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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

IDAHO POWER COMPANY,

Plaintiff,

v.

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.

)
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) Consolidated Subcase No. 92-00023
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) IDAHO POWER COMPANY'S REPLY
) MEMORANDUM IN SUPPORT OF
) CROSS MOTION FOR SUMMARY
) JUDGMENT
)
)

INTRODUCTION

The consent judgments entered in Ada County District Court Case Nos. 62237 and 81375 (the "Consent Judgments") made it clear that Idaho Power Company ("Idaho Power") was the owner of the disputed water rights described in the Swan Falls Agreement¹ and disposed of all matters at issue in those actions with prejudice against the State of Idaho. The State's strained attempt in its Memorandum in Response to Idaho Power's Motion for Cross Summary Judgment (the "State's Response") to ignore the fact that the Ada County actions did indeed address the issue of ownership fails in the face of the plain language of these Judgments. And, contrary to the State's claim, the District Court in the Ada County actions had jurisdiction to enter these Consent Judgments as a matter of law. The doctrines of *res judicata* and judicial estoppel therefore bar the State from asserting ownership of Idaho Power's water rights described in the Swan Falls Agreement in conflict with the Judgments. For all of these reasons, Idaho Power is entitled to an order of this Court on Summary Judgment quieting title to Idaho Power's water rights.

STATEMENT OF PERTINENT FACTUAL HISTORY

Idaho Power incorporates the Statement of Facts as set forth in its original Memorandum in Support of Cross Motion for Summary Judgment (the "Cross Motion") and in its Memorandum in Response to the State's Motion for Summary Judgment ("Idaho Power's Summary Judgment Response").

In addition, Idaho Power is compelled to respond to two assertions raised by the State, even though these assertions are irrelevant to Idaho Power's Cross Motion. The State asserts that Idaho Power could not be "trusted to honor a promise to subordinate" its water rights in the

¹ For ease of reference, Idaho Power refers to the water rights described in the Agreement as the "Swan Falls Agreement Water Rights."

future and that the ownership and control of the Swan Falls Agreement Water Rights by the State was the only way to “ensure that the hydropower water rights actually would be subordinated.”²

Characterizing Idaho Power’s basis for protecting its water rights as motivated by a desire to “increase revenue,” as the State does, is disingenuous and demonstrates a lack of understanding of utility regulation. The economic incentive that Idaho Power has to protect its water rights and maintain flows in the Snake River is the same incentive that the State should have – to preserve low-cost hydropower resources and correspondingly reasonable power rates for the citizens of Idaho who are Idaho Power’s customers. Idaho Power is an “electrical corporation” regulated by the Idaho Public Utilities Commission (“IPUC”) under Title 61 of the Idaho Code. As such, the IPUC sets the rates that Idaho Power charges its customers for electrical service, as well as the rate of return that the Company can earn on its capital. Through an approved “Power Cost Adjustment” process, the IPUC ensures that the vast majority of any increased revenues attributable to water availability for hydro generation goes to Idaho Power customers, not to its shareholders. The maintenance of adequate river flows for hydropower benefits all of Idaho Power’s customers, and also the Idaho economy, by keeping Idaho Power’s electrical rates among the lowest in the nation. To say that Idaho Power is driven by a desire to increase revenue and thereby infer that it is solely driven by a “profit motive,” is simply incorrect.

Further, the State asserts that Idaho Power historically could not be “trusted to honor a promise to subordinate.” Consistent with this history, according to the State, Idaho Power’s

² See State’s Response at 25-28. Reflective of this inference is the following: “The dispute over control of the water rights reflected the State’s view at the time that Idaho Power could not be trusted to honor a promise to subordinate the water rights in the future. As previously discussed, Idaho Power obtained the support of the State and the public for Idaho Power’s Hells Canyon project in the late 40s and early 50s in large part because Idaho Power trumpeted that unlike the federal government, Idaho Power always had and always would subordinate its hydropower water rights on the Snake River to upstream development. Idaho Power continued making these representations for years, and profited handsomely from them: agricultural development encouraged by Idaho Power increased demand for electricity, expanded Idaho Power’s markets and increased revenue.” *Id.* at 25.

representation that it would subordinate its water rights to new water rights approved by the State under the Swan Falls Agreement was a hollow promise that would be abandoned when it was expedient for Idaho Power to do so.³ This grossly mischaracterizes not only the history leading up to the Swan Falls Agreement, but the last twenty-three years of experience under the Agreement. As the State acknowledges, the Idaho Supreme Court's reversal of the district court decision holding that the Swan Falls water rights were effectively subordinated by the Hells Canyon subordination provisions "was widely unexpected." This decision put Idaho Power in the unenviable position of having to protect these unsubordinated water rights, for the benefit of its ratepayers, from depletion by upstream junior uses.⁴ It was a difficult time for Idaho Power and the State, but eventually the parties reached agreement and Idaho Power agreed to subordinate certain flows provided that the new consumptive uses complied with criteria established in the Agreement. Since the execution of the Swan Falls Agreement, Idaho Power has not asserted that its Swan Falls Agreement Water Rights identified in the Agreement are not subject to subordination as provided by the Agreement, and Idaho Power makes no such assertions in this action.⁵ In fact, in the twenty-plus years since the implementation of the Swan Falls Agreement the State has processed applications to appropriate trust water under the provisions of the Agreement and Idaho Power has participated in that process.⁶

ARGUMENT

I. THE DOCTRINE OF RES JUDICATA BARS THE STATE'S CLAIM TO LEGAL TITLE AND IDAHO POWER IS ENTITLED TO SUMMARY JUDGMENT AS A

³ See State's Response at 26.

⁴ *Id.* at 8-9.

⁵ Idaho Power does seek a declaration from the Court in this action that the Swan Falls Agreement did not subordinate the Swan Falls Agreement Water Rights to ground water recharge. Instead, Idaho Power seeks clarification of the nature and effect of the subordination provisions of the Agreement, not the fact that the water rights are in fact subordinate to certain upstream consumptive uses.

