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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. 92-00023
	)	
Case No. 39576	)	REPLY IN SUPPORT
	)	OF STATE OF IDAHO'S
	)	MOTION TO DISMISS
	)	FILED MAY 7th, 2008
	)	

Idaho Power Company's response to the State of Idaho's Motion to Dismiss fails to address the issue raised by this Court and the State's motion as to why the claims set forth in the Company's Complaint, dated May 10, 2007, should not be dismissed pursuant to *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433, 453-54 (2007). Instead, the Company side steps the issue by claiming that it has potential contractual claims that are not subject to

the exhaustion doctrine, that the claims are no longer justiciable in light of the Court's Order of April 18, 2008, and that dismissing an improperly pleaded claim for injunctive relief now will prevent Idaho Power Company from protecting its interests should it seek to enjoin specific state action in the future. There is no reasonable basis in fact or law for Idaho Power Company's assertions.

ARGUMENT

I. THE CLAIMS IN QUESTION ARE ADMINISTRATIVE IN NATURE AND MUST BE DISMISSED ON THAT BASIS.

Idaho Power Company states that it "does not intend to pursue its claims relating to water rights administration under the present law of the case and absent future developments that may or may not occur." Response at 10. Consequently, the State's request that the claims be dismissed pursuant to the exhaustion doctrine is "essentially a request for declaratory relief seeking an advisory opinion on the non-justiciable question of future administrative or judicial jurisdiction." *Id.* On the contrary, the State has requested that the Court determine the question of the *present* jurisdiction of this Court over the claims in Idaho Power Company's Complaint.

The potential for different factual situations and possible future claims has no bearing on the current motion.¹ Idaho Power's current claims pertain to the allocation of water and the administration of water rights by the Idaho Department of Water Resources ("IDWR"). The exhaustion requirement applies to claims that "raise issues of fact or misapplication of agency rules or policies." *American Falls Reservoir District No. 2 v.*

¹ The State has repeatedly stated, both in meetings with Idaho Power Company and in response to the Court's questions at the May 20th Status Conference, that it does not seek to prevent the Company from bringing claims in the appropriate forum after the exhaustion requirement has been satisfied.

Idaho Department of Water Resources, 143 Idaho 862, 154 P.3d at 442 (2007). Idaho Power Company misconstrues this holding in its Response to the State's Motion, stating that, "[t]he decision in *American Falls Reservoir District No. 2* does not mandate that Idaho Power pursue a lengthy administrative process in front of IDWR before it may obtain judicial review of claims based on breach of the State's trustee and contractual duties under the Swan Falls Agreement." Response at 5.

On the contrary, the holding in *American Falls* explicitly confronts the issue of claims relating to water rights administration that are brought under alternative legal theories, in that case, challenging the constitutionality of the conjunctive management rules. There, the Court made it clear that alternative legal theories "do not alleviate the necessity of establishing a complete administrative record" as a precondition or seeking judicial review:

Although a district court has jurisdiction to decide constitutional issues, administrative remedies generally must be exhausted before constitutional claims are raised. *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005). Other jurisdictions have also refused to excuse a party from exhausting administrative remedies merely because the party raises a constitutional issue that no official in the proceeding is authorized to decide, reasoning that **"to hold otherwise would mean that a party whose grievance presents issues of fact or misapplication of rules or policies could nonetheless bypass his administrative remedies and go straight to the courthouse by the simple expedient of raising a constitutional issue."** *Foremost Ins. Co. v. Public Serv. Comm'n*, 985 S.W.2d 793, 795 (Mo.Ct.App.1998). Thus, raising a constitutional challenge does not alleviate the necessity of establishing a complete administrative record.

143 Idaho 862, 154 P.3d at 442 (2007) (emphasis added).

Any claim of breach of contract or trust duties relating to the trust created by Idaho Code §42-203B necessarily raises issues of fact regarding IDWR's allocation of and administration of the water rights held in trust. Pursuant to *American Falls Reservoir*

District No. 2 v. Idaho Department of Water Resources, therefore, these claims, regardless of their characterization as arising out of contractual or statutory duties, should be dismissed for failure to exhaust administrative remedies. Although the State recognizes “the two judicially recognized exceptions to the exhaustion rule: when the interests of justice so require, and when an agency has acted outside of its authority,” *see Id.* at 443, neither of those exceptions applies to the claims presently at issue.

II. WATER RIGHTS ADMINISTRATION ISSUES RELATING TO THE TRUST AND IDAHO POWER COMPANY’S WATER RIGHT ARE GOVERNED BY STATE LAW.

