2 *WATERS AND WATER RIGHTS* § 16.04 (c)(3) (Beck ed. 1991).

203. Section 203B(4) states that "the user of water for power purposes . . . 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." *IDAHO CODE* § 42-203B(4) (1990). Thus, Idaho Power is entitled to use all water that appears at its Swan Falls powerplant, up to the plant's capacity; to protest any proposed appropriation that seeks to benefit from the

Furthermore, it is clear that this compromise did not create a new block of water. The idea of "reserving a block of water," as mentioned in the Framework and elsewhere, would be a novel departure from Idaho water law, and probably was not intended literally.²⁰⁴ Idaho's appropriation system recognizes that individuals and entities—and the State itself—are entitled to appropriate water for a wide variety of beneficial uses, but the doctrine does not authorize the State to "reserve" portions of the public's water for particular uses.²⁰⁵ Even in-stream flows, minimum streamflows and appropriations to maintain lake levels are acquired pursuant to the licensing procedure, as with any other water right.²⁰⁶

Pursuant to the Agreement, the State obtained from Idaho Power the prerogative to subordinate a portion of the Company's hydropower water rights to new rights or undeveloped permits. In return, the State committed to scrutinize applicants for these new rights pursuant to the additional standards set forth in the Swan Falls statutes. But once a user is found to be eligible—either by being found to have no significant impact on Swan Falls flows or by meeting the five criteria in section 203C(2)—he or she is entitled to a water right of the same constitutional stature as any other water right.

The statutes do not purport to enshroud the new rights with unique characteristics *once they are created* except that they are immune from call by the subordinated hydropower right. These rights are free from being curtailed to supply Idaho Power's rights in excess of the minimum flows, but they remain subject to curtailment in favor of

subordination; and to assert its priorities against all but those junior appropriations that are entitled to the benefit of the subordination.

204. The State of Montana has enacted a statute specifically authorizing the "reservation" of waters of that state for public purposes such as instream flow maintenance. See, e.g., MONT. CODE ANN. §§ 85-2-316, 331, 605 (Supp. 1990). But Montana's constitution is different from Idaho's, and it is doubtful whether Idaho's constitution, which contemplates the recognition of individual rights in water and not reservations, would allow such a technique.

205. The State Water Plan also states that "[i]t is the policy of the State of Idaho that water held in trust by the State pursuant to Idaho Code 42-203B be reallocated to new uses in accordance with the criteria established by Idaho Code 42-203A and 42-203C." STATE WATER PLAN, *supra* note 193, Policy 5B at 36. The concept of "reallocating" water held in trust does not comport with the language of section 203B, which provides that rights are held in trust. The use of the word "reallocation" is confusing in the Swan Falls context, but it appears that the Water Board intended that, in recognizing new water rights that would deplete flows at Swan Falls, the Department should make ample room for those wanting to develop water for non-irrigation purposes. The concept of "reallocation" is discussed briefly *infra* at note 206 and accompanying text.

206. See, e.g., IDAHO CODE §§ 67-4301 to 67-4312; IDAHO CODE §§ 42-1501 to 1505 (1990).

all other senior water rights which they might affect. Actually, the new rights issued subject to the Swan Falls statutes are not even different from all pre-existing non-hydropower water rights in the "trust water area" because, under the settlement, these other rights also were given the permanent benefit of the subordination. By passing through the section 203C process, the new rights merely step into equal status with the pre-1984 rights.

The Department's choice of words notwithstanding, it appears that neither the parties to the settlement nor the Legislature²⁰⁷ intended to authorize the Department to "reallot[e] certain hydro-power water rights to new upstream beneficial uses."²⁰⁸ The subordination did not divest Idaho Power of its interest in its Swan Falls water rights or authorize the new rights to obtain the Swan Falls priorities. While the subordination means that the Company cannot exercise its priority against particular users, it still is entitled to use its water rights fully to the extent of 8,400 cfs at all times when water is available at its point of use.²⁰⁹

B. The Department Seeks to Impose Special Restrictions on "Trust Water" Rights

1. The Department's Policy Statement Further Elaborates the Concept of a Special Class of Water Rights Subject to Special Restrictions

As indicated above, the Department's 1988 Policy Statement is intended to provide guidance to the Department in its review and approval of pending applications to appropriate water subject to the Swan Falls statutes.²¹⁰ But like the Department's Rules, the Policy

207. The authors believe that the Legislature's use of the word "reallocation" in the heading of section 42-203C was simply unartful, and that it can have no real meaning in the operation of the statutory scheme because it is so clearly contrary to the express language of the statute itself, particularly section 203B. In interpreting the meaning of a statute, the provision's title "cannot broaden or extend the effect of the act as expressed in the body." SUTHERLAND STAT. CONST. § 18.07 at 47 (4th Ed.) Idaho Law is consistent with this principle. *State v. O'Bryan*, 96 Idaho 548, 555, 531 P.2d 1193, 1200 (1975).

208. "Reallocation" is not a recognized term of art in water law. However, one treatise uses the term to refer to transfers, changes, or exchanges of water rights. *See e.g.*, 2 WATERS AND WATER RIGHTS § 16 at 235 (R. Beck ed. 1991). Transferring Idaho Power's rights from its current use to, say, irrigation, would be complicated, to say the least. For example, such a reallocation could raise the expectation that the new "trust water" rights should carry Idaho Power's priorities.

209. The Company may also assert its full rights against those not benefitting from the subordination and to use them as a basis for protesting both new water rights and any proposed transfer.

