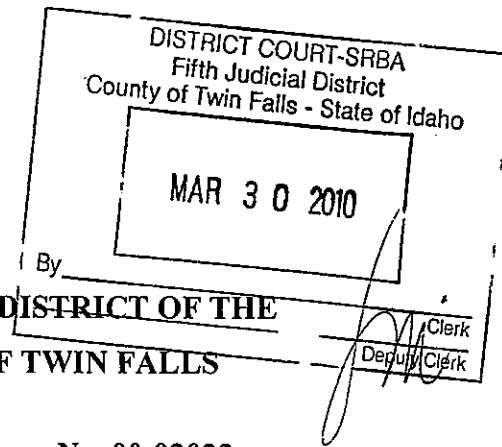


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DEPARTMENT OF
WATER RESOURCES



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)
)
) Subcase Nos. 02-10135; 36-02013; 36-
) 02018; 36-02026; 00-91013 (Basin-Wide
) Issue 13)
)
) ORDER DISMISSING COMPLAINT
) AND PETITION FOR
) DECLARATORY AND INJUNCTIVE
) RELIEF

I.

PROCEDURAL BACKGROUND AND FACTS

On May 10, 2007, Idaho Power Company ("Idaho Power") filed a *Complaint and Petition for Declaratory and Injunctive Relief* (hereinafter "*Complaint and Petition*"), designated by this Court as subcase 00-92023, naming the State of Idaho ("the State"), the Governor, the Attorney General, and the Director of the Idaho Department of Water Resources ("IDWR") as parties. Subcase 00-92023 is a consolidation of common issues regarding the meaning and application of the terms of the October 25, 1984, Swan Falls Agreement ("Swan Falls Agreement" or "Agreement") and related implementing legislation and agreements as applied to twenty-six hydropower claims filed by Idaho Power.¹

On June 25, 2009, the State and Idaho Power filed a *Joint Motion to Dismiss Complaint and Petition for Declaratory and Injunctive Relief* ("*Stipulation*"), which included a proposed *Order Dismissing Complaint And Petition For Declaratory and*

¹ See this Court's *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 Scheduling Conference* (July 24, 2007).

Injunctive Relief (“*Dismissal Order*”). The *Stipulation* and the *Dismissal Order* were part of the proposed negotiated resolution of this consolidated subcase and were filed simultaneously with the State’s and Idaho Power Company’s joint motions for entry and modification of partial decrees for water rights at issue in this consolidated subcase.

The *Stipulation* was contingent upon entry of partial decrees in the form proposed by the State and Idaho Power Company in their joint motions for entry and modification of partial decrees. Following a hearing on *Motions for Reconsideration* of the Court’s January 4, 2010 *Order Approving Settlement*, this Court issued its *Order on Motions for Reconsideration; Order Consolidating Issue With Basin-Wide Issue 13; Order Partially Decreeing Elements of Water Rights; Order Dismissing Complaint and Petition for Declaratory Relief* on March 26, 2010 (“March 26, 2010 *Order*”). In its March 26, 2010 *Order*, this Court partially decreed water rights at issue in this subcase and ordered the dismissal of Idaho Power’s *Complaint and Petition*. No party has objected to the State and Idaho Power’s proposed *Dismissal Order*.

II.

ORDER

Therefore, based on the foregoing, this Court orders the dismissal of the *Complaint and Petition* 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.²

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.

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 06-2.³

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.⁴

² See also this Court’s *Order Dismissing Claims Pertaining To Water Availability Without Prejudice and Denying Motion To Dismiss Claim For Injunctive Relief* (Aug. 4, 2008).

³ See also this Court’s *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 Scheduling Conference* (July 24, 2007).

⁴ See also this Court’s *Order Dismissing Claims Pertaining To Water Availability Without Prejudice and Denying Motion To Dismiss Claim For Injunctive Relief* (Aug. 4, 2008).

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 FURTHER ORDERED that this *Order* supplements with more particularity the portion of this Court's March 26, 2010 *Order* dismissing Idaho Power's *Complaint and Petition for Declaratory and Injunctive Relief*.

IT IS SO ORDERED.

DATED March 30, 2010.


JOHN M. MELANSON
Presiding Judge, *pro tem*
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DISMISSING COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF was mailed on March 30, 2010, with sufficient first-class postage to the following:

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ORDER