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Questions about water rights on the Snake River caused a political fight. The Swan Falls Dam, above, sparked a debate between using water for power or for irrigation.

REMINISCENCE ON THE 1984 SWAN FALLS WATER RIGHTS NEGOTIATIONS

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It would be the most memorable “house call” I ever made as an attorney.

I was driving an old pickup I had borrowed from the Idaho Transportation Department’s Pocatello fleet up a back road into the high country above Lava Hot Springs. It began to snow, and the flurries were drifting up on the roadway. As I drove higher into the mountains, the road became a trail, and then a path. At the end of the road, a man on horseback was waiting, along with a second horse. The man was my client, John V. Evans,



Patrick D. Costello

then-governor of Idaho. I asked with apprehension why he’d brought the second horse. “Why, she’s for you, Pat,” the governor said. I protested that I had planned to return to Pocatello as soon as we completed our business so I could catch the evening flight back to Boise. I hadn’t ridden a horse since high school, and was in my Alexander-Davis lawyer duds, but the governor insisted that we ride back up

the snowy trail to the bunkhouse. Governor Evans and his son David (now the Oneida County magistrate judge) were in the middle of the annual cattle roundup on their spread up on Dempsey Creek. After an uncomfortable (for me) ride of maybe 30 minutes (which seemed interminable) we arrived at the tiny bunkhouse, which lacked both running water and electricity. The governor cooked us up some steaks over the wood fire. Then we talked about the latest crisis in the Swan Falls water rights negotiation.

It was late October, 1984. Since July of that year I had spent nearly every day negotiating on the governor’s behalf with Idaho Power Company’s lawyer, Tom Nelson,¹ and then-Deputy Attorney General Pat Kole,² trying to settle a legal and political war over Snake River water rights. The Idaho Supreme Court had ruled the previous year that the power company’s 1901 water rights at Swan Falls Dam had not been affected by the power company’s subordination of its Hells Canyon water rights to subsequent irrigation projects.³ That ruling set off a political battle royale. Governor Evans, though a Stanford-educated banker and a usually pro-conservation Democrat, was nevertheless firmly in the camp of the pro-subordination irrigators. “I want Idaho to be the Snake River water-master, not Idaho Power Company,” he would frequently declare. Eight bills were introduced during the 1983 ses-

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sion of the Idaho Legislature attempting to subordinate hydropower rights to out-of-stream uses such as irrigation. None of them passed. The pro-irrigation lawmakers tried again during the 1984 session, but, again, were unsuccessful; during that session, however, the Legislature enacted Senate Bill 1180, encouraging the governor and attorney general to try to settle the “7500 law suit”, in which Idaho Power had sued about 7500 Snake River water rights holders and applicants. This suit also came to be known as “Idaho Power Company vs. The World.”⁴

The war of words

That spring of 1984, the power company mounted a public relations offensive (timed to coincide with legislative

primary election campaigns) to generate support for its position against subordination. Then-Attorney General Jim Jones⁵ responded with strongly-worded pronouncements of his own in support of the pro-subordination cause, raising the specter of power company control of all future development in southern Idaho. After the primary elections, Governor Evans wrote to Idaho Power Company President James Bruce, suggesting that, rather than meeting to discuss settlement of the “Idaho Power Company vs. the World” lawsuit, the parties enter into negotiations to resolve the question of future, as well as past, water development in the Snake River Basin.

The three principals (Evans, Jones, and Bruce) met privately in the governor’s office in July 1984. After the governor and attorney general complained to Bruce about what they perceived as unfair power company advertisements, Bruce took issue with some of Evans’s and Jones’s public statements. But eventually, both sides concluded that, if these negotiations were to bear fruit, the war of words in the media would have to be suspended. However, the level of distrust on both sides was such that they each feared the other would use the negotiations to lull the other party into complacency during the fall legislative election campaigns. The principals ultimately agreed to a public relations “cease fire,” lasting until October 1. If there was no agreement by then, all bets were off.

Negotiations

Nelson, Kole, and I were then sent off to attempt to work out a settlement. For the next several weeks, we received advice and information from state, federal, and power company hydrologists, economists, farmers, and representatives of conservation, recreation, and sportsmen’s interests. It was quite a seminar in Idaho history, politics, and water law.