A. The trust was created by statute, not by the Swan Falls Agreement.

In its Response to the State’s Motion, Idaho Power states that, “the State fails to distinguish between legal obligations of the State regarding water rights administration under Idaho state law, and duties of the State in its role as trustee pursuant to the terms of the Swan Falls Agreement.” Response at 2. However, as this Court has noted, the trust was created by operation of law, not by the Swan Falls Agreement. “[T]he rights are held in trust *by operation of law*. The implementation of such law was not only a condition of the Agreement, but apparently a law which Idaho Power helped to draft.” Order at 38 (emphasis added). The Court emphasized that, “the agreement was carefully drafted so that Idaho Power would not be directly assigning or transferring its water rights to the State. Rather than transferring or assigning the rights, they were placed in trust *pursuant to the State’s regulatory authority*.” *Id.* at 31 (emphasis added). The trust was created by statute and any claims relating to the trust or its administration are necessarily also statutory in nature.

Additionally, the ongoing obligations created by the settlement were also almost entirely statutory in nature, making them susceptible to future legislative action. The only continuing contractual obligation is the company's unsubordinated right to minimum flows at Murphy gage of 3900 cfs in the summer and 5600 cfs in the winter. Tom Nelson emphasized this point in a House Resources and Conservation Committee Meeting, on February 11, 1985:

[T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing next year, that is its prerogative. The *only* thing the legislature does not have to the power to do, would be to change the contractual recognition of the company's water rights at Murphy gage (emphasis added).

Orr Aff., Exh. 20, p.2.

B. The administration of the trust created by Idaho Code §42-203B is vested solely in the Director of the Idaho Department of Water Resources.

Idaho Power Company states that it does not seek immediate judicial review of the causes of action that are the subject of the State's motion, but that "should such claims or similar ones based on breach of the contractual and trustee duties established under the Swan Falls Agreement arise in the future, judicial as opposed to administrative review would be consistent with the Court's rulings in this case as well." Response at 6. The Company further argues that "while Idaho Power's contract and trust based claims may have some relation to administration, they do not "pertain solely to the administration of water rights" and therefore need not be addressed solely via an administrative action. *Id.* at 7.

This interpretation is inconsistent with the Swan Falls settlement, as evidenced by both the plain language of the Agreement, the implementing legislation and by the intent

of the parties as shown in the legislative record. Exhibit 1 to the Swan Falls Agreement, places the authority for evaluating and approving permits for the use of water subject to the rights held in trust by the State in the hands of the Director of IDWR. *See Orr Aff.*, Exh. 30. The language in Idaho Code §§42-203C mirrors that of Exhibit 1 to the Agreement. The legislative record is clear that decisions relating to allocation, subordination and administration of water subject to water rights held in trust were to be made by the Director of IDWR.

While it is true that the Governor is named as trustee, the Director alone is empowered to grant new water rights. Exhibit 7B to the Agreement, and subsequently Idaho Code §42-203B(2) state that “[t]he rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are *acquired pursuant to state law*” *Id.* (emphasis added). Pursuant to state law, the Director is the only person authorized to grant permits for water use. This issue was explicitly addressed by the negotiators and the committee in a Senate committee hearing on January 18th, 1985, when Tom Nelson stated that “the rights have to be acquired pursuant to state law. Under state law, unless you change it, the governor plays no part in the process.”

CHAIRMAN NOH: Along those same lines, would you care to outline briefly just exactly what are the limits and the extent of a governor’s power to grant water rights through the trust agreement. Sometimes – this trust agreement has sometimes been interpreted as granting of the governor an inordinate amount of authority saying who gets water and who doesn’t get water.

MR. COSTELLO: Yes, Mr. Chairman. As a matter of fact, when I was glancing through the attorney general’s testimony I was a little trouble by a statement here that the governor would be empowered under this to approve of water to be allocated under the trust. That’s not really what was contemplated here at all. This is strictly a *passive trust over which the governor will not exert any active discretion*. It’s modeled after trusts that are set up to reserve water in certain lakes around the state. There are a

half a dozen of these trusts set up by Idaho law. The governor is named as trustee just because you need an individual to be sued in the event of some squabble over the trust assets. And beyond that, it's automatic that water rights flow out of the trust into private hands if they are granted in accordance with state law. *So it is simply a mechanism to sever, in lawyer's terms, to sever the legal and equitable title to the water immediately so there's some immediate change in position of the parties,* that as soon as the agreement becomes binding and this statute takes effect, legal title to the water will go to the state, and the company retains the beneficial use of the water as long as the trusts last. *But it is a passive trust. No active role is taken by the trustee.*

CHAIRMAN NOH: Mr. Kole and Mr. Nelson, do you concur with that interpretation?