210. POLICY STATEMENT, *supra* note 191.

Statement contains some curious provisions regarding the legal effect of the Swan Falls arrangement. For example, it provides that the Department's "actions in allocating the water of the Snake River Basin upstream from Swan Falls Dam will advance and be guided by the following policies:"

2. Protect the value, economic and otherwise, of the asset (trust water) obtained by the people of Idaho in the Swan Falls Agreement; . . .
3. Encourage efficient use of trust water supplies; . . .
4. Assure that those directly benefitting from the use of trust water support financially any necessary costs to the state of meeting commitments of the state which enable the use of trust water²¹¹

This language suggests that the Department believes that new appropriations in this area will be diverting water that is a unique asset that the people of Idaho just obtained in the Swan Falls settlement. But as previously discussed, the people of Idaho already own this and all other waters within the State and exercise control over it. The Swan Falls history shows that what was "obtained by the people" was a mechanism for subordinating Idaho Power's rights so that, in spite of the potential dominance of the Company's rights in this part of the state, citizens can continue to acquire the right to use the public waters.

2. The Department's Rules Impose Special Conditions on the Transfer of Rights Obtained Pursuant to the Swan Falls Statutes

The Department apparently interprets the Swan Falls statutes as allowing it to subject Swan Falls water rights to the section 203C criteria long after the rights have crossed the threshold of that section's expanded public interest review. For example, the Department interprets the Swan Falls statutes as requiring applications to transfer previously acquired Swan Falls water rights to also undergo additional public interest review under section 203C(2). Water Appropriation Rule 6,12 states:

The director may condition a permit issued for trust water to require that any amendment (Section 42-211, Idaho Code), transfer (Section 42-222, Idaho Code), or assignment of interest in the permit by any method whatsoever shall not result in the project failing to meet the public interest criteria of Sec-

211. *Id.* at 6.

tion 42-203C, Idaho Code except, however, lenders obtaining title to the project through default will have a reasonable period of time, as determined by the director, to meet such criteria or to convey the project to a person or entity that does meet the criteria.²¹²

This rule thus enunciates another means of specially and permanently restricting transfers of a "trust water" right appropriated under the section 203C process.

Statutory support for such regulation appears to be lacking.²¹³ The Swan Falls statutes establish special eligibility criteria to be applied by the Department at the *application* stage whenever a proposed diversion may result in a significant reduction in water available for hydro-power production.²¹⁴ After approval, the statutes do not provide a specific basis for treating the "trust water" permit or license differently from any other permit, or any water right that is licensed or decreed.

In other words, the Swan Falls statutes appear to create a "gateway" for the acquisition of new water rights in this area; they do not construct a new regulatory environment or class of water rights. Under this "gateway" analysis, once it is determined that an applicant's proposed diversion will not significantly affect Swan Falls flows—or, if it will, that it passes muster under section 203C(2)—the permit is granted and the appropriator takes his or her place among all other rights, with the added benefit that the right enjoys the subordination of four senior rights at the Swan Falls dam. Actually, there is not even an added benefit because all other rights in the "trust water area" already enjoy this same benefit. In contrast, Rule 6,12 extends the section 42-203C review beyond the application stage and imposes it on water right transfers, which have their own well-established rules and body of law.²¹⁵

212. It is uncertain whether, by using the term "permit" in this rule, the Department intends to exclude from its coverage those situations where a license has been granted and the water right holder seeks to transfer the right. The reference to "lenders obtaining title" evidently is directed at the situation where a financial institution obtains the water right through foreclosure and the institution could not meet the "family farming tradition" criterion.

213. There are only two sections in Idaho's water appropriation statutes that impose special restrictions on the transfer of permits other than the general requirements contained in IDAHO CODE § 42-222 (1990). Neither relates to the transfer of permits or licenses acquired under the Swan Falls statutes, and both apply only to rights held for hydropower purposes. IDAHO CODE §§ 42-205(a), 207 (1990).

214. IDAHO CODE § 42-203C(2) (1990).

215. See, e.g., IDAHO CODE § 42-222(1) (1990), *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944).

In addition, this transfer restriction also appears to overlook the requirement in section 203C(1) that, to subject a proposed right to the public interest criteria of section 203C(2)(a), the Department first must find that the appropriation would "significantly reduce" the water available for hydropower purposes. Indeed, as discussed below at section V, the Department has found that all currently proposed appropriations of water under the Swan Falls statutes cumulatively will not cause a significant reduction. Thus, the Department's rule would impose the section 203C criteria on transfers of rights that, under the statutes, were never subject to such criteria at the application stage.

3. The Department's Term Limitation and Reopener Concepts Conflict With the Swan Falls Statutes and with Idaho Water Law

The most far-reaching provision in the Department's Policy Statement is that which suggests that the Department will grant water rights under the Swan Falls procedure that are limited to a twenty-year period, after which they either would be subjected to the special public interest review in section 42-203C and then would be approved or terminated:

When the existing hydropower rights are considered, the Upper Snake River Basin is essentially fully appropriated. [Idaho Power's] water rights placed in trust and held by the state are a valuable asset in economic and other terms. The state has a responsibility to determine whether this asset provides the greater benefit to the people of Idaho as a source of flow for hydropower and other instream uses, or for upstream consumptive economic development. In either case the trust water resource must be managed on a continuing basis. *This continuing management can be assured by issuing permits for the use of the trust water for specific terms long enough to amortize the development investment.* The priority of the filing would not be lost at the end of the term, but in reprocessing, the public interest would be re-evaluated and the adequacy of the water supply would be considered. If filings with earlier priority dates are subsequently processed, approved, and developed which require the water which has been used by the filing being re-evaluated or the project no longer meets the public interest criteria, the filing would not be continued.²¹⁶

216. POLICY STATEMENT, *supra* note 191, at 6 (emphasis added).

The Policy Statement does not identify the source of the Department's authority for this position.

The introduction to the Policy Statement explains that it "is not being promulgated as a rule and regulation, and [that] IDWR will not use it as a basis for decision making on individual filings."²¹⁷ Nevertheless, the Policy Statement summarizes the Swan Falls controversy and the statutes that were drafted as a result of the Swan Falls subordination agreement and then sets forth several specific policies which the Department apparently intends to follow. Because the Policy Statement appears to be a "statement of general applicability," it is possible that its adoption without having been formally promulgated as a rule could be attacked as violative of the Idaho Administrative Procedure Act.²¹⁸ While the Department's Policy Statement may include policies and procedures by which applications under the Swan Falls statutes will be processed,²¹⁹ it nonetheless is intended to affect "private rights and procedures available to the public." Indeed, the permits issued to date to irrigators and others contain the "subject to review" language.

