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

In Re SRBA	)	
	)	
Case No. 39576	)	Consolidated Subcase: 92-23
	)	
_____	)	
IDAHO POWER COMPANY,	)	IDAHO POWER COMPANY'S
	)	SCHEDULING AND STATUS
	)	CONFERENCE REPORT
Plaintiff,	)	
	)	Date: December 18, 2007
v.	)	Time: 3:00 p.m.
	)	Hon. John M. Melanson
STATE OF IDAHO; C.L. "BUTCH" OTTER,	)	
Governor of the State of Idaho; LAWRENCE G.	)	
WASDEN, Attorney General of the State of Idaho;	)	
IDAHO DEPARTMENT OF WATER	)	
RESOURCES; and DAVID TUTHILL, Director,	)	
Idaho Department of Water Resources	)	
	)	
Defendants.	)	

The Idaho Power Company ("Idaho Power") hereby files this scheduling and status conference report for consideration by the Court in advance of the scheduling and status conference in this matter set for December 18, 2007 at 3:00 p.m.

1. STATUS OF PROCEEDINGS

Idaho Attorney General and IDWR Filings Claiming Legal Title to Idaho Power Water Rights, and Idaho Power's Complaint and Petition Broadening Disputed Issues Concerning Swan Falls Settlement

In late 2006 and early 2007, the Idaho Attorney General filed with IDWR various Notices of Change of Ownership claiming legal title to water rights in Basins 2, 36 and 37 decreed and licensed in Idaho Power's name. The IDWR Director's Reports for Basins 2 and 37 adopted the Attorney General's position that the State holds legal title to the Idaho Power water rights (the water rights at issue in Basin 36 previously had been partially decreed in Idaho Power's name by the SRBA Court on November 11, 1997).

In response to the Attorney General's filings and IDWR's concurrence, on May 10, 2007, Idaho Power filed its *Complaint and Petition for Declaratory and Injunctive Relief* ("Complaint and Petition") raising a more comprehensive set of issues between Idaho Power and the State of Idaho concerning the Swan Falls Agreement beyond the "legal title" issue raised by the State. Along with the Complaint, Idaho Power also filed on May 10, 2007 a *Motion to Stay or Consolidate* proceedings regarding Idaho Power's water rights in Basins 2, 36 and 37.

While the *Complaint and Petition* fully set forth the specific relief sought by Idaho Power, a summary is presented in the Court's July 24, 2007 *Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues in Consolidated Subcase; and Permitting Discovery Pending Objection Period in Basin 02; and Notice of Scheduling Conference* ("Consolidation Order"), which is set forth below.

- A. A declaration that there was no “Trust Water” available when the Swan Falls Agreement was executed in 1984, and therefore no trust res and no valid trust established under the Swan Falls Settlement.
- B. A reformation of the Swan Falls Settlement based on mutual mistake of fact regarding the existence of Trust Water, eliminating any asserted trust while retaining provisions unrelated to the purported trust.
- C. A declaration that to the extent there is a valid trust, the trust res is water and not water rights, the State of Idaho does not hold legal title to Idaho Power's water rights, and title to the water rights referenced in the Swan Falls Settlement is quieted in Idaho Power.
- D. A declaration that the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.
- E. A declaration that Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to the use of water for ground water recharge.
- F. A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for the multiple year impacts of ground water pumping.
- G. Preliminary and permanent injunctions: (a) enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights; (b) ordering IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20 year terms of previously granted permits for new appropriations of Trust Water; (c) ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement; and (d) ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple year impacts of ground water pumping in the ESPA.

Consolidation Order at 3-4.

Court's Ruling Confirming SRBA Jurisdiction over Declaratory Relief Claims and Consolidating Issues of Interpretation and/or Application of Swan Falls Agreement

On May 30, 2007, the State filed a *Motion to Strike or Alternatively Dismiss the Complaint and Petition* (“*Motion to Dismiss*”) and supporting brief, making various arguments that the SRBA Court lacked jurisdiction to consider any issues concerning interpretation or

application of the Swan Falls Agreement beyond the basic elements of the water rights concerned including the question of title to those water rights. Following briefing and a hearing on June 25, 2007, the Court issued its July 24, 2007 *Consolidation Order*, including the following holdings concerning its jurisdiction to resolve the matters raised in the *Complaint and Petition*:

- A. “The State's motion to dismiss on the grounds that the *Complaint and Petition* do not follow SRBA procedure is Denied.” *Consolidation Order* at 9.
- B. “[J]urisdiction to preside over the declaratory relief being sought by Idaho Power resides with the SRBA. *Id.* at 12.
- C. “[D]ismissal or transfer of the reformation cause of action would be premature.” *Id.* at 13.
- D. “[T]he causes of action for preliminary and permanent injunctive relief specifically against the Director of IDWR and IDWR are separated from the remaining causes of action and stayed pending resolution of the remaining issues or until further order of the Court.” *Id.* at 14.
- E. “Idaho Power's cause of action for a preliminary injunction ordering the Attorney General to repeal Opinion No. 06-02 shall be dismissed.” *Id.* at 15.