⁶ There has been little processing of applications for trust water since 1992 when a series of moratorium orders was entered by the Director of IDWR. The first moratorium order was entered in May 1992. These orders are available on IDWR's website at www.idwr.idaho.gov/about/orders_moratorium.htm.

MATTER OF LAW ON THE ISSUE OF OWNERSHIP OF THE SWAN FALLS AGREEMENT WATER RIGHTS.

A. Idaho Power Sought a Determination Regarding the Ownership and Status of Its Water Rights in Both Ada County District Court Actions, and the Consent Judgments Therefore Bar the State from Asserting Its Ownership of These Rights.

The State argues that the doctrine of *res judicata* does not bar the State's claim to ownership of Idaho Power's water rights, because the lawsuits adjudicated by the Consent Judgments were "principally declaratory judgment actions on the question of priority and subordination and did not present or resolve disputed claims of ownership." *See* State's Response at 2. The State bases this argument on a largely irrelevant revisitation of history, and a reargument of its own Motion for Summary Judgment. Neither is helpful to the Court. There are really only five pertinent documents the Court need consider to determine that the question of the ownership of Idaho Power's water rights was in fact resolved by the Consent Judgments: the complaints in the two Ada County cases, the Swan Falls Agreement in which the State and Idaho Power agreed to file Consent Judgments "that describe Idaho Power's water rights," and the Consent Judgments.

Strikingly, the State fails to compare, analyze, or even mention any of the allegations at issue in the Ada County complaints and adjudicated in those actions. In fact, both complaints clearly alleged ownership of the Swan Falls Agreement Water Rights the State is now trying to take from Idaho Power, and sought relief in the form of judgments validating the ownership and enforcement of those rights as against upstream juniors.

Idaho Power filed Ada County Case No. 62237 on October 22, 1977, after the Idaho Water Resource Board (the "Board") published the December 1976 State Water Plan ("1976 Water Plan") adopting a minimum flow at Swan Falls of 3300 cfs. The 1976 Water Plan recognized that "[a] flow of 3,300 cfs at Swan Falls is about one-third of the flow necessary to

meet the entitlement of hydro-generation at that power plant *if the recorded water filings are valid.*”⁷ The 1976 State Water Plan therefore put at issue the validity of Idaho Power’s water rights. The Board had also filed an application to construct Shoestring Dam, which had the potential to flood Idaho Power’s Bliss, Lower Malad, Lower Salmon, and Upper Salmon projects.⁸ This action raised the potential for a taking of Idaho Power’s facilities and water rights. Finally, a group of Idaho Power ratepayers had filed a complaint against Idaho Power, alleging that Idaho Power had an affirmative duty to protect all present and future water rights above and below Swan Falls to protect the rate base of its customers.⁹ This action necessarily required a determination of the ownership and nature of Idaho Power’s water rights, so they could be enforced.

Idaho Power thus alleged in the Complaint that “[a] decision of this court concerning the status of Idaho Power’s Swan Falls water right and other water rights between Milner Dam and Hells Canyon is required for the guidance of the parties hereto, and a justiciable controversy exists between and among the parties hereto.”¹⁰ And in its prayer for relief, Idaho Power requested an order “[a]djudging and decreeing that plaintiff’s water rights at its Swan Falls power plant are valid, subsisting water rights not subject to upstream depletion and the subsequent rights of holders of water rights in the Snake River above Swan Falls and below Milner Dam are subject to the said rights of Idaho Power Company.”¹¹ Ownership of Idaho Power’s rights at its Swan Falls facility was unquestionably at issue in the complaint in Ada County case no. 62237.

⁷ Davis Aff., Ex. D (Complaint in 62237) at 11 (citing 1976 Water Plan at 116) (emphasis added).

⁸ *Id.* at 10.

⁹ *Id.* at 14-15.

¹⁰ *Id.*

¹¹ Davis Aff., Ex. D at 16.

The District Court ultimately entered summary judgment in favor of the defendants in the case finding that the Company's water rights at Swan Falls were subordinate to upstream depletions. That ruling was appealed and resulted in the seminal 1983 Swan Falls case, *Idaho Power Co. v. State*, 104 Idaho 575, 661 P.2d 741 (1983), which added fuel to the Swan Falls controversy. Justice Shepard opened the opinion for the Court by briefly describing the controversy:

Narrowly stated, *the case involves the validity of Idaho Power's water rights at its Swan Falls power plant on the Snake River*, and the case arose when Idaho Power brought the action *seeking a determination of the validity of those water rights*, and that they were not subject to future upstream depletion. More broadly stated, the case involves conflicting claims to utilization of the waters of the Snake River between competing interests of power generation and agricultural irrigation. The issues involved are of large significance to the majority of the people of the state.

Id. at 578, (*emphasis added.*)¹²

Clearly, the validity of the water rights held or *owned* by Idaho Power at Swan Falls was at the very heart of this case. The Supreme Court reversed the district court, finding that Idaho Power's Swan Falls water rights were not subordinated and remanded the case back to the district court to determine the validity of the defendants' arguments that the Company had abandoned, forfeited or waived that portion of its water rights that had been diverted by junior users upstream of Swan Falls. This litigation remained pending until resolved through the Swan Falls Agreement.

In response to the above Supreme Court decision, Idaho Power filed a subsequent action in 1983 in Ada County case no. 81375. Again, this was in response to ratepayer concerns that Idaho Power was not protecting its assets. The complaint sought to 1) establish the nature and

¹² Early in the opinion the Court also found that "Idaho Power had secured a federal court decree which, together with state water licenses, granted Idaho Power water rights at Swan Falls of 9450 cfs with priority dates ranging from 1900 to 1919. However, it is undisputed that the Swan Falls power plant's hydroelectric capacity is 8400 cfs, and therefore the water rights at Swan Falls are limited to 8400 cfs." *Id.*

extent of its rights at its various facilities, and 2) enforce those rights as against upstream juniors. Idaho Power filed its complaint against the State and some 7500 junior water users in the Snake River and ESPA.