The three of us quickly determined that, while the state and power company were far apart on the central issue of subordination of hydropower rights, the two sides had many common interests. It was in both the state’s and the power company’s interests to have enforceable minimum stream flows. No one wanted to be able to “walk across the Snake River on the backs of dead sturgeon,” as Tom Nelson would frequently predict would be the result if unchecked high-lift pumping from the Snake River was ever allowed.⁶ Policy decisions about the use of this finite resource were hampered by the paucity of data about water usage and hydrology in the basin. The fact that there had never been a general stream adjudi-

cation on the entire Snake River meant a water master could not be installed to deliver water at whatever level the parties might ultimately agree was acceptable. In addition to the immediate crisis posed by the Idaho Power litigation, state officials were concerned about the uncertain federal reserved water rights that could be asserted by federal agencies and Idaho’s Indian tribes. Commencement of a general stream adjudication would be the only way to force federal agencies and tribes to participate, according to the terms of the McCarran Amendment.⁷

Breakthrough

Conflict creates opportunity. It occurred to us that the strong desire among legislators to put the Swan Falls crisis behind them might make them willing to pay for things like studies and an adjudication, or to enact public interest criteria to regulate future water development, to which they likely otherwise would have been unwilling to agree.

On October 1, 1984, Evans, Bruce, and Jones met again, this time to sign a “Framework for Final Resolution of Snake River Water Rights Controversy.” The key provision was a compromise on stream flows. The power company would agree to reduce its water rights at Swan Falls to 3900 CFS in the summer and 5600 CFS during the non-irrigation season, and the state, in turn, would amend the state water plan to enact new minimum flows in the same amounts at the Murphy Gauge below Swan Falls Dam. The state would be allowed, and required, to assert the power company’s right in order to firm up the enforceability of its minimum stream flows. Exactly how this would be accomplished legally was purposely left unclear. The word “subordination” was not once mentioned in the document. It did condition the agreement on the commencement of the Snake River adjudication, funding for studies and data collection, and enactment of public interest criteria to guide future development. Enough progress had been made toward agreement that the principals agreed to continue the public relations “cease fire” for awhile longer.

Endgame

Over the next several weeks, Nelson, Kole, and I continued to meet by day to hammer out contractual language, water plan amendments, and legislation to implement the general language of the Framework. Often by night, we were touring the state on board the small state airplane (which had been purchased in the aftermath of the Teton Dam collapse) to appear at public meetings convened by the

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Idaho Water Resources Board. These were held in Idaho Falls, Pocatello, Twin Falls, Boise, and Lewiston. (After each landing, Tom Nelson would exclaim: “Cheated death again!”) The meetings were held to provide public information and receive public comment about the proposed agreement outlined in the Framework. The reception we received at some of the venues for the “Pat, Pat, and Tom” show was less than friendly. After one such presentation, I was publicly called a “loose cannon.” The next day I was amused to find that some wag had hung a sign on the cannon on the statehouse lawn which read “SS Costello.”

Eventually, all of the terms of the Swan Falls contract had been drafted, save one: the subordination clause. The attorney general’s position was that the power company should agree to immediately subordinate its rights. The power company argued its rights should only be subordinated over time as new development was approved according to the public interest criteria set forth in the agreement⁸. It appeared we were at impasse over this issue. That’s what I reported to Governor Evans when I went to Dempsey Creek.

After chewing over the issue in the bunkhouse, the governor instructed me to consult with Rexburg water lawyer Ray Rigby and other members of the governor’s Swan Falls advisory council before throwing in the towel. The next morning, the governor and I rode back down the trail to the pickup. I took off to confer with Rigby and the others. During these meetings, Rigby came up with the “trust water” concept which eventually broke the impasse.⁹

In the early morning of October 25, 1984, Evans, Jones, and Bruce again met in the governor’s office to sign two documents. The first, simply entitled “Agreement,” was the main Swan Falls contract, including six pieces of proposed state legislation to set up the trust mechanism and the public interest criteria, to fund various

studies, and, not insignificantly, to commence the general stream adjudication of the Snake River. The second, styled "Contract to Implement Ch. 259, Sess. Laws, 1983," provided for the dismissal of the "Idaho Power Company vs. the World" case on the terms set forth in S.B. 1180.