As of December 31, 1991, the Department had "reprocessed" and approved 120 pre-1985 permits in the "trust water area" which had not been developed prior to the Swan Falls statutes,²²⁰ and had granted 354 new permits.²²¹ The Department has implemented the Policy Statement's term limitation language by including a standard condition in each of these permits: "2. The use of trust water authorized by this right is subject to review 20 years after the date of this order to determine availability of trust water and to reevaluate the public inter-

217. *Id.* at 1.

218. IDAHO CODE § 67-5201(7) (1989).

219. *See* *Serv. Employees Int'l Union, Local 6 v. Idaho Dept. of Health & Welfare*, 106 Idaho 756, 759, 683 P.2d 404, 407 (1984) (a policy manual was not a rule because it "provides only guidelines for the internal management of the Department 'not affecting private rights or procedures available to the public . . .").

220. IDAHO DEPT. OF WATER RESOURCES, SWAN FALLS TRUST WATER AREA STATUS REPORT AS OF DECEMBER 31, 1991 1 (Jan. 1992) (on file with the Idaho Dept. of Water Resources). Actually, the Department issued orders "continuing" these permits, which were those which had been issued prior to the effective date of the Swan Falls statutes (July 1, 1985), but for which actual beneficial use of water had not been proven as of that date. Section 42-203D(1) required that the Director reevaluate these permits to determine whether they comply with the requirements of section 203C—as a practical matter, whether they "would significantly reduce the amount of trust water available to" Idaho Power at Swan Falls, and if so, whether they meet the public interest requirements. IDAHO CODE § 203C(1) (1990). The Department's Rules set forth the procedure for "reprocessing" of these permits. Rules, *supra* note 187, at Rule 4.

221. As of the end of 1991, the total acreage under permit pursuant to the Swan Falls arrangement was 43,104 acres. IDAHO DEPARTMENT OF WATER RESOURCES, SWAN FALLS TRUST WATER AREA STATUS REPORT AS OF DECEMBER 31, 1991.

est."²²² This permit language follows the Policy Statement's direction to assure "continuing management" of what the Department sees as a separate trust water resource or asset, although it stops short of expressly imposing a term limit. Nonetheless, this "subject to review" language is unique to these permits, and logically may be seen as a "reopener" of one's water right license after twenty years.

Actually, the Department has issued a few minimum stream flow rights containing reopener provisions, none of which have yet been challenged.²²³ There is no language in the minimum stream flow statute that would impose or authorize such a condition.²²⁴ Both the effect and legality of such language is uncertain, but it may be seen as placing substantial restrictions or limitations on these rights that are not placed on non-minimum flow water rights recognized under Idaho law.

Interestingly, the Idaho Water Resource Board has mentioned the term limitation concept in ways that leave open its position on the question whether such a condition could be placed on non-hydropower rights. In 1984, a few months before the Swan Falls settlement, the Board adopted a resolution stating that

the local public interest requires that all permits and licenses authorizing the diversion and use of waters of the state of Idaho for hydropower purposes be subject to review by the Director of the Department of Water Resources. Normally, the review should be made at the end of the operating period specified by the Federal Energy Regulatory Commission authorization or as otherwise provided by the Director of the Department of Water Resources. Pursuant to such review, the Director, upon appropriate findings, should renew the water right with its original priority date for the benefit of the project, with the same or different conditions, or should declare the right to be terminated in whole or in part.²²⁵

The resolution does not attempt to address the question whether imposing such a "review" upon an existing hydropower right would be a taking. In any event, the most startling part of this resolution is its

222. See, e.g., Memorandum Decision and Order, In the Matter of Evaluating Whether Development of 20,000 Acres of Irrigated Land Would Cause a Significant Reduction in Trust Water Available for Power Production, Permit No. 36-7839 at 5 (Jan. 30, 1990).

223. See, e.g., Idaho Dept. of Water Resources, In re Application for Establishment of a Minimum Stream Flow in Niagara Springs, Application No. 36-7200 (1988).

224. See IDAHO CODE § 42-1501 to 1504 (1990).

225. IDAHO WATER RESOURCE BOARD, RESOLUTION ADOPTING POSITION ON TERM PERMITS 2 (July 25, 1984).

further statement that it "is not intended to imply any restriction on the authority of the Director of the Department of Water Resources to impose in the local public interest a fixed term on permits and licenses for uses of water other than hydropower."²²⁶ It is possible that the Department took its cue from this resolution in drafting its rules and Policy Statement regarding the implementation of the Swan Falls statutes, and possibly employing the "reopener" in minimum stream flow permits.

The concept of imposing term limitations on water rights has been discussed in legal journals and elsewhere,²²⁷ but such a restriction has not been adopted under the western prior appropriation systems.²²⁸

Although the idea of imposing a term limitation, review period or reopener may be a well-intentioned effort by the Department to carry out its trust obligation to Idaho Power, imposing such conditions on Idaho's irrigators or other non-hydropower appropriators does not appear to be grounded upon any statutory authority. The statutory scheme by its terms applies only at the initial application stage, and does not commit the state to an ongoing review schedule with respect to these water rights.²²⁹

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

227. "States ought to consider, when new water uses are approved, granting rights that are reasonably secure—but not permanent and absolute, as is the case with rights obtained under the classic [prior appropriation] doctrine. One possible approach would be to provide for fixed term leasing of water, a concept widely used in eastern states and in foreign countries." Charles Wilkinson, *Aldo Leopold and Western Water Law: Thinking Perpendicular to the Prior Appropriation Doctrine*, 24 LAND AND WATER L. REV. 1, 30 (1989). See also Patrick Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri?* 47 MO. L. REV. 429, 456 (1982); and WESTERN GOVERNORS' ASSOCIATION, WATER EFFICIENCY: OPPORTUNITIES FOR ACTION 111-12 (July 6, 1987).