Regarding consolidation and other procedural aspects of the litigation, the Court's

Consolidation Order held:

- A. “[I]ssues pertaining to ownership and interpretation and/or application of the Swan Falls Agreement in [the Basin 2, 36 and 37 subcases at issue] shall be separated and consolidated with subcase 92-23 into a single consolidated subcase for purposes of resolution.” *Id.* at 16.
- B. “Future pleadings addressed to the issues of ownership and interpretation and/or application of the Swan Falls Agreement should be filed in said consolidated subcase.” *Id.*
- C. “Matters other than ownership of the water rights and interpretation and/or application of the Swan Falls Agreement shall remain with the assigned special master and may proceed as determined by the special master.” *Id.* at 16-17.
- D. “The proceedings in Consolidated Subcase 92-23, with the exception of discovery, are stayed pending the close of the objection period for Basin 02 on December 5, 2007. However, the parties may commence discovery.” *Id.* at 17.

- E. "The Court will set a status conference ... for purposes of determining whether the issues in Consolidated Subcase 92-23 need to be resolved before the Court can address Basin-Wide Issue 13." *Id.* at 17.

2. ISSUES REMAINING BEFORE SRBA COURT

As a result of the Court's *Consolidation Order*, the following issues or claims for relief remain for immediate determination under the SRBA Court's jurisdiction in Consolidated Subcase 92-23.

- A. Declaration as to absence of trust water and no valid trust (First Claim for Relief).
- B. Reformation based on mutual mistake eliminating trust while retaining other provisions of Swan Falls Settlement (Second Claim for Relief).
- C. Declaration as to nature of trust res and quiet title (Third Claim for Relief).
- D. Waiver, estoppel and laches (Fourth Claim for Relief).
- E. Declaration as to no subordination to recharge (Fifth Claim for Relief).
- F. Declaration as to State's obligations regarding Swan Falls minimum flows and administration (Sixth Claim for Relief).

This list does not include those claims of relief that were separated and stayed until further action of the Court, or the only claim dismissed by the Court, which was the claim for injunctive relief seeking a repeal of Attorney General Opinion 06-2.

3. PARTIES TO CONSOLIDATED SUBCASE 92-23

The parties to Consolidated Subcase 92-23 include all those parties who have raised issues concerning "ownership and interpretation and/or application of the Swan Falls Agreement" in pleadings filed in Consolidated Subcase 92-23 or in those subcases to which the consolidation applies. Those parties include: (a) Idaho Power; and (b) the State. With respect to other parties filing objections in Basin 37, including the Idaho Ground Water Appropriators ("IGWA") and the City of Pocatello, it is unclear whether their objections involve concern "ownership and interpretation and/or application of the Swan Falls Agreement."

In order to ensure the orderly progression of this litigation, the Court should adopt a deadline for the filing of any Motions to Participate under SRBA Administrative Order #1, Section 10.k. In addition, Idaho Power observes that additional parties may seek to join Consolidated Subcase 92-23 through the filing of responses due February 5, 2007 in Basin 2, as discussed immediately below.

4. PENDING MOTIONS BEFORE THE COURT

Idaho Power Motion for Continuance of Stay Pending Filing of Responses to Objections in Basin 2

On December 7, 2007, Idaho Power filed a *Motion for Continuance of Stay*, seeking to continue the Court's stay (except for discovery) on proceedings in Consolidated Subcase 92-23, which the Court put in place only until the filing of objections in Basin 2. Idaho Power's motion observes that additional parties may seek to participate, and that additional issues may be raised, through the filing of responses to objections filed in Basin 2 on or before February 5, 2008. Idaho Power's motion is motivated by judicial economy, as it seeks to ensure that all potential parties are before the Court before the litigation proceeds forward on the merits. The State opposes Idaho Power's motion. *See State of Idaho 's Response to Idaho Power Company 's Motion for Continuance of Stay*, dated December 14, 2007.

State of Idaho's Motion for Partial Summary Judgment

On December 14, 2007, the State filed a *Motion for Partial Summary Judgment* which seeks judgment as a matter of law as follows (see *Motion* at 2):

1. That pursuant to Idaho Code § 42-203B, legal title to any portion of the water rights subject to the Swan Falls settlement for flows in excess of the minimum flows established at the Murphy Gage under the State Water Plan is held in trust by the State of Idaho, by and through the governor, for the benefit of Idaho Power Company and for the benefit of the People of the State of Idaho;

2. That pursuant to Idaho Code § 42-203B, the water rights for power purposes held in trust by the State under Idaho Code § 42-203B are subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to State law; and

3. That the equitable doctrines of reformation, mutual mistake of fact, estoppel, waiver, and laches cannot be invoked or applied in a manner contrary to or inconsistent with Idaho Code § 42-203B.

