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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

Case No. 39576

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) **STATE OF IDAHO'S AND IDAHO**
) **POWER COMPANY'S STIPULATION**
) **AND JOINT MOTION TO DISMISS**
) **COMPLAINT AND PETITION FOR**
) **DECLARATORY AND INJUNCTIVE**

) **RELIEF**
)

STIPULATION

The State of Idaho and Idaho Power Company ("the Parties"), by and through their counsel of record, hereby stipulate and agree to the following:

1. Dismissal without prejudice of the "First Claim for Relief" alleged in the "*Complaint And Petition For Declaratory And Injunctive Relief*" filed by Idaho Power Company in this Consolidated Subcase on May 10, 2007 ("Complaint") to the extent it seeks a factual declaration that when the Swan Falls Agreement was executed in 1984, the Snake River tributary to the Murphy Gage, including surface and ground water in the Eastern Snake Plain Aquifer ("ESPA"), was over appropriated; and also to the extent it seeks a factual declaration that when the Swan Falls Agreement was executed in 1984, there was no unappropriated water available on a firm, average daily basis in the Snake River Basin tributary to the Murphy Gage, including surface and ground water in the ESPA.

2. Dismissal with prejudice of the remainder of the "First Claim for Relief" alleged in the Complaint.

3. Dismissal with prejudice of the "Second Claim for Relief" alleged in the Complaint.

4. Dismissal with prejudice of the "Third Claim for Relief" alleged in the Complaint.

5. Dismissal with prejudice of the “Fourth Claim for Relief” alleged in the Complaint.

6. Dismissal with prejudice of the “Fifth Claim for Relief” alleged in the Complaint to the extent it seeks declarations that water rights 36-02013, 37-02128, 37-02472, 37-02471, 37-20709, 37-20710, 36-02018, 36-02026, 02-02057, 02-02001A, 02-02001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032A, 02-02032B, 02-04000A, 02-04000B, 02-04001A, 02-04001B, 02-00100 and 02-10135 are not subordinate or may not be subordinated, through the Swan Falls Settlement or otherwise, to the use of water for ground water recharge.

7. Dismissal without prejudice of the “Fifth Claim for Relief” alleged in the Complaint with regard to any other water rights held by Idaho Power Company.

8. Dismissal without prejudice of the “Sixth Claim for Relief” alleged in the Complaint.

9. Dismissal with prejudice of the “Seventh Claim for Relief” alleged in the Complaint to the extent it seeks injunctions ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2.

10. Dismissal with prejudice of the “Seventh Claim for Relief” alleged in the Complaint to the extent of any challenge to the State of Idaho’s claim of legal title to the hydropower water rights held in trust by the State pursuant to the Swan Falls Settlement.

11. Dismissal without prejudice of the remainder of the “Seventh Claim for Relief” alleged in the Complaint.

12. Each of the Parties will bear its own costs and fees for this Consolidated Subcase.

13. Any remaining claims in the Complaint are dismissed with prejudice.

14. The proposed “*Order Dismissing Complaint And Petition For Declaratory And Injunctive Relief*” attached hereto is consistent with this Stipulation.

15. Neither party will appeal any part of the “*Memorandum Decision And Order On Cross-Motions For Summary Judgment*” entered in this Consolidated Subcase on April 18, 2008. The “*Memorandum Decision And Order On Cross-Motions For Summary Judgment*” is a final decision that is binding between the Parties and their respective successors and assigns.

14. This Stipulation is contingent upon entry of partial decrees for the hydropower water rights at issue in this Consolidated Subcase in the form proposed by the Parties, and will become effective and binding only upon entry of such partial decrees. If the SRBA District Court does not enter such partial decrees within ninety (90) days of the filing of this Stipulation, or if the SRBA District Court enters partial decrees different from those proposed by the Parties, then either Party shall have the option in its sole and absolute discretion to declare this Stipulation void and without any effect.

**JOINT MOTION TO DISMISS COMPLAINT AND PETITION
FOR DECLARATORY AND INJUNCTIVE RELIEF**

The State of Idaho and Idaho Power Company, by and through their counsel of record, hereby jointly move this Court to dismiss the *Complaint And Petition For Declaratory And Injunctive Relief* pursuant to the Parties’ “*Stipulation*,” above. Attached hereto is the Parties’ proposed form of dismissal order.

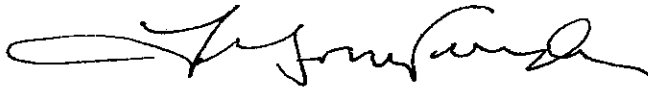
The State and Idaho Power further request that the Court set a status conference to determine whether there is any opposition to this joint motion. Should there be opposition, the State and Idaho Power request oral argument on this joint motion and that

this Court set a briefing and hearing schedule. The State and Idaho Power further request that this joint motion be heard and considered together with the *State of Idaho's and Idaho Power Company's Joint Motion for Entry of Partial Decrees Re: Water Rights in Basin 02 and Basin 37*, the *State Of Idaho's And Idaho Power Company's Joint Motion To Modify Partial Decrees Re: Water Rights 36-02013, 36-02018 And 36-02026*, and the *State of Idaho's and Idaho Power Company's Joint Motion to Consolidate Water Right 02-10135 Into Consolidated Subcase 00-92023*, all of which are filed herewith.