In parallel counts, Idaho Power asserted the ownership of water rights at each of its facilities. Count One Paragraph VI, Count Three Paragraph III, Count Four Paragraph III, and Count Five Paragraph III each alleged:

Idaho Power is the holder of certain licensed and decreed water rights for the generation of power at its [Swan Falls, Bliss, Lower Salmon, Upper Salmon] power plant, all of which are more specifically identified as follows:

[listed specific licenses and decrees for the water rights at each plant].¹³

Idaho Power made similar parallel prayers for relief as to each count:

Adjudging and decreeing that Idaho Power's water rights at its [Swan Falls, Bliss, Lower Salmon and Upper Salmon] power plant are superior in time and in right to all consumptive rights claimed by the named Defendants herein and each of them and that the rights of each of said Defendants are junior and subordinate to Idaho Power's [Swan Falls, Bliss, Lower Salmon and Upper Salmon] right;

Adjudging and decreeing that the superior water rights of Idaho Power at the [Swan Falls, Bliss, Lower Salmon and Upper Salmon] power plant, or any portion thereof, have neither been abandoned, forfeited, waived, nor lost in any other manner to the Defendants, or any of them, and that as a consequence, the Defendants' consumptive use of water which is tributary to the Snake River above the Swan Falls plant is contrary to and in violation of the superior water rights of Idaho Power[.]¹⁴

Therefore, as with its complaint in case no. 62237, the complaint in 81375 alleged the ownership and enforcement of Idaho Power's rights at each of its facilities. The State's position that "the Ada County cases were principally declaratory judgment actions on the questions of priority and subordination and did not present or resolve disputed claims of ownership," is belied by the plain language of both complaints. *See* State's Response at 2.

¹³ Davis Aff., Ex. E at 80, 263, 265, 267.

¹⁴ *Id.* at 272-276.

With these complaints in place, the State and Idaho Power entered into negotiations to try to resolve the lawsuits and provide additional water for new consumptive uses upstream of Idaho Power's Swan Falls facility. As a starting point, the parties developed the Framework for Final Resolution of Snake River Water Rights Controversy (the "Framework"), stating that the purpose of the negotiations was to "resolve the controversy and settle the pending litigation[.]"¹⁵ One of the goals of the negotiation was to structure "the settlement of the pending Swan Falls litigation ...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 reject proposed development which it deems to be detrimental[.]"¹⁶ The Framework concluded that "the focus of settlement of the 'Swan Falls Controversy' has necessarily been on the claims of right and authority at that site."¹⁷

The Framework was signed in October 1984, the same month the parties entered into the final Swan Falls Agreement. The Agreement at paragraph 7(F) states that "[u]pon implementation of this Agreement, State and Company shall consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that *describe the Company's water right as provided in paragraphs 7(A) through 7(E).*"¹⁸ In 1984, the State thus knew and understood that ownership of Idaho Power's Swan Falls Agreement Water Rights was at issue in both Ada County cases, and further understood that the Swan Falls Agreement and the Consent Judgments in both actions would serve as a resolution of all issues in those cases.

Consistent with the Framework, the Swan Falls Agreement and the Consent Judgments make clear that Idaho Power retained ownership of the subordinated Swan Falls Agreement

¹⁵ Affidavit of Michael C. Orr in Support of State of Idaho's Motion for Partial Summary Judgment ("Orr Aff."), Ex. 29 (Framework).

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.*

¹⁸ Davis Aff., Ex. A (Swan Falls Agreement) at 4 (emphasis added).

Water Rights. In its forty-nine page Response, the State never mentions that the Agreement and the Consent Judgments state: “State and Company agree that *Company’s water rights* shall be as follows[.]” and then list each of the Idaho Power water rights, incorporating the minimum flow provisions and the subordination requirements.¹⁹ Importantly, paragraphs 7(B) in all three instruments entitle Idaho Power Company “to the use of the flow of the Snake River at its facilities to the extent of its actual beneficial use [8400 c/f/s] but not to exceed those amounts stated in [the water right licenses listed in paragraph 7A.]”²⁰ Paragraph 7(B) thus explicitly recognizes that Idaho Power’s right to use water at its facilities was by virtue of its licenses and decrees. Nothing in paragraphs 7(A) through 7(E) even hints that there was an agreement between the State and Idaho Power for Idaho Power to convey ownership of all or any portion of its water rights to the State.

The State focuses on Idaho Code § 42-203B as the end of all discussion concerning ownership of Idaho Power’s water rights.²¹ The State argues that the Consent Judgments “were intended to simply terminate litigation that had been mooted by implementation of the settlement, on terms consistent with the implementation of the settlement.” *See* State’s Response at 18. But as discussed above, the Consent Judgments were intended by the parties to “describe the Company’s water right as provided in paragraphs 7(A) through 7(E).”²² This was an implementation condition of the Agreement of equal standing to the enactment of the suite of legislative initiatives (of which Section 42-203B was only one).

In 1989 at the time the State and Idaho Power negotiated and drafted the Consent Judgments, all of the Swan Falls legislation, including Section 42-203B, had been both adopted

¹⁹ Davis Aff., Exs. A, B, and C.

²⁰ *Id.*

²¹ It should be noted that the Consent Judgments decree that the Swan Falls Agreement “shall remain in full force and effect independent of this Judgment.” Davis Aff., Exs. B and C (Consent Judgments).