Professor Wilkinson criticizes the permanence of water rights under the prior appropriation doctrine, but presumably these rights will remain permanent entitlements as long as western state constitutions, such as Idaho's, adhere to the classic doctrine. Nonetheless, the doctrine already has the potential to provide much of the flexibility and attention to the public interest that Professor Wilkinson advocates. For example, the doctrine embodies concepts of efficiency, allows reasonable state regulation and permits transfers and changes to new private and public uses while preserving the notion of certainty of rights that has long been so important in western water law. Indeed, in the Framework, Idaho Power and the State recognized that coincident with any subordination of the Company's Swan Falls rights, "[t]he State should make it easier to get willing sellers with willing buyers and to facilitate approval of changes in the place of use." Framework, *supra* note 124, at 7.

228. An exception to this is Idaho's provision in section 203B(7) concerning hydro-power rights, that is based on Idaho's unique constitutional provision allowing the State to "regulate and limit" water rights for power purposes. IDAHO CONST. art. XV, § 3.

229. IDAHO CODE § 42-203C(1) (1990). An administrative agency like the Department has only such powers as state statutes or ordinances confer. *Beker Indus. Inc. v.*

More importantly, the Swan Falls statutes expressly authorize the Director to "limit a permit or license for power purposes to a specific term of years"²³⁰—a restriction that presumably is permissible only because of the provision in the Idaho Constitution allowing the State to "regulate and limit" a water right that is used for power purposes.²³¹ The astute irrigator or other appropriator in whose permit the reopener condition appears may well point out that the Legislature's express inclusion of term limitation language in the Swan Falls statutes with respect to power rights prevents the Department from imposing any such provision, or even a reopener clause, in non-power licenses.²³²

Idaho's constitution secures the right to appropriate,²³³ and the Idaho Supreme Court has construed this to mean that persons are constitutionally entitled to establish rights to use unappropriated waters of the state, subject to reasonable regulation.²³⁴ The constitution makes no distinction among non-power rights except for the ranking of preferences among domestic, irrigation, manufacturing, and mining.²³⁵

Georgetown Irr. Dist., 101 Idaho 187, 191, 610 P.2d 546, 550 (1980). In addition, the purpose of the trust established by the Swan Falls statutes was to protect Idaho Power's water rights use "*pending* approval of depletionary future beneficial uses." IDAHO CODE § 42-203B(1) (1990) (emphasis added). The Department's construction may be seen as imposing these conditions beyond this time period.

230. IDAHO CODE § 42-203(B)(7) (1990).

231. IDAHO CONST. art. XV, § 3.

232. IDAHO CODE § 42-203C(7) (1990). "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 . . ." IDAHO CODE § 42-203B(7) (1990) (emphasis added). The doctrine of *expressio unius est exclusio alterius* provides that where a statute enumerates specific areas to be encompassed by its enforcement, those areas not mentioned are excluded. See, e.g., *State v. Michael*, 111 Idaho 930, 729 P.2d 405 (1986). The detailed reference to term limits in the Swan Falls statutes with respect to water rights for power purposes but not with respect to any other purposes indicates that the Legislature did not intend to allow the Department to impose a term limitation on non-power appropriations.

233. "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." IDAHO CONST. art. XV, § 3.

234. See *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982); *Wilterding v. Green*, 4 Idaho 773, 45 P. 134 (1896).

235. IDAHO CONST. art. XV, § 3. The preferences among types of uses merely provides the holder of a preferred use the right to condemn and pay fair compensation for the right for a lower preference use. *Montpelier Milling Co. v. Montpelier*, 19 Idaho 212, 113 P. 741 (1911).

Neither does it suggest that the Department may apply less than even-handed treatment to all non-hydropower appropriators.²³⁶

The Department also may find it difficult to justify any attempt to impose term limitations or reopener obligations on these water rights under the public trust doctrine. In recent years, the Idaho Supreme Court has implied that a vested water right may be subject to restrictions, on a case-by-case basis, based on the state's continuing interest in vindicating public values recognized pursuant to public trust doctrine or local public interest concepts.²³⁷ Whatever the State's power under this emerging doctrine is, it presumably applies equally to all appropriative water rights. Moreover, the legislature enacted the Swan Falls statutes two years after the Supreme Court in *Kootenai Environmental Alliance* indicated that the public trust doctrine exists in Idaho. Accordingly, if the Legislature wished to provide a framework for the ongoing management of a separate class of water rights under the doctrine, it could have provided so in the statute. Ironically, singling out these new rights for ongoing scrutiny under public trust concepts actually might inhibit the Department's ability to impose such scrutiny on rights not issued pursuant to the Swan Falls statutes.

The Department may believe that term limit or reopener language is necessary to assist in administering those rights that benefit from the Swan Falls subordination. For example, the Department may argue that it needs some means of conditioning or curtailing diversions under these rights in the future if either the 3,900 or 5,600 cfs minimum appears in danger of being violated. However, any such reasoning would not be persuasive because the Department already has full power, and indeed the duty, to curtail junior rights that are injuring senior rights. To the extent that curtailment might be necessary to protect the minimums at the Murphy gauge, the Department has the authority to do so without conditioning any rights with reopener or term limit language.

Actually, inserting the condition into water right permits and licenses is more likely to *undercut* the Department's ability to manage water resources or institute a call or curtailment to meet the minimum flow requirements at Murphy gauge. For example, if the Department determines that rights must be curtailed or further conditioned to meet the minimum flow requirement, the Department likely would find

236. The Department's policy also may be vulnerable to attack as a violation of federal constitutional principles of equal protection of the laws because it creates, without adequate justification, two classes of non-hydropower water rights, one with a term-of-years limitation or reopener condition and one without. See U.S. CONST. amend. XIV.