Idaho Power received notice of the State's *Motion for Partial Summary Judgment* on the day it was filed. The State did not file an accompanying memorandum from the State detailing the arguments and other materials supporting the State's motion. While the State's motion does contain several paragraphs of argument, it states that the grounds for the motion will be fully explained in a supporting memorandum to be filed at some future date, in accordance with the Court's scheduling determinations and orders. Idaho Power received notice of the State's motion on the day it was filed.

Idaho Power submits that a briefing schedule, and particularly the date for Idaho Power's response to the State's *Motion for Partial Summary Judgment* and supporting brief, cannot be determined until the State files its brief and other supporting materials. Until the State files its supporting brief, it is impossible to determine; (1) the extent of the State's arguments on these fundamental issues in this litigation; (2) whether the State intends to file an over length brief; and (3) the evidence, affidavits or other supporting materials relied on by the State. Therefore, a standard briefing schedule would unquestionably be inappropriate given the apparent scope of the State's motion.

5. DISCOVERY AND POTENTIAL DOCUMENTARY EVIDENCE

Since the Court stayed Consolidated Subcase 92-23, except for discovery, both parties have initiated discovery efforts. On October 9, 2007, Idaho Power served its *First Set of Discovery Requests* on the State, and the State responded on November 13, 2007. On October 18, 2007, the State served on Idaho Power its *First Set of Requests for Admissions and Requests for Production of Documents*, and Idaho Power served its response on November 19, 2007. On November 20, 2007, the State served its *First Set of Interrogatories to Idaho Power Company*,

and Idaho Power's response is forthcoming.

Idaho Power has in its possession at this point over 40,000 pages of documents. Given the extent of potentially relevant documents, additional time will be necessary to discover and organize documents relevant to the many issues in this case.

6. POTENTIAL FACT AND EXPERT WITNESSES

Both parties have identified a large number of individuals with knowledge of relevant facts in this matter. The State, in response to discovery requests by Idaho Power, identified some 58 individuals having knowledge of relevant facts, a number of whom are or were in high level positions, and a number of whom are scattered in various parts of the country. Idaho Power is in the process of compiling its list of individuals with knowledge of relevant facts, and at this point expects that it will exceed the length of the State's list, although there will be some overlap between the two parties' lists.

Idaho Power expects that this litigation will require expert witness testimony. Idaho Power has not finalized any expert designations or set a timetable for any formal expert reports pending the Court's adoption of a scheduling order in this case.

7. PROPOSED PRELIMINARY PRETRIAL AND TRIAL SCHEDULE

The parties have discussed their views on case scheduling, but have been unable to come to agreement on a proposed pretrial and trial schedule. Idaho Power believes that in light of the complexity of this litigation, the need to finalize the parties to the Consolidated Subcase before moving forward on the merits as sought by Idaho Power's *Motion to Continue Stay*, and the State's recent filing of its *Motion for Partial Summary Judgment*, which will necessarily delay discovery and trial preparation, the following schedule is appropriate for this litigation:

2/5/08	Responses due in Basin 2 (other parties may still join)
2/5/08	Deadline for other parties to join (via Notice of Participation)
2/5/08	Summary judgment motion filing open (once all parties in)
	Motions, discovery and case preparation proceed
11/08	Expert witness designations
12/08	Expert witness reports
12/08	Initial fact witness lists/disclosures
2/09	Rebuttal expert designations and reports
75 days before PTC	Fact discovery cutoff
60 days before PTC	Expert discovery cutoff
45 days before PTC	Dispositive motion cutoff
2 wks before PTS	Exhibit lists
1 wk before PTS	Final Witness lists
1 wk before PTC	Pretrial Statement or Stipulation ("PTS") (IRCP 16(d))
20 days before trial	Final Pretrial Conference ("PTC") (per IRCP 16(d))
5/09 (18 mos. away)	Trial (2-4 weeks)

Dated this 17th day of December, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December 2007, a true and correct copy of the foregoing **IDAHO POWER COMPANY'S SCHEDULING AND STATUS CONFERENCE REPORT** was filed with the SRBA via facsimile and served by the methods indicated below, and addressed to each of the following:

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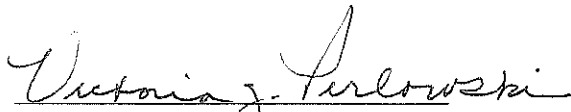
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