²² Davis Aff., Ex. A (Swan Falls Agreement) at 4.

and subsequently amended by the Idaho legislature.²³ However, the still pending actions were not simply dismissed. In each case, as required by the Agreement, the Court entered a judgment ordering, adjudging and decreeing that “Idaho Power Company’s water rights shall be as follows[.]”²⁴ Each Judgment then provided:

The above-captioned case is hereby dismissed *with prejudice as against the State defendants* as to all claims of plaintiff not resolved by the decisions of the Idaho Supreme Court reported as *Idaho Power Company v. State of Idaho*, 104 Idaho 570, 661 P.2d 736 and 104 Idaho 575, 661 P.2d 741 (1983) or by the entry of this Judgment.²⁵

The doctrine of *res judicata*, and more specifically the sub-category of claim preclusion, prevents the State from taking the action that it has taken to transfer Idaho Power’s Swan Falls Agreement Water Rights into its name. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007). “For claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment.” *Id.* at 124, 157 P.3d at 618. The State does not dispute that the present action involves the same parties, and that there was a final judgment in the Ada County cases. *See* State’s Response, generally. “Claim preclusion bars adjudication not only on the matters offered and received to defeat the claim, but also as to ‘every matter which might and should have been litigated in first suit.’” *Id.* at 126, 157 P.3d 613, 629 (*quoting Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993)). “In other words, when a valid final judgment is rendered in a proceeding, it ‘extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose.’” *Id.* (*quoting Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990)). Because the Idaho Supreme Court views the definition of “transaction or series of transactions” broadly and recognizes that “claim preclusion ‘may apply even where there is not a substantial

²³ Davis Aff., Exs. B and C (Consent Judgments).

²⁴ *Id.*

²⁵ *Id.*

overlap between the theories advanced in support of a claim, or in the evidence relating to those theories,” the State’s argument that the Ada County cases did not expressly decide the issue of ownership, fails. *Id.*

Indeed, one of Idaho’s early *res judicata* cases dealt specifically with the attempted relitigation of a water rights dispute. In *Joyce v. Murphy Land & Irr. Co.*, 35 Idaho 549, 208 P. 241 (1922), the same parties who had previously litigated the matter of entitlement to delivery of water entered into a second action to assert abandonment because of a change in the place of use of the same water rights. *Id.* at 552, 208 P. 244. In that case the Idaho Supreme Court announced the following rule:

If we are correct in the construction that we place upon the findings of fact, conclusions of law and the decree in the *Joyce-Rubin* case, and the construction placed thereon by this Court, the trial court did not err in granting the respondents’ motion for a nonsuit upon the theory that the issues in the instant action, and the rights of the parties to the use of the water of Sinker Creek determined, which being true, said decree constituted a previous adjudication of the right of respondent corporation to retain all of the eighty inches of water decreed to it, and would be *res adjudicata*. **...But conceding, as insisted by appellants, that this exact point was not presented upon the former trial, it was necessarily involved, and we think determined.** We think the correct rule to be that in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also as to **every matter which might and should have been litigated in the first suit.**

Id. at 553 (**emphasis added**) (citing *Shields v. Johnson*, 12 Idaho 329, 85 P. 972 (1906), and *King v. Cooperative Savings Assn.*, 6 Idaho 760, 59 P. 557 (1899)).

In sum, the State and Idaho Power consciously negotiated the terms of Idaho Power’s ownership of its water rights in the Swan Falls Agreement. The parties negotiated the language of the Consent Judgments, a requirement of the Swan Falls Agreement, which stated that Idaho Power owned the water rights at issue.²⁶ The Judgments dismissed the case as against the State

²⁶ Davis Aff., Exs. B and C (Consent Judgments).

with prejudice. As a result, the Consent Judgments ordering, adjudging and decreeing Idaho Power's water rights as the property of Idaho Power are *res judicata* and bar the State from now taking a position that Idaho Power's water rights were previously transferred to the State as a matter of law.

B. The Ada County District Court Had Jurisdiction to Enter the Consent Judgments in Case Nos. 62237 and 81375.

The State argues that the Consent Judgments cannot bar the State's assertion of ownership of Idaho Power's water rights because the Fourth Judicial District Court did not have jurisdiction to enter the Judgments after the commencement of the Snake River Basin Adjudication ("SRBA"). The State's argument is a somewhat desperate attempt to avoid the effect of the Consent Judgments.

Idaho Power Company v. The State of Idaho, case no. 62237, was filed in the Fourth Judicial District Court in 1977, approximately 10 years before the commencement of the SRBA.²⁷ *Idaho Power Company v. IDWR, IWRB, et al.*, case no. 81375, was filed in the Fourth Judicial District Court in 1983, approximately four years prior to the commencement of the SRBA.²⁸ Thus, it is undisputed that both actions were pending when the SRBA Court was created. The issue is therefore whether the legislature, in establishing the SRBA, intended to divest all other courts of jurisdiction to continue to hear matters then pending that might be the subject of the SRBA Court's jurisdiction. The legislature did not express any such intent. Moreover, the result of such a holding would be to throw into doubt the viability of all judgments in all other actions pending at the time the SRBA commenced that might arguably have been heard in the SRBA Court, some twenty years after the fact.

²⁷ Davis Aff., Ex. D (Consent Judgment in 62237 case).

²⁸ Davis Aff., Ex. E (excerpts of complaint in 81375 case).

Interestingly, one of the requirements of the Swan Falls Agreement was that the parties propose and support legislation that would create “[f]unding for a general adjudication of the Snake River Basin generally as set forth in Exhibit 2 attached hereto.”²⁹ As discussed above, the Agreement also required the State and Idaho Power to consent to entry of decrees in Ada County Civil Case Nos. 62237 and 81375 that “describe the Company’s water right as provided in paragraphs 7(A) through 7(E).”³⁰ On November 2, 1984, both the State and Idaho Power moved the Ada County District Court for a stay of proceedings in both cases, which stays remained in place until 1989, when the parties submitted the proposed Consent Judgments as required by the Swan Falls Agreement.