237. See *Shokal v. Dunn*, 109 Idaho 330, 336-39, 707 P.2d 441, 447-50 (1985); *Kootenai Env'tl. Alliance v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 631, 671 P.2d 1085, 1094 (1983).

it difficult to impose the restriction upon those appropriators whose 20-year review date has not yet arrived. The irony would be even more complete in that case because such appropriators also would be the most junior.

4. The Practical Effects of a Term Limitation or Reopener

So far, no irrigator who has received a "trust water" right has challenged the Department's inclusion of the term limitation or reopener provision. But, regardless of whether the Department's insertion of the provision is legally permissible, there are several reasons why it could cause significant harm to appropriators, particularly irrigators.

Idaho irrigators carry out their economic planning on the presumption that their water rights indeed are, as the Idaho courts have held repeatedly, perpetual rights of use and protectable property interests.²³⁸ Southern Idaho farmers stake their livelihood and the well-being of their families on the continued availability of water. Home, farm and ranch mortgages, college educations, and retirement security represent lifetime investments which may not reasonably be amortized and then given up in twenty years. Even the possibility that the State may step in and, by means of a reopener clause, cancel, restrict or reduce a water right may substantially limit the choices such a family might make.

Moreover, it is possible that an irrigation right with a twenty-year term or reopener provision would not be well received by businesses and financial institutions who are asked to make long-term investments in Idaho's farms and ranches. If the water right may disappear or be curtailed at the end of twenty years, the value and credit worthiness of the entire operation would be affected. Presumably, in an actual term limitation situation that value will continue to decline as the term runs out. It is questionable whether, as suggested in the Policy Statement, limiting the term of a license to the period required to amortize an investor's development capital would benefit either the public or Idaho's farmers.

It is unclear what effect the imposition of the "subject to review" condition will have on the hundreds of Idaho farmers and other appropriators who now are depending on water rights acquired under the Swan Falls procedure that contain this language. But it is clear that it presents a novel approach that could have significant negative impacts.

238. A water right acquired under Idaho law is a valuable, perpetual property right. See *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984); *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959); *Reno v. Richards*, 32 Idaho 1, 178 P. 81 (1918).

This condition in these permits and licenses also could result in substantial burdens on the Department's financial and personnel resources. As the twenty-year term approaches, either the condition will be enforced or it will be ignored. If meaningful review is to occur, the Department will have the task of deciding, for each appropriation, whether it should be reevaluated, discontinued, or limited, and of providing specific reasons for the result reached that will stand up in court.

On the other hand, if the Department ultimately ignores the reopener and term limitation policies, the language in the licenses still could stand as detriments to those irrigators or other water right holders whose property continues to carry this cloud. Moreover, even without state enforcement there still may be cases where one appropriator attempts to compel the Department to assert the reopener condition against another. Thus, even attempted nonenforcement of the "subject to review" language may prove troublesome for both water right holders and the Department.

One of the prior appropriation doctrine's functions is to promote certainty in priority and availability of water, according to the first in time, first in right principle.²³⁹ The Department's term of years and reopener policies run counter to this tradition.

V. LOOKING FORWARD: RECONCILING INTENTIONS WITH RESULTS

In his introduction to *Beyond the Hundredth Meridian*, Wallace Stegner's classic account of the "second opening of the west," historian Bernard DeVoto discusses the inherent tensions between perception and reality, and also between intentions and results, that perhaps uniquely mark much of the history of the West. DeVoto wrote, in connection with the development of western water law systems, that the "experience of the West produced turbulence but not understanding."²⁴⁰ In attempting to explain what happened in the Swan Falls controversy, and why, it is fair to ask whether it heralded a new order on the Snake River in Idaho, or whether it too was an experience that "produced turbulence but not understanding."

239. For a scholarly discussion of the relationship between certainty and flexibility in water law and policy, see 1 CLARK, *WATERS AND WATER RIGHTS* § 63 (1967).

240. See BERNARD DEVOTO, *Introduction* in WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN*, JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST xxi (1954).

A. Snake River Flows at Murphy Gauge

The Idaho Power ratepayer/petitioners who initiated the controversy sought to protect the Company's rights at Swan Falls. On the face of the settlement, they fell short of that goal. Idaho Power agreed to a process by which it could be stripped of its right to defend Murphy gauge flows above the 3,900 and 5,600 cfs minimums. However, the reality is that flows in this reach are not likely to reach these minimums on any sustained basis, even with substantial new development.

The presumed low flow of 4,500 cfs that was the basis for the Swan Falls settlement calculations arguably is not an accurate measure of the effect of existing agricultural development on Idaho Power because river flows approaching that level are uncommon, short-term events. As shown previously, the 4,500 cfs flow that was used as a starting point for the negotiations reflected a one-time mean daily flow that occurred in the summer of 1981.²⁴¹ But through the years 1985 to 1990, which were below-normal water years, the average monthly flows at Swan Falls during July and August averaged 6,529 cfs and 7,077 cfs respectively.²⁴² These can be compared to the years 1919 to 1940 in which the average monthly flows for July and August averaged 7,900 cfs and 7,171 cfs, respectively.²⁴³

Indeed, from 1919, when Idaho Power made its final, and by then somewhat junior, appropriation of 4,000 cfs at Swan Falls, through 1940, which is the approximate beginning of the period of renewed agricultural expansion relying on groundwater development, average July flows at the Murphy gauge equalled or exceeded 8,400 cfs in only three years. During that same period, average August flows never exceeded 7,904 cfs. In other words, when Idaho Power made its 1919 appropriation there was insufficient water in the Snake River to fill that right during July and August of an average year.

Since 1914 the average July flows have never fallen below approximately 5,300 cfs, and average August flows have never fallen below 5,900 cfs.²⁴⁴ Again, although average daily and instantaneous flows at the Murphy gauge occasionally approach 4,500 cfs, historically they average well above that and compare closely with average monthly flows experienced at the time Idaho Power made its most junior appropriation at Swan Falls.