Implementation of the agreement

The Legislature adopted the Swan Falls legislative package during the 1985 session with surprisingly little controversy or debate, compared to the fireworks over subordination that had marked the preceding two sessions. The Idaho Water Resource Board amended the State Water Plan to conform to the minimum flow and other provisions of the Swan Falls agreement. The final stumbling block to implementation of the agreement was its approval by the Federal Energy Regulatory Commission. That had not been forthcoming by the fall of 1986, so Nelson, Kole, and I went to Washington, D.C. to work with our congressional delegation on a legislative directive to FERC to approve the agreement. Within a week's time Senator James McClure had succeeded in attaching the necessary Swan Falls language to an energy conservation bill then poised for final passage. We headed back to Idaho thinking our work on Swan Falls was finally over. The three of us were chagrined to learn a short time later that, for reasons having nothing to do with the Swan Falls provision, President Ronald Reagan had vetoed the bill! Fortunately, Senator McClure was able to secure passage of the Swan Falls language early in the next Congress.¹⁰

2009: Another Swan Falls agreement

Of course, the 1984 agreement would not prove to be the end of the Swan Falls controversy. In 2007, Idaho Power filed a lawsuit against the state over the meaning of the "trust water" provision of the 1984 agreement. The district court ruled in the state's favor, and the parties entered into yet another agreement, the 2009 "Framework Reaffirming the Swan Falls Settlement."¹¹

Swan Falls legacy

Probably the most important legacy of the Swan Falls agreement was the commencement of the Snake River Basin Adjudication. At the time we estimated it would take 10 years and \$28 million to complete the adjudication. It has now taken more than 20 years. According to Clive Strong, chief of the Idaho Attorney General's Natural Resources Division, it is projected to be completed in 2012. The total cost will likely end up being close



Photo courtesy of Library Of Congress

A man stands at an irrigation headgate identified as being in Idaho during the early 20th Century. Federal Bureau of Reclamation engineers transformed the arid Snake River plain into a fertile land with dams and reservoirs.

to three times the initial estimate. In the process, reserved water rights for the Fort Hall Shoshone-Bannock Tribe, the Shoshone-Piute Tribe, and for the Nez Perce Tribe, as well as several federal agencies have been defined and quantified. Idaho is now in a much better position to manage its own water resources as a result.

About the Author

Pat Costello teaches Trial Advocacy and Dispute Resolution at the University of Idaho College of Law where he also supervises two of the College's clinics. He is a former Clearwater County magistrate judge, and was legal counsel to Governors John V. Evans and Cecil D. Andrus from 1981-87.

Endnotes

¹ Tom Nelson is now a Ninth Circuit Judge on senior status.

² Pat Kole is now Vice-president for Legal and Governmental Affairs for the Idaho Potato Commission.

³ *Idaho Power Company v. State of Idaho*, 104 Idaho 575, 661 P.2d 741 (1983). As used herein, subordination means that the holder of a senior water right could not assert the existence of that right to prevent development of other projects, even if the projects adversely impacted the holder's right. Patrick D. Costello and Patrick J. Kole, *Commentary on Swan Falls Resolution*, W. Nat. Resources Litig. Dig. 11, 12 n. 2 (Summer 1985).

⁴ Jeffrey C. Fereday and Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal, and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev. 573, 597 (1992)

⁵ Jim Jones is now an Idaho Supreme Court justice.

⁶ As the negotiations wore on, Tom Nelson demonstrated day after day how to use humor and colorful metaphors instead of bluster and threats to make effective negotiating points. In addition to the dead sturgeon remark, I remember him repeatedly warning what would happen to the Snake River if rutabagas ever reached \$100 per sack. Pat Kole told me recently he believed the use of humor to dispel what was a fairly tense atmosphere was one of the keys to the successful conclusion of our negotiations.

⁷ 743 U.S.C. § 666

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⁸ The public interest criteria were: "(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 costs 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 about the Murphy Gage 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." Costello & Kole, *supra* at 17. These criteria were eventually incorporated into Sec. 42-203C, I.C.

⁹ Rather than immediately subordinating the Swan Falls water right, it would be held in trust by the state to be gradually subordinated over time as new water rights were approved according to the public interest criteria set forth in the preceding note. For more thorough discussions of the trust water concept, see generally: Clive J. Strong and Michael C. Orr, *The Origin and Evolution of Hydropower on the Snake River: a Century of Conflict and Cooperation*, 46 Idaho L. Rev. 119 (2009) and also Fereday & Creamer, *supra*, note iv.

¹⁰ Pub. L. No. 100-216, 101 Stat. 1450 (1987)

¹¹ Strong and Orr, *supra*, note viii, at 166-175.