It seems curious that the parties would on the one hand agree to support legislation commencing the SRBA, and on the other agree to keep the pending litigation in place and later enter consent decrees in those cases, if they had intended for the SRBA to divest the Fourth Judicial District Court of jurisdiction to enter those Consent Judgments. Obviously, this was not the intent of the parties, it could not be what they presented to the legislature, and it therefore could not have been the intent of the legislation unless the legislature so expressly stated.³¹

The SRBA was commenced pursuant to uncoded law § 42-1406A on November 19, 1987. The uncoded law, as set forth in the Idaho Code compiler’s notes, and as amended in 1994, does not address whether the legislature intended the jurisdiction of the SRBA Court to

²⁹ Davis Aff., Ex. A. at ¶ 6(B).

³⁰ *Id.*, at ¶ 7(F).

³¹ Indeed, the legislature affirmed the Agreement which required the filing of the Consent Decrees in the Ada County Court. This further shows that the legislature had no intent to divest that court of jurisdiction to enter those Judgments.

retroactively strip all other courts of jurisdiction to continue to hear matters pending in those courts that were the subject of the SRBA Court's jurisdiction.³²

The State cites Idaho Code § 42-1404 (1), *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993) and *Sagewillow, Inc. v. Idaho Department of Water Resources*, 135 Idaho 24, 13 P.3d 855 (2000), in support of its proposition that the Fourth Judicial District Court lost jurisdiction to continue to hear the pending cases once the SRBA was established. Those authorities are all based on actions commencing *after* the initiation of the SRBA. Idaho Code § 42-1404 (1) precludes the *filing* of a private adjudication in any water system in which a general adjudication has commenced, but does not address the effect of a general adjudication on pending private adjudications.³³ Several Idaho cases, including *Walker* and *Sagewillow*, have stated that any action to determine the elements of a water right, including ownership, within the Snake River Basin, must be filed within the adjudication. *See, e.g. Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 206, 879 P.2d 1135, 1139 (1994). All of these cases, however, involve actions filed after the commencement of the SRBA.

As a general matter, statutorily created courts cannot divest existing courts of jurisdiction to hear pending matters, unless such intent is expressly stated.³⁴ This is particularly true where, as here, the jurisdiction involves substantive rights. The jurisdiction of the district courts to entertain private adjudications, declaratory judgment and other actions concerning the

³² See Supplemental Affidavit of Shelley M. Davis in Support of Memorandum in Support Idaho Power Company's Cross Motion for Summary Judgment, ("Supp. Davis Aff."), Ex. P, (Copy of uncodified law as set forth in compiler's notes).

³³ Idaho Code § 42-1404(1) states "Any claimant may file suit in the district court for the county in which the point of diversion or place of use of the claimed right is located for the purposes of adjudicating right to the use of water from any water system for which a general adjudication has not been commenced." In *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993), the Court analyzed Idaho Code § 42-1401(1) and stated that the statute "regulates the *filing* of private adjudications and prevents a claimant from *filing* a private adjudication when a general adjudication has been commenced."

³⁴ *Landgraf v. Usi Film Prods.*, 522 U.S. 244, 280 (1994) states in the absence of an express prescription as to the proper reach of a statute, "[i]f the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."

ownership, priority and enforcement of water rights are matters defining real property interests. Such actions are *ad hoc* in nature, involving and affecting only the parties to the particular litigation. Likewise, the commencement of a general adjudication such as the SRBA establishes and adjudicates those rights, but does so on a basinwide scale, and thus involves different notice and substantive procedure, involves more parties, and establishes all the elements of a water right as against all users in the basin.³⁵ As a result, the Court should apply a presumption that the SRBA statute does not apply retroactively to matters pending at the time of the commencement of the SRBA. In *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), the Court distinguished between "jurisdiction-allocating" statutes and those which "create[] jurisdiction where none previously existed." *Id.* at 951. The latter category includes a statute that "does not merely allocate jurisdiction among fora. . . . [A statute of this character] speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.* The SRBA clearly "created jurisdiction where none previously existed," and the Court should not consider its jurisdiction to have retroactive effect.

The policy reasons for preventing an implied or silent divestiture of jurisdiction in pending matters are obvious. At the time the SRBA was initiated, there were likely an unknown (and unknowable) number of actions then pending in various courts that arguably under *Walker*,

³⁵ The substantive nature of the SRBA statute is perhaps best illustrated by the legislature's reliance on the McCarran amendment, 43 U.S.C. § 666, to determine the proper geographic scope of the SRBA. *See* Idaho Code § 42-1406A(3)(b), H.B. 267, 1985 Idaho Sess. Laws ch. 118, at 287 ("The director shall not include in the [SRBA] petition . . . any adjudicated tributary unless the United States . . . refuse[s] to consent to the jurisdiction of the district court . . . pursuant to the McCarran amendment, 43 U.S.C. § 666."). Undoubtedly, a statute requiring pending cases to be litigated in a general adjudication, as opposed to an already pending private proceeding, would impact the substantive rights of the parties to the pending proceeding by subjecting the determination of their rights to those asserted by the United States. *See Dugan v. Rank*, 372 U.S. 609, 618 (1963) (holding the McCarran amendment is not applicable to a "private suit to determine water rights," but does apply to "a case involving a general adjudication") (emphasis in the original).

Sagewillow and the other cases could have or should have been under the jurisdiction of the SRBA Court. As these cases illustrate, there was and probably remains considerable and legitimate question as to the precise scope of the SRBA Court's jurisdiction, which the Idaho Supreme Court has had to resolve. If this Court accepts the State's argument that the commencement of the SRBA had the effect of instantly divesting all courts of jurisdiction to hear all pending matters that should be the subject of the SRBA, then the legitimacy of the judgments entered in those cases is thrown into doubt. All such judgments will be subject to reopening, or could be void. The legislature could not have intended such a result.

C. Separation of Powers Does Not Render the Consent Judgments Meaningless.

The State's argument that Idaho Code § 42-203B stripped the court of jurisdiction to enter the Consent Decrees deserves but a passing response. The State's argument is another repetition of its strained interpretation of 203B that that legislation transferred Idaho Power's water rights into a trust by operation of law. This argument has been addressed both in this Brief and in Idaho Power's Response to the State's Motion for Summary Judgment.