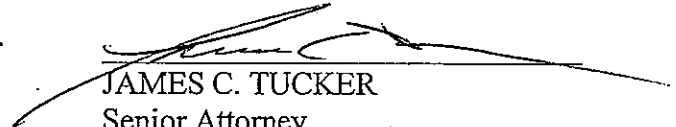
Respectfully submitted this 25th day of June 2009.

STATE OF IDAHO

IDAHO POWER COMPANY



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June 2009, I caused a true and correct copy of the STATE OF IDAHO'S AND IDAHO POWER COMPANY'S STIPULATION AND MOTION TO DISMISS COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF to be served on the following parties by the indicated methods:

Clerk of the SRBA Court
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208-736-2121

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IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☐ Facsimile: _____
☒ Statehouse Mail

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83720-4449

- ☐ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☐ Facsimile: _____
☒ Not Applicable

United States Department of Justice
Environment & Natural Resources
Division
550 West Fort Street
MSC 033
Boise, ID 83724

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☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☐ Facsimile: _____

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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

Case No. 39576

)
) Consolidated Subcase No. 00-92023 (92-23)
)
) **ORDER DISMISSING COMPLAINT**
) **AND PETITION FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF**
)

Currently pending before this Court is the *State of Idaho's And Idaho Power Company's Stipulation And Joint Motion To Dismiss Complaint And Petition For Declaratory And Injunctive Relief* ("Stipulation"), which was jointly filed by the State of Idaho and Idaho Power Company and included a proposed *Order Dismissing Complaint And Petition For Declaratory And Injunctive Relief* ("Dismissal Order"). The *Stipulation* and the *Dismissal Order* are part of the proposed negotiated resolution of this consolidated subcase and were filed simultaneously with the State's and Idaho Power Company's joint motion for entry and modification of partial decrees for the water rights at issue in this consolidated subcase.

The *Stipulation* is contingent upon entry of partial decrees in the form proposed by the State and Idaho Power Company in their joint motion for entry and modification of partial decrees. This Court has entered partial decrees for the hydropower water rights at issue in this consolidated subcase in the form proposed by the State and Idaho Power Company.

The Court held a hearing on the *Stipulation* on ____ [date] ____, and no party objected to the *Stipulation* or to the proposed *Dismissal Order*. Therefore, pursuant to and in accordance with the *Stipulation*, this Court orders the dismissal of the *Complaint* as follows:

1. The "First Claim for Relief"

The "First Claim for Relief" in the *Complaint* is a declaratory judgment claim seeking declarations that:

[(a)] when the Swan Falls Agreement was executed in 1984, the Snake River tributary to the Murphy Gage, including surface and ground water in the ESPA, was over appropriated; (b) on account of such over appropriation, there was no unappropriated water available in this portion of the Snake River Basin on a firm, average daily basis above the average daily minimum flows provided for in the Agreement, i.e., there was no 'Trust Water'; and (c) that because there was no Trust Water in 1984, there was no trust *res* and therefore no valid trust established under the Settlement.

Complaint at 21.

IT IS HEREBY ORDERED that the "First Claim for Relief" in the *Complaint* is dismissed without prejudice to the extent it seeks a factual declaration that when the Swan Falls Agreement was executed in 1984, the Snake River tributary to the Murphy Gage, including surface and ground water in the ESPA (Eastern Snake Plain Aquifer), was over appropriated; and also to the extent it seeks a factual declaration that when the Swan Falls Agreement was executed in 1984, there was no unappropriated water available on a firm, average daily basis in the Snake River Basin tributary to the Murphy Gage, including surface and ground water in the ESPA.

IT IS FURTHER ORDERED that the remainder of the "First Claim for Relief" in the *Complaint* is dismissed with prejudice.

2. The "Second Claim for Relief"

The "Second Claim for Relief" in the *Complaint* is a declaratory judgment claim seeking declarations that:

to the extent that the Snake River Basin above the Murphy Gage, including the ESPA, was over appropriated in 1984 as to the Swan Falls Daily Minimum Flows, the parties, who had assumed that Trust Water was available for new appropriations under the Swan Falls Agreement's trust arrangement, were acting on the basis of a mutual mistake of fact regarding the existence of Trust Water. The Swan Falls Agreement should therefore be reformed based on mutual mistake of fact regarding the existence of Trust Water available in 1984, eliminating any asserted trust while retaining provisions unrelated to the purported trust, including (i) subordination to existing uses, and (ii) Idaho Power's right to acquire additional water from sources upstream of its power plants and to convey

such water to and past its power plants below Milner Dam independent of any minimum flows established under the Agreement.

