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

In Re SRBA	) Consolidated Subcase no. 92-23
	)
Case No. 39576	) MEMORANDUM IN SUPPORT
	) OF STATE OF IDAHO'S
	) MOTION TO DISMISS
	) FILED MAY 7th, 2008
	)

The State of Idaho, by and through its counsel, submits this Memorandum in support of its Motion to Dismiss, filed on May 7, 2008. For the reasons set forth herein, the State respectfully urges the Court to dismiss Idaho Power Company's remaining claims for declaratory and injunctive relief.

INTRODUCTION

This Court has identified three of the remaining causes of action in this consolidated subcase as pertaining “solely to the administration of water rights.” Memorandum Decision and Order on Cross-Motions for Summary Judgment, dated April 18, 2008 (“Order”). As discussed in detail below, Idaho law is clear that a party must exhaust its administrative remedies before seeking judicial relief for matters of water rights administration, thus these causes of action must be dismissed for failure to exhaust administrative remedies.

The remaining claim for injunctive relief should also be dismissed for failure to state a claim upon which relief can be granted, as Idaho Power has failed to address its request to specific action on the part of the State.

STANDARD OF REVIEW

The State’s motion to dismiss for failure to exhaust administrative remedies is brought under I.R.C.P. 12(b)(1) for lack of subject matter jurisdiction. “[T]he exhaustion doctrine implicates subject matter jurisdiction because a ‘district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted.’” *Owsley v. Idaho Indus. Comm’n*, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005), quoting *Fairway Dev. v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990). The State’s motion to dismiss for failure to state a claim upon which relief can be granted is brought under I.R.C.P. 12(b)(6). Because these motions are based upon the pleadings, “the non-moving party is entitled to have all inferences from the record viewed in his favor.” *Young v. City of Ketchum*, 137 Idaho 102, 103, 44 P.3d 1157, 1158 (2002); *see also Owsley*, 141 Idaho at 133, 106 P.3d at 459.

ARGUMENT

I. ALL CLAIMS PERTAINING TO THE ADMINISTRATION OF WATER RIGHTS SHOULD BE DISMISSED BECAUSE IDAHO POWER HAS NOT EXHAUSTED AVAILABLE ADMINISTRATIVE REMEDIES.

a. Idaho Power Company must exhaust administrative remedies before seeking judicial relief.

The Idaho Administrative Procedure Act (“IDAPA”) provides that “[a] person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.” Idaho Code § 67-5271. “The doctrine of exhaustion requires that where an administrative remedy is provided by statute, relief must first be sought by exhausting such remedies before courts will act.” *White v. Bannock County Comm’rs*, 139 Idaho 396, 401, 80 P.3d 332, 337 (2003). The exhaustion doctrine “requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered.” *Regan v. Kootenai County*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). Until administrative remedies are exhausted, a district court is without subject matter jurisdiction to consider the matter. “If a claimant fails to exhaust administrative remedies, dismissal of the claim is warranted.” *White*, 139 Idaho at 401, 80 P.3d at 337.

The Idaho Supreme Court forcefully re-emphasized this requirement in the context of water rights administration in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, where it held that the district court erred in hearing the plaintiffs’ case before the plaintiffs had exhausted their administrative remedies. 143 Idaho 862, 154 P.3d 433, 453-54 (2007). “Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy exhausted

before the courts will act.” *Id.* at 440, quoting *Dep’t of Ag. v. Curry Bean*, 139 Idaho 789,792, 86 P.3d 503, 506 (2004). The Court in *American Falls* outlined the reasoning behind the doctrine of exhaustion:

Important policy considerations underlie the requirement for exhausting administrative remedies, such as providing the opportunity for mitigating or curing errors without judicial intervention, deferring to the administrative processes established by the Legislature and the administrative body, and the sense of comity for the quasi-judicial functions of the administrative body.” *Id.* at 443, quoting *White v. Bannock County Comm’rs*, 139 Idaho 396, 401-02, 80 P.3d 332, 337-38 (2003).

In the current case, three of the claims remaining before this Court pertain to the administration of water rights and are therefore subject to the exhaustion requirement. These claims should be dismissed pursuant to *American Falls*.

b. **Idaho Power Company has not exhausted its administrative remedies with regard to the remaining claims identified in this Court’s Order as 2, 3(ii), and 3(iii).**

Idaho Power Company is seeking a declaration that the Idaho Department of Water Resources (“IDWR”) has failed to account for delayed depletive effects of groundwater pumping in the Snake River Basin, an order requiring that IDWR re-evaluate water availability when determining whether to renew term permits, and an order requiring IDWR to take reasonable steps in its administration of water rights in the Snake River Basin. As the Court has found, these causes of action pertain solely to the administration of water rights.

Idaho Power Company’s request for a declaration regarding IDWR’s purported failure to account for the delayed depletive effects of groundwater pumping falls squarely in the realm of water administration. Under Idaho Code § 42-231, the Director of IDWR has the duty to control the appropriation and use of groundwater in the State and to

investigate the nature and extent of the State's groundwater resources. To the extent that Idaho Power takes issue with the manner of such investigation or the subsequent conclusions reached by the Director, it may request a hearing before the Director pursuant to Idaho Code § 42-1701A(3). If, following such hearing, the Company continues to be unsatisfied with the Director's action, it may seek judicial review. I.C. § 42-237(e); I.C. § 42-1701A(4). Idaho Power Company has, to date, not requested a hearing on this matter, and therefore has failed to exhaust its administrative remedies as to this claim.