II. THE STATE IS JUDICIALLY ESTOPPED FROM ASSERTING LEGAL TITLE TO THE SWAN FALLS AGREEMENT WATER RIGHTS IN DIRECT CONFLICT WITH THE CONSENT JUDGMENTS.

The parties do not disagree that the doctrine of judicial estoppel is intended to ensure that a party does not assert a position in one lawsuit and then assert an entirely conflicting position in another lawsuit. As the United States Supreme Court stated, "[w]here a party assumes a certain position in a legal proceedings, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *See New Hampshire v. Maine*, 121 S. Ct. 1808, 1813-14, 532 U.S. 742, 747-48 (2001). The doctrine was adopted by courts to protect the dignity and integrity of the judicial process, by ensuring that a

party may not obtain a concession in one court, and then enter another court and based on misrepresentations, or simply because it has changed its mind, gain another advantage from the same party based on the same transaction or subject matter. *See Sword v. Sweet*, 140 Idaho 242, 252 (2004).

That is precisely what the State attempts to do here by asserting legal title to Idaho Power's Swan Falls Agreement Water Rights. The State spends nearly 30 pages of its Response to the Cross Motion arguing over the language of the Agreement, the Legislation and the legislative history surrounding the Swan Falls Legislation, while virtually ignoring the language of these Judgments. *See State's Response* at 13-28, 36-48. The State does this because, as discussed above, the Consent Judgments, and the language of the Agreement from which they derive, clearly establish that Idaho Power retained ownership of the water rights described in the Swan Falls Agreement. The language of these Consent Judgments is paramount and must be analyzed on the face of these documents and in conjunction with the Agreement – not based on the language of the Legislation as the State contends. This analysis confirms that the State has fundamentally changed its position from that set forth in the Agreement and the Consent Judgments.

A. The State has Altered its Position from that Clearly Expressed in the Language of the Consent Judgments and the Agreement.

1. The Agreement, not the Legislation, Controls the Meaning of the Consent Judgments.

In an attempt to divert attention from the Consent Judgments, the State makes the misguided argument that the Agreement and the Consent Judgments are dependent upon Section 42-203B of the Swan Falls Legislation for meaning and effect, and therefore there can be no inconsistency giving rise to a judicial estoppel claim. *See State's Response* at 13-14. In fact, as

argued extensively in Idaho Power's Summary Judgment Response, the opposite is true. The Agreement laid the foundation for the language of the Legislation and the language of the Consent Judgments and, as such, both must be interpreted consistently with the terms of the Agreement. *See* Idaho Power's Summary Judgment Response at 15-17.

Indeed, the Agreement provides that "the parties agree to propose and support the following legislation *to implement the Agreement*," and then lists the legislative program that includes the language codified in Section 42-203B.³⁶ Thus, the parties viewed the Legislation as "implementing" rather than nullifying or terminating the Agreement. The parties also expressly agreed in Paragraph 4 that they "[would] not take any position before the legislature *or any court*, board or agency which is inconsistent with the terms of this agreement."³⁷ This provision of the Agreement is not limited as to time and is still in effect today.

Finally, the parties affirmed in the Agreement that the Agreement would remain in effect in perpetuity if certain conditions were satisfied. *See* Idaho Power's Summary Judgment Response at 16. No party has ever asserted that the Agreement was terminated or is otherwise invalid. To the contrary, the legislature expressly affirmed the validity and continuing effect of the Agreement in the Legislation itself. *See* Idaho Code § 42-203B(5) ("The contract entered into by the governor and the Idaho Power Company on October 25, 1984, is hereby found and declared to be [a valid agreement between the governor and a holder of hydropower rights], and the legislature hereby ratifies the governor's authority and power to enter into such an agreement."). The entry of the Consent Judgments also affirms the continuing validity of the Agreement.³⁸ There is simply no legal basis to justify the State's decision in its Response to

³⁶ *See* Affidavit of Michael Gheleta ("Gheleta Aff.") Ex. A (Swan Falls Agreement) at ¶ 6 (emphasis added).

³⁷ *Id.* at ¶ 4.

³⁸ *See* Davis Aff., Ex. B and C (Consent Judgments) at ¶ 4 ("The Swan Falls Agreement . . . shall not be merged into nor integrated with this Judgment, but shall remain in full force and effect independent of the Judgment.")

ignore the import of the Agreement to interpreting the meaning and effect of the Consent Judgments.³⁹

The Agreement is particularly critical to consider here because it gave rise to, and formed the basis of, the Consent Judgments, as discussed above. Indeed, the Consent Judgments restate verbatim Paragraphs 7(A) through 7(E) of the Agreement – including the introductory provision in Paragraph 7 stating that "Idaho Power's water rights shall be as follows." Once this provision is considered, as it must be, the Consent Judgments plainly and conclusively establish that Idaho Power retains ownership of the water rights set forth in the Swan Falls Agreement.

The language of the Consent Judgments provides the final, and most enlightened, word on the parties' understanding as to who owns the Swan Falls Agreement Water Rights. The parties drafted these documents together with full knowledge and understanding of not only the language of the Agreement but also the codified Swan Falls Legislation. The State had the opportunity to review and agree to the language of the Consent Judgments before Idaho Power filed them with the Court. It is telling that the State made no objection to the entry of the Consent Judgments with the language declaring ownership of the Swan Falls Agreement Water Rights in the name of Idaho Power. This demonstrates that the State understood and supported Idaho Power's continued ownership of the Swan Falls Agreement Water Rights and it should be precluded from asserting a contrary position in this action under the doctrine of judicial estoppel.

