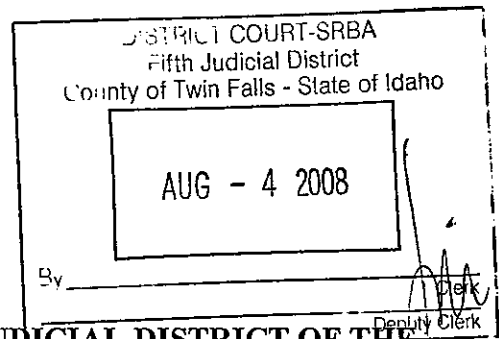




**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	) Subcase No. 00-92023
	)
Case No. 39576	) ORDER DISMISSING CLAIMS
	) PERTAINING TO WATER
	) AVAILABILITY WITHOUT
	) PREJUDICE AND DENYING MOTION
	) TO DISMISS CLAIM FOR INJUNCTIVE
	) RELIEF

This matter came before the Court pursuant to the State of Idaho's *Motion to Dismiss in Response to Court's Order Dated April 18, 2008*. Oral Argument on the *Motion* was heard July 18, 2008.

At issue are four claims raised by Idaho Power that this Court identified as pertaining to the administration of Idaho Power's water rights as opposed to defining the elements and scope of the subject rights. *Memorandum Decision and Order on Cross Motions for Summary Judgment* at 48- 49. These claims for relief include: 1) A declaration that the State of Idaho has failed in its administration of water right priorities in the Snake River Basin by not taking into account the multiple-year impacts of groundwater pumping; 2) An order requiring IDWR to re-evaluate water availability, and to take appropriate action, upon the expiration of the 20-year terms of previously granted permits for new appropriations of trust water; 3) An order requiring IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple-year impacts of groundwater pumping

**ORDER DISMISSING CLAIMS PERTAINING TO WATER AVAILABILITY WITHOUT
PREJUDICE AND DENYING MOTION TO DISMISS CLAIM FOR INJUNCTIVE RELIEF**

in the ESPA; and 4) An order enjoining the State from taking any action affecting Idaho Power's water rights on the basis of the State's asserted legal title to the water rights.

The State has moved to dismiss the first three of these claims based on the argument that Idaho Power must pursue the enforcement and administration of its water rights through the administrative process and has therefore failed to exhaust administrative remedies. The State argues these claims should be dismissed with prejudice.

Idaho Power counters that under the terms of the Swan Falls Agreement the State has contractual and trust obligations to Idaho Power that are independent from IDWR's general constitutional and statutory obligations regarding the administration of water rights. It is these contractual rights and trustee obligations that Idaho Power was seeking to enforce. The position of Idaho Power is that the exhaustion requirements do not apply to these independent rights and obligations. However, as a result of this Court's ruling that the *res* of the trust consists of water and not water rights Idaho Power's current position is that there is no present need to proceed with the water availability claims - including whether the state has met its obligation as trustee to take reasonable steps to insure the Swan Falls Daily Minimum Flows including consideration of multiple-year impacts of ground water withdrawals, and whether the State should be compelled to reconsider water availability in renewing 20-year term permits for trust water appropriations. Idaho Power argues that any such dismissal should be without prejudice.

Since Idaho Power does not intend to proceed with its water availability claims at this time there is no need for the Court to address and rule on the jurisdictional issues. However, even if the Court were to conclude that Idaho Power failed to exhaust administrative remedies any said dismissal would be without prejudice. *See Westway v. Idaho Transportation Department*, 139 Idaho 107, 115, 73 P.3d 721, 729 (2003) (dismissing case without prejudice where failed to exhaust administrative remedies). Accordingly, based on Idaho Power's representations the remaining claims pertaining to water availability are dismissed without prejudice.

In regards to the injunctive relief sought, Idaho Power raises concern with the State's administration of its hydropower rights in relation to aquifer recharge rights based on the State's reliance on the reasoning in Idaho Attorney General Opinion 06-2. Idaho Power does not allege that the State has taken action inconsistent with its rights during the pendency of this consolidated subcase. The issue of Idaho Power's rights in relation to recharge is presently before the Court. After the issue is decided it will be determinative of any claim for permanent injunctive relief. During the pendency of this action the Court has jurisdiction to craft temporary relief pending a determination on the merits. The Court will address preliminary relief if and when the issue arises prior to rendering a decision on the merits. Accordingly the motion to dismiss this claim for injunctive relief is denied.

IT IS SO ORDERED

Dated August 4, 2008

A handwritten signature in black ink, appearing to read 'John M. Melanson', is written over a horizontal line.

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER DISMISSING CLAIMS PERTAINING TO WATER AVAILABILITY WITHOUT PREJUDICE AND DENYING MOTION TO DISMISS CLAIM FOR INJUNCTIVE RELIEF** were mailed on August 4, 2008, by first-class mail to the following:

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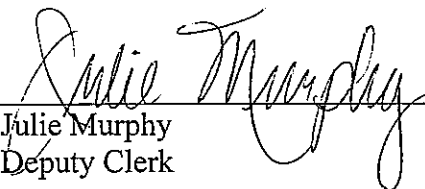
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Julie Murphy
Deputy Clerk