MR. KOLE: Mr. Chairman, I do. In looking at page three, I think that is slightly inaccurate. *The governor of course is a passive trustee. The intent here was that the director would be the individual who would make the reallocation determination.* So I think that basically the last paragraph, it should not read the "governor will be empowered" but probably the "director will be empowered" to release water. And I'm referring to our prepared testimony.

CHAIRMAN NOH: You're referring to the testimony rather than the release?

MR. KOLE: Yeah, that's correct, Mr. Chairman. That's really just an oversight that should have been corrected.

CHAIRMAN NOH: Fine. Mr. Nelson, is that the way you understand it?

MR. NELSON: Mr. Chairman, members of the committee, that's correct. And I think its clear on page three the senator referred to lines looks like it's to 20, but it's about 16 through 19, *the rights have to be acquired pursuant to state law. Under state law, unless you change it, the governor plays no part in the process.*

Orr Aff., Exh. 37, Tr. pp. 52-54 (emphasis added).

Idaho Power re-emphasized this point in the Statement of Idaho Power Company in Support of Senate Bill 1008:

One acknowledged typographical error is on page 3, of the Attorney General's testimony, to the effect that the Governor, as trustee, would be

empowered by Section 2 of SB 1008 to release trust water to new uses that comply with state law. *Those decisions would be made by the Idaho Department of Water Resources under the criteria set out in § 42-203C Idaho Code, not by the Governor as trustee*”

Orr. Aff., Exh. 10, attachment, p. 1(emphasis added). Additionally, the “Statement of Legislative Intent S.B. 1008 Prepared by the Senate Resources and Environment Committee February 1, 1985” states that,

The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan.

Orr. Aff., Exh. 11, attachment, p. 4.

The legislative record makes clear the intent of the parties, including the Governor’s representative and Idaho Power’s representative, to create a passive trust in which the trustee takes no active role. All questions of water allocation, subordination or administration were to be left to the Director and IDWR. The Director’s determinations are governed by state law; the Governor has no obligation to oversee the Director’s actions relating to the trust. Consequently, Idaho Power Company’s concern that breach of the Swan Falls Agreement could occur in the future through the “inaction” of the Governor in fulfilling his contractual duty as trustee is unfounded. First, there is no contractual duty regarding the trust. The trust is purely statutory in nature and any duties of the trustee would similarly be based in statute, not contract. Second, the intent of the parties to the Swan Falls settlement was precisely that the Governor, as trustee, *not* be required to take action on the trust.

There is therefore no support for the Company’s contention that the claims that are the subject of the State’s motion can be construed to incorporate claims against the

Governor for breach of trustee and contractual duties. The Governor has no contractual duties with regard to the allocation, subordination or administration of water subject to trust. The parties intended that the Director determine how trust water was to be allocated and administered, and that these decisions would be controlled by the State's regulatory authority, not by contract or trust obligations.

C. The Parties to the Swan Falls Settlement intended that grievances related to the Director's administration of the water rights held in trust be heard first in an administrative proceeding.

Exhibit 7B of the Swan Falls Agreement states that "[t]he user of water for power purposes as beneficiary of the trust established by Sections 2 and 3 shall be entitled...to protect its rights to the use of water *as provided by state law* against depletions or claims not in accordance with state law" *Orr Aff.*, Exh. 30. (emphasis added). Exhibit 1 of the Agreement details the administrative remedies available to a party protesting the Director's allocation of trust water, pointing specifically to the provisions of Idaho Code §42-1701A allowing for administrative hearing and eventual judicial review.² *See Orr Aff.*, Exh. 30. The language in the exhibits was subsequently codified in Idaho Code §42-203B and C.

Tom Nelson, negotiator for Idaho Power Company, discussed the intention of the drafters to incorporate the administrative hearing and judicial procedures provided by

² 42-1701A(3-4) Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section. (4) Any person who is aggrieved by a final decision or order of the director is entitled to judicial review. The judicial review shall be had in accordance with the provisions and standards set forth in chapter 52, title 67, Idaho Code.

Idaho Code §42-1701A in the following excerpt from the Senate Resources and Environment Committee Meeting Minutes of February 1, 1985:

MR. NELSON: Mr. Chairman, Senator Ringert, first working backwards. It was not the intent of the section to preclude judicial review, but I can't tell you without looking at the rest of 203 where that right to review exists, but I believe either in a part of 203 that we haven't put in – there it is, subsection 6, on page 2, just ahead of section 2 bill, is in the existing code, a right of review, which would I think apply to the entirety of 203.