2. *The Legislation, Including the 1986 Amendments to the Legislation, Is At Best Ambiguous As to the Trust Res.*

³⁹ As stated in Idaho Power's Summary Judgment Response, the effectiveness of key portions of the Agreement was contingent upon several actions, including amendment to the State Water Plan, enactment of certain legislation including the Swan Falls Legislation, issuance of an appropriate order by the Federal Energy Regulatory Commission ("FERC"), and entry of the Consent Judgments. *See* Idaho Power's Summary Judgment Response at 11-18. In light of this, the State's attempt to ignore each of these actions and focus solely on the Legislation makes no sense. They are each an integral part of the overall Swan Falls settlement agreed to by the parties and are entitled to equal weight.

The State's continued reliance solely on the language of Section 42-203B in support of its claim to legal title is misplaced. The Legislation is ambiguous on the issue of the trust *res* and, when read in its entirety, does not support the State's position of absolute ownership and control. In fact, as set forth in Idaho Power's Summary Judgment Response, the Legislation actually recognizes in several respects that the water rights at issue remain Idaho Power's rights and are not held in trust by the State. *See* Idaho Power's Summary Judgment Response at 23. The 1986 Amendments to the Legislation, which were undertaken to "clarify" ambiguities in the original Legislation, further confirm that the trust established by the Agreement consists of "water" or "trust water," not Idaho Power's Swan Falls Agreement Water Rights.⁴⁰ *See* Idaho Power's Summary Judgment Response at 24-25. Thus, apart from the fact that the terms of the Consent Judgments need not conform to the Legislation, the Legislation itself does not support the State's position that it is not estopped from asserting ownership of Idaho Power's right in this action.

B. The Establishment of the Swan Falls Trust Did Not Divest Idaho Power of Title to its Swan Falls Agreement Water Rights.

The State also spends an inordinate portion of its Response reviewing select statements from the legislative history surrounding the enactment of the Swan Falls Legislation. *See* State's Response at 23-28. This discussion is irrelevant to Idaho Power's Cross Motion for several reasons.

First, the legislative history cited by the State sheds no light on the meaning and effect of the Consent Judgments – the only question at issue in Idaho Power's Cross Motion. In fact, none of the parties quoted by the State makes any reference whatsoever to the Consent Judgments or

⁴⁰ Gheleta Aff. Ex. M (Minutes, Feb. 19, 1986, Senate Resources and Environment Committee) at 1 ("Senator Crapo explained that the bill contained revisions of the Swan Falls legislation passed last year and is intended to merely clarify the agreement. . . . Mr. Nelson . . . agreed with Senator Crapo on the legislation and said they too supported the bill and the change.").

the parties' intent in crafting the language of the Judgments affirming Idaho Power's ownership of the Swan Falls Agreement Water Rights.

Moreover, the State seems to cite the legislative history for the limited proposition that the parties agreed to a trust arrangement and that the purpose of the trust was to facilitate subordination of Idaho Power's water rights. Idaho Power does not dispute either of these points. Nor does it dispute the State's characterization of the trust as a pivotal component of the settlement. Instead, Idaho Power challenges the State's characterization of the trust *res* as consisting of Idaho Power's water rights, a proposition that the legislative history cited by the State does not directly address.

Finally, the State's presentation of the legislative history surrounding the Swan Falls Legislation is entirely one-sided. As Idaho Power presented in its Summary Judgment Response, the weight of the legislative history belies the State's claim to have legal title to Idaho Power's water rights. Indeed, all of the key participants – including Idaho Power's Greg Panter and Tom Nelson, the State's Pat Kole and Pat Costello, Attorney General Jim Jones, and IDWR's Ken Dunn – stated on numerous occasions that they believed the trust consisted of water.⁴¹ See

⁴¹ For example, the State argues that Mr. Tom Nelson's statement in his 1990 deposition that "Idaho Power's water rights remain intact" somehow does not support the conclusion that Idaho Power retained ownership of the Swan Falls Agreement Water Rights, but only that these rights "were not immediately subordinated by the Agreement." See State's Response at 17. Nothing could be further from what Mr. Nelson meant in making this statement, as indicated by other statements in his deposition that reinforce his conclusion that Idaho Power retained ownership of the Swan Falls Agreement Water Rights. Mr. Nelson clarifies, for example, that Idaho Power's filings for an adjudication of its water rights would be for more than its rights corresponding to the minimum flows. "In other words, [Idaho Power] holds rights in addition to the minimums. Q.: So what's the amount of the entirety of that? A. 8,400 c.f.s., that's the hydraulic capacity of the existing turbines down there." See Supp. Davis Aff., Ex. O. (Complete Transcript of the Deposition of Thomas Nelson (*In re SRBA*) (October 31, 1990) ("Nelson Depo.") at 140. Mr. Nelson was even more explicit that Idaho Power retained ownership of the Swan Falls Agreement Water Rights later in the deposition:

Q.: What are your views of the definition of a subordinated water right?

A.: I think it means about the same here as it does in most land questions. It's functionally junior to a right to which under the priority system it should be senior.

Q.: So that a subsequent appropriator could come along and get ahead in line of a subordinated water right user?

Idaho Power's Summary Judgment Response at 26-34. The State's reliance on select quotes from the legislative history in no way defeats Idaho Power's Cross Motion.

C. The Swan Falls Trust Was Created by Agreement and Not by Operation of Law under Section 42-203B.

1. Section 42-203B Does Not Control the Trust Arrangement Between Idaho Power and the State.

Finally, the State now claims that Section 42-203B of the Legislation established the trust by operation of law – and not by contract with Idaho Power – and thus no formal conveyance of title from Idaho Power to the State was necessary (a conveyance the State tacitly admits never occurred). *See* State's Response at 36-37. As with many of the State's arguments, this argument suffers from the State's myopic focus on a single provision of the Legislation to the exclusion of the broad canvass of relevant and applicable information the Court should consider in determining the scope and nature of the trust, including the entirety of the Swan Falls Legislation, the Agreement and the Consent Judgments.