241. U.S.G.S. WATER RESOURCES DATA, *supra* note 132.

242. IDWR SNAKE HISTORIC DISCHARGE—MURPHY, *supra* note 31.

243. *Id.*

244. *Id.* Both of these low monthly averages occurred in 1981 when the average July flow was 5,292 cfs and the average August flow was 5,915 cfs. *Id.*

Thus, one could assert that after all the collective heartburn caused by the Swan Falls dispute, Idaho Power, its ratepayers, agricultural interests and the river at Murphy gauge now find themselves in much the same position they were in seventy years ago. But such a conclusion would be overly simplistic. An informed review of the situation would show that natural flows past Milner have decreased significantly over the years while consumptive use of water in the Snake River Basin above Swan Falls has increased, that discharges from the Thousand Springs area have declined and that a portion of the flows measured today at Swan Falls are attributable to storage releases from American Falls and other reservoirs under the auspices of the Upper Snake Water Supply Bank—water whose delivery is paid for by Idaho Power and its ratepayers.

But whatever the complexities and qualifying factors, the fact remains that Idaho's Snake River water supply system has absorbed the development of over a million acres of irrigated farmland since the 1920s while still producing flows in the Snake River below Milner that resemble pre-development levels. This remarkable fact surely is testimony to the sheer vastness of the Snake Plain Aquifer and the magnitude and flexibility of the river's surface water storage system. Additional flexibility arises from the responsiveness of agriculture to market demands that have given rise to the new technologies and increased efficiencies employed by Snake River Plain irrigators.

The notion that "there ain't enough to go around" that pervaded Idaho's thinking in the 1980s now seems somewhat premature in hindsight, and it might remain so for years to come if this dynamic system continues to operate through proper management and institutional foresight. Certainly Idaho Power will have to continue to purchase storage releases from the Upper Snake to maintain desirable flows at Swan Falls, but the evidence suggests that at least for the foreseeable future the amount purchased need not be much and it likely will be available. The fact that Idaho Power can purchase water from the Upper Snake Water Supply Bank for delivery below Milner suggests that the two-rivers concept, while officially declared, is not an irresistible barrier to delivering water where it is needed in the market.

B. The Viability of the Special Public Interest Criteria of Idaho Code § 42-203C

Despite all the attention directed at the five additional public interest standards of section 42-203C(2), these criteria have yet to be considered by the Department in its evaluation of applications for "trust water." The reason for this is that the criteria are applicable only if the Department first determines that a "trust water" appropria-

tion, "individually or cumulatively with other existing uses or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce" flows at Swan Falls or other hydroelectric plants.²⁴⁵ However, the Department has determined that Idaho Power's hydroelectric power production will not be significantly affected by any foreseeable new diversions for agricultural development.

In 1988-89, in cooperation with the Idaho Public Utilities Commission, the Department used computer modeling to simulate the effects of developing the first 20,000 acres of land in the "trust water area" for which applications were then pending. The Department identified the location of potential new development and the sources of water for such development, estimated the net depletion resulting from such new irrigation development and computed the loss in potential power generation at each hydropower plant on the Snake River below Milner. The likely locations of potential new agricultural lands were predicted by reviewing pending water right applications and undeveloped permits in the trust water area.²⁴⁶

The Department determined that a given new diversion's annual depletion of the river would be felt imperceptibly at first and would increase over the years until, approximately sixty years after initiation, most of its effect would be felt annually.²⁴⁷ The Department estimated that sixty years after development of the first 20,000 acres of land, Idaho Power's hydropower generation capability at its plants upstream from the Murphy gauge would be reduced by approximately 2.8 million kilowatt hours (KWH) annually.²⁴⁸ The Department determined that this lost hydropower capacity would increase the Company's power costs by \$159,553, or approximately 0.05%, per year²⁴⁹ and then concluded that this impact was insignificant.²⁵⁰

245. IDAHO CODE § 42-203C(1) (1990).

246. IDAHO DEPT. OF WATER RESOURCES, IN RE: EVALUATING WHETHER DEVELOPMENT OF NEW IRRIGATED ACREAGE WILL CAUSE A SIGNIFICANT REDUCTION IN TRUST WATER AVAILABLE FOR POWER PRODUCTION, MEMORANDUM DECISION AND ORDER 1-2 (undated standard_order approving applications for permit) [hereinafter MEMORANDUM DECISION].

247. *Id.* at 2.

248. *Id.* at 3. The Department only calculated the impacts on Idaho Power's hydropower generating capability above Swan Falls, on the ground that the Company's Hells Canyon rights are already totally subordinated to upstream development. *Id.* at 4.

249. *Id.* In estimating the impact on power rates caused by the 20,000 acres of development, the Department considered the cost to Idaho Power of replacing the lost hydropower generation capability with new thermal generation capacity. The Department did not, however, consider the impacts to Idaho Power's rate base resulting from factors such as increased power demand due to increased irrigation pumping related to the new development. *Id.* at 3.

250. *Id.* at 5.

With this information in hand, the Department applied its model to estimate the effect, in terms of lost hydroelectric power capacity, of developing the full 196,000 acres of land in the trust water area for which applications were then pending. The result was that the average annual increase in the price to ratepayers, due to replacing the hydro-power with electricity from more expensive thermal sources, would be approximately \$837,654 per year, or an increase of 0.25% per year.²⁵¹ The Department then concluded that:

Other factors present in a dynamic system as large as the Snake Plain aquifer will have more effect on the discharge of the Snake River than decreases caused by [196,000 acres] of new development Approval of applications for permit or permits which propose the development of 196,000 acres of newly irrigated land with water from the Snake Plain aquifer will not either individually or cumulatively cause a significant reduction in the water supply available to the holder of a water right used for power production purposes.²⁵²

In terms of actual flows at Swan Falls, the Department estimated that development of 196,000 new acres of irrigated land would deplete flows at Swan Falls by approximately 176,000 acre-feet per year by the sixtieth year following development.²⁵³ This would mean that, at that time, the Swan Falls plant would suffer an average reduction in flow of approximately 243 cfs, as compared to levels that would be expected without 196,000 acres of development.