1701 is the section of legislature added or changed, I think in 1980, which creates the right of review under the Administrative Procedures Act.

CHAIRMAN NOH: Senator Ringert.

SENATOR RINGERT: Mr. Chairman, Tom, I think the one on page 2 refers to proceedings under applications, and 203D on page 4 is review of existing permits, so I just wonder if we do have that coverage.

MR. NELSON: Well, Mr. Chairman and Senator Ringert, as I said, It was not intended to exclude it. My thought was section 203 in total already has the right of review in all. And the 1701A is the section that creates the administrative review.

So I think you can incorporate it by reference there, at least, even if subsection 6 doesn't pick it up.

Orr. Aff., Exh. 11, tr. p.5.

The letter of the Agreement and the legislative record demonstrates that the parties to the Swan Falls Settlement intended that grievances arising out of the statutes creating the trust and vesting the Director with the authority to administer it, be dealt with in accordance with Idaho Code §42-1701A. This included issues relating to the allocation, subordination and administration of the water rights held in trust by the State. The fact that there is no mention of contractual obligations or remedies was not an oversight. Idaho Power has not exhausted the administrative remedies provided by statute and therefore its claims must therefore be dismissed pursuant to *American Falls Reservoir District No. 2 v. Idaho Department. of Water Resources*.

III. IDAHO POWER COMPANY'S REQUEST FOR INJUNCTIVE RELIEF IS OVERBROAD AND MUST BE DISMISSED.

In its Complaint, Idaho Power Company requested that the Court enjoin the State defendants "from taking any action affecting the subject water rights on the basis of the State's asserted title to such rights." Complaint at 25. The Court itself stated that the claim is "unclear as to what particular action by the State, Idaho Power is referring." Order at 48. In its Response to the State's Motion to Dismiss, the Company argues that the claim is a properly pled general request for injunctive relief. This runs contrary to Idaho law, however, which requires that a claim for injunctive relief specify the particular acts to be enjoined. *See Harris v. Preston-Whitney Irrigation Co.*, 92 Idaho 398, 443 P.2d 482 (1968).

Idaho Power Company argues that the Court should not dismiss this claim because it is necessary to safeguard the Company's interests in the event that the State takes "unlawful action" impacting Idaho Power's water rights. The Company acknowledges, however, that its request, as pled, is insufficient, stating that, "[i]f it becomes necessary for Idaho Power to seek an injunction based on acts which the State may take prior to the conclusion of this litigation, Idaho Power will file an appropriate motion for preliminary injunction which will specify the acts sought to be enjoined." Response at 15. Idaho Power Company further specifies that "[i]f it is necessary for Idaho Power to move for a preliminary injunction in this case, it will provide further detail and specific facts to enable the Court to craft an order that is sufficiently specific as to the State acts enjoined." *Id.*

Idaho Power acknowledges, therefore, that it would have to file another, more specific, motion for injunctive relief before the Court could grant the request, yet asks the Court to deny the State's Motion to dismiss the claim. Furthermore, the repeated implication in the Response that an injunction against State action is not currently necessary, begs the question of whether the Company had a good faith basis to request one in the first place.

Regardless of the basis for the original request, however, the fact remains that the claim, as pled, is insufficient to the extent that Idaho Power would have to file a second, sufficiently specific motion in order to meet the standard for a request for injunctive relief. This in itself provides a compelling argument for why the claim should be dismissed.

CONCLUSION

The Court should dismiss claims pertaining to administrative matters for lack of subject matter jurisdiction pursuant to the exhaustion doctrine, including claims which, under Idaho Power's theory, are based in contract or trust law. Dismissal is also appropriate as to Idaho Power's request for injunctive relief because the request is insufficiently specific, and therefore fails to state a claim on which injunctive relief can be granted.

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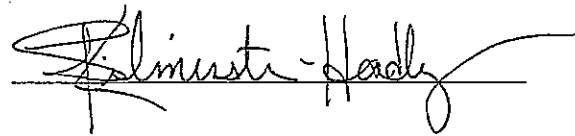
DATED this 7th day of ~~June~~ ^{July}, 2008.

THE STATE OF IDAHO

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A handwritten signature in black ink, appearing to read "Kilminster-Hadley", written over a horizontal line.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July, 2008, I caused to be served a true and correct copy of the foregoing REPLY IN SUPPORT OF STATE OF IDAHO'S MOTION TO DISMISS FILED MAY 7th, 2008 to the following parties by the indicated methods:

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