In particular, a careful examination of all seven subparagraphs contained within Section 42-203B demonstrates that this Section establishes two mechanisms by which the State may “regulate and limit” the use of water for power purposes: (1) through an agreement between the

A.: Right.

Q.: And so what it does is it takes away part of the value of that water right to the owner?

A.: *It takes away one element of the water right, certainly, which is a protectable priority date versus other users.*

Q.: What would be the other valuable elements of the water right other than the right to assist upon a priority date? Would it be quantity?

A.: Definition of it so you can transfer. The right to use it. In other words, *that fact that it's subordinated doesn't mean it isn't there, nor does it mean that you can't require that it be there.* In other words, you could defend a subordinated water right against a wasteful use, for example. *So it's far better than no water right at all.*

Id. at 183-84 (emphasis added). These statements leave little doubt that when Mr. Nelson stated that “Idaho Power's water rights [for flows above the minimum flow levels] remain intact, but they are subject to subordination,” he meant that Idaho Power retained ownership of those rights, even though they could be subordinated to certain junior users.

State and the holder of the water rights, and (2) through the State's constitutional authority to regulate hydropower permits and licenses issued after July 1, 1985. *See* Idaho Power's Summary Judgment Response at 51-52. The Swan Falls trust was created by agreement, after months of negotiations between the State and Idaho Power. *Id.* Indeed, subparagraph (5) of Section 42-203B, the subparagraph giving the State the authority to establish water rights trusts by agreement, recognizes and ratifies the Swan Falls Agreement as being an agreement properly executed under this subsection. *Id.* at 52. Thus, title to the Swan Falls Agreement Water Rights never transferred by operation of law, or otherwise, to the State.⁴²

2. *State's "Ownership by Operation of Law" Position Conflicts with Its Prior Actions.*

The State makes the alternative argument that it has asserted its ownership of the Swan Falls Agreement Water Rights continuously since the enactment of Section 42-203B, but cites only to the enactment of the Swan Falls Legislation as an example. *See* State's Response at 39-41. As an initial matter, even if the State did "assert" its ownership, it never did so in the Ada County cases nor did it obtain these rights through formal conveyance, as discussed above.

Moreover, actions – and lack of action – taken by the State during the two decades after the Agreement demonstrate the fallacy of the State's new found-position that it owns Idaho Power's subordinated water rights. On numerous occasions, and in judicial contexts, the State repeatedly has confirmed Idaho Power's ownership of these rights. *See* Idaho Power's Summary Judgment Response at 35-47. The most explicit example of this, but by no means the only example, are the Consent Judgments at issue in this Cross Motion. The State has also issued

⁴² The State claims on page 38 of its Response that a statutory trust served Idaho Power's best interests, as well as the State's, because it avoided the appearance that Idaho Power had voluntarily relinquished its water rights. This argument is entirely flawed because assumes, incorrectly, that the trust res is water rights. Idaho Power never feared that it was voluntarily relinquishing valuable water rights as it never agreed to convey its water rights to the trust and thus to the State. Instead, it agreed to subordinate those rights under certain circumstances defined by the Agreement. Agreement to subordinate water rights does not equate to a conveyance of title to those rights.

countless trust water permits over the past twenty years with new priority dates, not the priorities of Idaho Power, presumably because Idaho Power owned the subordinated rights.⁴³ See Idaho Power's Summary Judgment Response at 35-39. Finally, the State has supported Idaho Power's ownership of the Swan Falls Agreement Water Rights in proceedings before FERC and the SRBA court. *Id.* at 39-47. The State's affirmance of Idaho Power's ownership of the Swan Falls Agreement Water Rights in these other actions precludes the State from now claiming in this action that it owns these very same rights.⁴⁴

CONCLUSION

For the foregoing reasons, Idaho Power seeks an order on summary judgment from this Court adjudging Idaho Power to be sole and lawful owner of the water rights as described and entered in Ada County Cases *Idaho Power Company v. the State of Idaho, et al.*, Case No. 62237 and *Idaho Power Company v. the Idaho Department of Water Resources, et al.*, Case No. 81375, and quieting title thereto in Idaho Power.

Dated this 14th day of February, 2008.

IDAHO POWER COMPANY

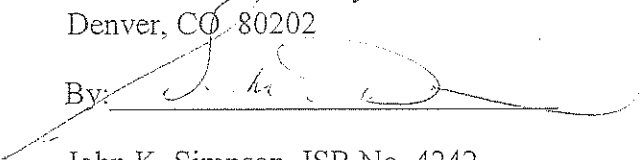
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⁴³ See Ex. 1 to Idaho Power's Summary Judgment Response, Response to Idaho Power Company's First Set of Discovery Requests at 39-40 ("The Department has subordinated the water rights held in trust by . . . 42-203C, and the other statutes and administrative rule that implement the Swan Falls settlement. The State admits that such permits have different priority dates than those of the water rights held in trust by the State.").

⁴⁴ The last section of the State's Response starting at page 42 attempts to raise issues of fact by quoting select statements from Idaho Power representatives that the State claims conflict with Idaho Power's assertion of ownership. This entire section, however, is a red herring, as none of the statements relied on by the State have any material relevance to the meaning and import of the language of the Consent Judgments on the issue of ownership of the Swan Falls Agreement Water Rights. Indeed, Idaho Power has already shown in this Reply Memorandum, in its Cross Motion for Summary Judgment and in its Summary Judgment Response that it consistently maintained and defended its ownership of the Swan Falls Agreement Water Rights throughout the negotiation of the Agreement and the enactment of the Legislation. And contrary to the limited picture presented by the State in its Response, Idaho Power's consistent position is clear from a balanced and complete review of the history surrounding both the negotiation of the Agreement and the enactment of the Legislation. See Idaho Power's Summary Judgment Response at 29-34.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of February 2008, I caused to be served a true and correct copy of the foregoing **IDAHO POWER COMPANY'S REPLY MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** by the method indicated below, and addressed to each of the following:

Filed with the Court via Hand Delivery.

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