The Company's request for an order requiring IDWR to re-evaluate water availability when determining whether to renew term permits is likewise subject to the exhaustion doctrine. It is the Idaho State Legislature that determines the Director's mandate, not Idaho Power Company. Idaho Code §§ 42-203A and 42-203C and the Water Appropriation Rules detail the duties of the Director regarding the permitting of water rights subject to the rights held in trust by the State. Idaho Power Company itself stated in testimony submitted to the Senate Resources and Environment Committee on January 25, 1985, that decisions to release trust water to new uses in compliance with state law "would be made by the Idaho Department of Water Resources under the criteria set out in 42-203C Idaho Code"¹ If the Company is aggrieved by the Director's action in permitting (or renewing term permits), it may request a hearing before the Director, after which hearing it may seek judicial review, as expressly contemplated by Idaho Code § 42-203A(6).

¹ Orr Affidavit, Exhibit 10, page 16. (Statement of Idaho Power Company presented to the Senate Resources and Environment Committee, Jan. 25, 1985).

Finally, Idaho Power has asked for an order requiring IDWR to take reasonable steps in its administration of water rights in the Snake River Basin. The Department administers water rights according to statutory law and administrative rules governing water appropriation and conjunctive management, among others. Idaho Power is effectively asking the Court to direct agency policy and procedure, directly contravening the exhaustion doctrine and *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*.

Idaho Code § 42-602 states that the Director of IDWR “shall have direction and control of the distribution of water from all natural sources within a water district . . .” The Director is further authorized to adopt rules and regulations for the distribution of water rights. I.C. § 42-603. As stated by the Court in *Keller v. MagicWater Co.*, “[t]he legislature intended to place upon the shoulders of the state engineer the primary responsibility for a proper distribution of the waters of the state . . .” 92 Idaho 276, 283, 441 P.2d 725, 732 (1968).

To the extent that Idaho Power Company contends that administration is necessary to protect its water rights, there are statutory remedies in place that afford the Company a chance to be heard by the Director. Only when the Company has fully availed itself of those remedies may it seek review of agency action in this Court. To date, Idaho Power has not initiated any administrative proceeding to address the issues set forth in the current litigation, including any concerns it has regarding the administration of the water rights held in trust by the State. The Company has had and does have ample opportunity to have its concerns heard before the Director.

By asking this Court to rule on administrative issues prior to availing itself of the statutory remedies available, Idaho Power Company is attempting to circumvent the Department's administrative procedures and preemptively force judicial intervention into matters statutorily entrusted to the Director in the first instance. This is not allowed under the *American Falls* decision.²

II. IDAHO POWER COMPANY HAS FAILED TO STATE A CLAIM FOR WHICH INJUNCTIVE RELIEF CAN BE GRANTED, AND THAT CAUSE OF ACTION SHOULD THEREFORE BE DISMISSED.

a. Requests for injunctive relief must be addressed to particular acts.

“Though the granting or refusing of an injunction order is within the sound discretion of the district court, an injunction must be addressed to ‘a particular act’” *Harris v. Preston-Whitney Irrigation Co.*, 92 Idaho 398, 401, 443 P.2d 482, 485 (1968). In *Harris*, the issuance of an injunction enjoining a canal owner from operating a canal so as to flood plaintiff's basement was held by the Court to be an abuse of discretion, as the order was vague and “did not advise what particular acts canal owner must refrain from doing.” *Id* at 398, 482.

b. Idaho Power Company has failed to specify what acts on the part of the State it seeks to enjoin by the claim identified in the *Order* as 3(i).

Idaho Power Company has requested a blanket injunction preventing the State from “taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights.” *Complaint* at 25. The Court in its *Order* dated April 18, 2008 stated that, with regard to this request, “[i]t is unclear as to what particular action by the State, Idaho Power is referring.” *Order* at 48. The request as stated is

² Furthermore, pursuant to Idaho Code § 42-1401B-D, IDWR actions may not be reviewed in water rights adjudication proceedings, nor can the Director be a party in to an adjudication.

vague and does not specify what particular acts the State is to be enjoined from doing and therefore must be dismissed pursuant to *Harris v. Preston Whitney Irrigation Co.*.

Additionally, Idaho Power Company has failed to identify any conduct on the part of the State that is not directly mandated by either state law or the Swan Falls Agreement or that is purely administrative in nature. As the State cannot be enjoined from fulfilling its statutory duties under state law, this constitutes another appropriate basis for dismissal of this claim.

CONCLUSION

The Court should dismiss claims pertaining to administrative matters for lack of subject matter jurisdiction, because Idaho Power Company has failed to exhaust its available administrative remedies. Dismissal is also appropriate as to Idaho Power's request for injunctive relief, because the Company has not addressed its request to a particular action on the part of the State and thus has failed to state a claim for such relief.

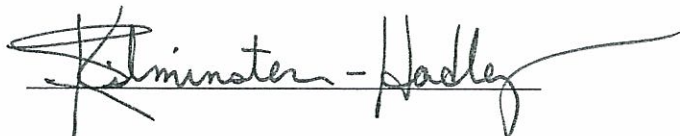
DATED this 30th day of May 2008.

THE STATE OF IDAHO

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A handwritten signature in black ink, appearing to read "Kilminster-Hadley", with a long horizontal line extending to the right.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2008, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION TO DISMISS IN RESPONSE TO COURT'S ORDER OF APRIL 18, 2008 to the following parties by the indicated methods:

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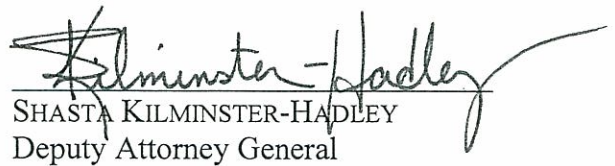
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