Complaint at 21-22.

IT IS HEREBY ORDERED that the “Second Claim for Relief” in the *Complaint* is dismissed with prejudice in its entirety.

3. The “Third Claim for Relief”

The “Third Claim for Relief” is a declaratory judgment claim seeking declarations:

that to the extent that there was in fact some amount of Trust Water available in 1984, and to the extent a valid trust was created under the Settlement: (i) the trust *res* is water and not water rights; (ii) the State of Idaho does not hold legal title to Idaho Power’s water rights; and (c) title to the water rights referenced in Paragraph 22 [of the *Complaint*] is therefore quieted in Idaho Power.

Complaint at 22.

IT IS HEREBY ORDERED that the “Third Claim for Relief” in the *Complaint* is dismissed with prejudice in its entirety.

4. The “Fourth Claim for Relief”

The “Fourth Claim for Relief” in the *Complaint* seeks declarations “that the State of Idaho’s claim of legal title to Idaho Power Company’s water rights is barred by the doctrines of estoppel, waiver and laches.” *Complaint* at 22-23.

IT IS HEREBY ORDERED that the “Fourth Claim for Relief” in the *Complaint* is dismissed with prejudice in its entirety.

5. The “Fifth Claim for Relief”

The “Fifth Claim for Relief” in the *Complaint* is a declaratory judgment claim seeking declarations that “Idaho Power’s water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to use of water for ground water recharge.” *Complaint* at 23.

IT IS HEREBY ORDERED that the “Fifth Claim for Relief” in the *Complaint* is dismissed with prejudice to the extent that it seeks a declaration that water rights 36-02013, 37-02128, 37-02472, 37-02471, 37-20709, 37-20710, 36-02018, 36-02026, 02-02057, 02-02001A, 02-02001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056,

02-02036, 02-02032A, 02-02032B, 02-04000A, 02-04000B, 02-04001A, 02-04001B, 02-00100 and 02-10135 are not subordinate or may not be subordinated, through the Swan Falls Settlement or otherwise, to the use of water for ground water recharge.

IT IS FURTHER ORDERED that the "Fifth Claim for Relief" in the *Complaint* is dismissed without prejudice with regard to any other water rights held by Idaho Power Company.

6. The "Sixth Claim for Relief"

The "Sixth Claim for Relief" in the *Complaint* is a declaratory judgment claim seeking declarations that:

the State has failed to take reasonable steps in its administration of water rights priorities in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Minimum Daily Flows, including failing to account for the multiple year impacts of ground water pumping, and accordingly has violated the Swan Falls Settlement.

Complaint at 23.

IT IS HEREBY ORDERED that the "Sixth Claim for Relief" in the *Complaint* is dismissed without prejudice in its entirety.¹

7. The "Seventh Claim for Relief"

The "Seventh Claim for Relief in the *Complaint* is an injunctive relief claim seeking the following preliminary and permanent injunctions:

(a) enjoining the State defendants from taking any action affecting the subject water rights on the basis of the State's asserted legal title to such water rights; (b) ordering IDWR to re-evaluate water availability, and to take appropriate action, upon expiration of the 20 year terms of previously granted permits for new appropriations of Trust Water; (c) ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2 on the basis that it is erroneous as a matter of law and a breach of the Swan Falls Settlement; and (d) ordering IDWR to take reasonable steps in the administration of water rights in the Snake River Basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Minimum Daily Flows, including taking into account the multiple year impacts of ground water pumping in the ESPA.

Complaint at 25.

¹ See also *Order Dismissing Claims Pertaining To Water Availability Without Prejudice And Denying Motion To Dismiss Claim For Injunctive Relief* (Aug. 4, 2008).

IT IS HEREBY ORDERED that the "Seventh Claim for Relief" in the *Complaint* is dismissed with prejudice to the extent it seeks injunctions ordering the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2.²

IT IS FURTHER ORDERED that the "Seventh Claim for Relief" in the *Complaint* is dismissed with prejudice to the extent of any challenge to the State of Idaho's claim of legal title to the hydropower water rights held in trust by the State pursuant to the Swan Falls Settlement.

IT IS FURTHER ORDERED that the remainder of the "Seventh Claim for Relief" in the *Complaint* is dismissed without prejudice.³

IT IS FURTHER ORDERED that any remaining claims in the *Complaint* are dismissed with prejudice, and that all parties to this consolidated subcase will bear their own costs and fees.

IT IS SO ORDERED.

DATED _____

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

² See also *Order Granting in Part, Denying in Part Motion to Dismiss; Consolidating Common Issues Into Consolidated Subcase; And Permitting Discovery Pending Objection Period In Basin 02; And Notice Of Status Conference* (July 24, 2007).

³ See also *Order Dismissing Claims Pertaining To Water Availability Without Prejudice And Denying Motion To Dismiss Claim For Injunctive Relief* (Aug. 4, 2008).