Thus, if 196,000 new acres were brought under irrigation today using water from the trust water area, then sixty years from now the lowest average daily flow that could be expected at Swan Falls would be 4,287 cfs—243 cfs less than the historical minimum of 4,530 cfs as a daily average. Yet, in measuring the impact of the Swan Falls statutes, and the additional development they allow, a more appropriate base number from which to subtract the 243 cfs may be the 6,529 cfs figure that is applicable to average July flows²⁵⁴ rather than the 4,500 cfs figure. If so, then Idaho Power still would be left with average July flows of 6,286 cfs sixty years from now if all pending applications for trust water are approved.

251. *Id.* at 3.

252. *Id.* at 4.

253. Interview with Alan Robertson, Idaho Dept. of Water Resources, in Boise, Idaho (Dec. 20, 1991).

254. IDWR SNAKE HISTORIC DISCHARGE—MURPHY, *supra* note 31.

Furthermore, the Department's findings mean that, unless circumstances change in the aquifer or with respect to current trends in the agricultural economy, the special public interest criteria set forth in section 42-203C(2) will have no influence on trust water appropriations. While varying physical, economic and political factors do have significant short and long-term effects on agricultural trends, it seems fairly safe to say that Idaho probably will not soon see the rate of expansion it experienced during the 1970s and early 1980s. The Bureau of Land Management's 1976 Environmental Statement, although developed during and because of an expansive period for agriculture supports this conclusion in its finding that large-scale development of desert lands for irrigated agriculture, did not appear to be feasible.²⁵⁵

Also, as of 1991 approximately 1,285,700 acres of agricultural land in Idaho, much of it in the "trust water area," had been taken out of production under the Federal Acreage Reduction and Conservation Reserve Programs.²⁵⁶ Although much of the land idled under these programs is under dryland farming and therefore not irrigated, it seems probable that if future economic changes were to accelerate agricultural development in Idaho, many of these idled lands would be the first to be "redeveloped" and they may well serve as a buffer against breaking out new lands for irrigation.

It was the dizzying pace of development of irrigated agriculture in the late 1970s and early 1980s that fed the fears of Idaho's policy makers and Idaho Power in the Swan Falls dispute. But for at least the present and for the foreseeable future, the reasons for concern that drove the dispute have dissipated. It appears that the minimum flows set for Swan Falls and the section 203C(2) criteria will be more statutory curiosity than day-to-day experience.

C. Direct Diversions From the Snake River Below Milner have been Curtailed

One of the concrete outcomes of the Swan Falls dispute that has the most direct and positive effect on Idaho Power's rights at Swan Falls is the Department's presumption that appropriations of water involving direct diversions from the Snake River below Milner are not in

255. See AGRICULTURAL DEVELOPMENT ES, *supra* note 135 and accompanying text.

256. See U.S. DEPT. OF AGRICULTURE, AGRICULTURE STABILIZATION AND CONSERVATION SERVICE, CUMULATIVE TOTAL: CONSERVATION RESERVE PROGRAM ACRES, IDAHO (1992) (unpublished data on file with ASCS State Office, Boise, Idaho); U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, IDAHO, 1991 Complying Farms Report PA-113R—Farm Data (Feb. 10, 1992) (unpublished data on file with ASCS State Office, Boise, Idaho).

the public interest.²⁵⁷ These are the diversions that have the greatest potential to significantly reduce flows at Swan Falls. At least until the Department finds the public interest to have changed substantially,²⁵⁸ this determination will curtail future irrigation development relying on the river below Milner, and will favor aquifer diversions upgradient which tend to have a much more moderated effect on below-Milner river flows.

D. The Snake River Basin Adjudication

Another palpable result of the Swan Falls dispute was the commencement of a basin-wide adjudication of all Snake River Basin water rights which was instituted by the Idaho Legislature as part of the statutory implementation of the Swan Falls Framework and Agreement (the SRBA).²⁵⁹ An estimated 135,000 claims to water rights in the Snake River Basin are expected to be filed and considered by the District Court in Twin Falls County.²⁶⁰ Among the rights quantified in the SRBA will be the federal reserved and Indian water rights.²⁶¹ These

257. The Department's Water Appropriation Rule 5,2,3, adopted in 1986 states that:

Other provisions of these rules notwithstanding, applications or permits to be reprocessed proposing a direct diversion of water for irrigation purposes from the Snake River between Milner Dam and Swan Falls Dam or from tributary springs in this reach are presumed to cause a significant reduction [in the quantity of water available under existing rights for hydropower purposes].

Water Appropriation Rule 5,3,9 states that proposals involving direct diversions from the Snake River between Milner Dam and Swan Falls Dam "are presumed to prevent full economic and multiple use of the water in the Snake River Basin and to adversely affect hydropower availability and electrical energy rates in the State of Idaho."

258. Presumably this determination is subject to change as future conditions change. See *State Dept. of Parks v. Idaho Dept. of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974).

259. The Framework stated that:

the key to effective management of the Snake River lies in a comprehensive determination of the nature, extent and priority of all of the outstanding claims to water rights. Only through a general adjudication will the state be in a position to effectively enforce its minimum streamflow rights, protect other valid water rights and determine how much water is available for further appropriation.

Framework, *supra* note 124, at 5. The legislative authorization for the Director to commence the SRBA is codified at IDAHO CODE § 42-1406A (1990).

260. Phillip Rassier, *Idaho Adjudication Presumption Statutes*, 28 IDAHO L. REV. 509 (1992).

261. The SRBA statutes were specifically drafted with the intention of satisfying the McCarran Amendment, 43 U.S.C.A. § 666 (1986), which allows the United States to be joined in any suit for the adjudication of rights "to the use of water of a river system or other source . . . where it appears that the United States is the owner of or is in the

federal and Indian water rights may well have remained unquantified for many years to come if the SRBA had not been commenced.

In response to the SRBA the Department has developed new procedures for acquiring and processing information on the thousands of claims that have been filed. The Swan Falls dispute served as a catalyst which prompted the Department to develop more sophisticated means of identifying and quantifying water rights management techniques. The Department now has a comprehensive and accessible computer database of water rights that allows the public and the Department to obtain information about water rights in the Snake River Basin quickly. Also, the Department now is able to classify current land use and determine beneficial use acreages throughout the basin with a combination of LANDSAT imagery, color-infrared aerial photographs and orthophotographic quadrangle maps. This prodigious catalogue of information will be used by the Department in making its recommendations to the court regarding each water right claim and undoubtedly will be valuable to the Department long after a final decree is entered. It remains to be seen how this information will be used to effect better management of the River and its tributary aquifer.

Many prior decrees issued in general stream adjudications for tributaries in the basin failed to state the requisite elements of the water rights such as the place of use or the duty of water.²⁶² The SRBA decree itself should establish these water rights and all previously unadjudicated claims with more certainty. This result would enhance the State's ability to administer water rights and minimize potential conflict among water users.

In these respects, the SRBA has the potential to provide a higher degree of certainty for Idaho's water right holders, including Idaho Power, and state administrators. If so, then it will be one of the real fruits of the Swan Falls dispute. Whether the SRBA's promise becomes a reality, and at what cost to the State, remains to be seen.

VI. CONCLUSION

Over the course of several decades, irrigators and Idaho Power Company both expanded their uses of Idaho's Snake River and its tributary aquifer. Some of the irrigation development caused measurable depletions to Idaho Power's senior water rights at Swan Falls Dam. Nonetheless, irrigation and power interests coexisted in harmony until

process of acquiring water rights by appropriation under State law . . . and is a necessary party to such suit."

262. See e.g., *Owen v. Nampa & Meridian Irr. Dist.*, 48 Idaho 680, 285 P. 464 (1930); *Farmers Coop. Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 P. 481 (1909).

events in the 1970s gave rise to serious discord. The resulting face-off between irrigation and hydropower became by far the biggest water rights dispute Idaho had ever seen. When the Idaho Supreme Court determined that the Company's Swan Falls rights were not subordinate to upstream appropriations, irrigators were presented with no less a question than whether there could be further agricultural development in large portions of southern Idaho. The Governor, the Attorney General and the Legislature sided with the irrigators, but they faced the formidable obstacle of Idaho Power's property rights. For its part, Idaho Power faced risks that its rights would be seen as having been waived by past practices, or at least that it would be estopped from asserting them against upstream juniors and new appropriators.

After much legal and political volleying, the dispute was settled. The Legislature ratified the arrangement by enacting several new statutes; the Water Resource Board amended its water plan; and the Department instituted new rules and policies. The compromise involved the subordination of a portion of Idaho Power's Swan Falls water rights to existing upstream appropriators and established a process by which another portion of these rights could be subordinated to future appropriations after consideration of certain factors designed to provide some protection to Idaho Power. The Company received assurance that its Swan Falls rights would not be depleted during the irrigation season below an amount that is about sixty percent of its historically-available flows. The Swan Falls compromise generally was consistent with Idaho Power's tradition of deference to upstream irrigation development and its hands-off approach to waters above Milner. Indeed, in the Swan Falls statutes the Legislature included language declaring, in effect, that the Snake River actually is two unconnected rivers, divided at Milner.

The settlement is not likely to have much effect on flows at Murphy gauge, at least for the foreseeable future. Idaho Power should continue to enjoy flows at its Swan Falls power plant in amounts well in excess of 4,500 cfs during all but the most extreme periods of water shortage. Development of irrigated acreage in southern Idaho will continue to be driven, not by the availability of water under the Swan Falls arrangement, but by the dictates of agricultural economics. Indeed, to the extent the availability of water is an issue in any proposed new "trust water" diversion, the tension is most likely to arise between the proposed new appropriation and the rights of existing irrigators, not between the applicant and Idaho Power.

One of the controversy's most significant outcomes likely is its effect on the legal stature of new water rights that are recognized pursuant to the Swan Falls statutes. Pursuant to rules and policies adopted in response to its interpretation of the Swan Falls statutes, the Depart-

ment has imposed an unexpected level of control on new water rights in the "trust water" area. The Swan Falls statutes do not reveal an intent to subject new appropriators to the guiding hand of a permanent, separate and "continuing management" as the Department seeks to do by rule or policy. Nor is there justification for concluding that new non-hydropower permits or licenses, such as the hundreds issued to irrigators in the last few years, be burdened with the "reopener" or term limit conditions that the Department has imposed on each of these new entitlements. These novel conditions, which call into question whether the certainties of the traditional prior appropriation doctrine continue to apply to such rights, could be particularly injurious to irrigators. This is perhaps the ultimate irony of the Swan Falls settlement. While the State sided with agricultural interests throughout the dispute, the Department now has saddled new irrigation rights with limitations that are unprecedented in Idaho water law and indeed are unknown to the prior appropriation doctrine.

The Swan Falls statutes frame a "gateway" through which certain new appropriations must pass, but once through, these water rights have a stature equal to all other water rights in Idaho and are subject to the same obligations and limitations of priority and beneficial use, and to the State's inherent authority as the trustee of all of Idaho's water resources. With the exception of their entitlement to benefit from the subordination of Idaho Power's rights, the new rights should be recognized, used and managed according to the traditional rules of western water law.

With the exception of the additional conditions the Department has placed on "trust water" rights—and the commencement of the Snake River Basin Adjudication—the Swan Falls dispute actually did not seriously reshape the day-to-day world for irrigators or for Idaho Power. New irrigation can occur, and the Snake River and the Snake Plain Aquifer will continue to be the fulcrum of southern Idaho's economy as they yield up their water to farms, ranches and industry. The hydroelectric generators at Swan Falls will continue their steady hum from the depths of the Snake River Canyon.