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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	)	**Basin-Wide Issue 91-13**
	)	**(Previously Consolidated Subcase 92-00037)**
	)	**ORDER DESIGNATING BASIN-WIDE ISSUE**
Case No. 39576	)	
	)	**RE: TO WHAT EXTENT, IF ANY, SHOULD**
	)	**THE *SWAN FALLS AGREEMENT* BE**
	)	**ADDRESSED IN THE SRBA OR**
	)	**MEMORIALIZED IN A DECREE?**

I. PROCEDURAL HISTORY

A. This matter originated as a result of objections filed to 346 water right recommendations reported in the *Basin 37, Part 1 (Ground Water) Director's Report*. The objections sought to include language regarding the "*Swan Falls Agreement*"[1] in either a remark included in the individual ***Partial Decrees*** or alternatively decreed as a general provision.[2] Because the objections represented the only objection filed to most of the 346 water rights, the Court issued on November 26, 2002, an ***Order Separating and Consolidating Common Subcases and Order For More Definite Statement and Notice of Hearing on Whether to Designate as Basin Wide***

[1] Used in the objections and for purposes of this ***Order*** to refer collectively to the October 1, 1984, *Swan Falls Agreement*, the October 25, 1984 *Swan Falls Contract*, and the 1982 *State Water Plan* as amended in 1985. In general terms, the *Swan Falls Agreement* subordinated a certain flow of Idaho Power Company's hydropower rights to upstream consumptive uses in exchange for certain guaranteed minimum flows and the development of a comprehensive plan for managing the watershed.

[2] The objections to all 346 rights stated:

> This water right must be decreed with the appropriate remarks and/or general provisions necessary to incorporate the protections accorded by the October 25, 1984 Swan Falls Agreement, the October 25, 1984 Swan Falls Contract, the 1982 State Water Plan as amended in 1985 (hereinafter jointly referred to as the Swan Falls Agreement), and other related law. Such remarks and/or general provisions are necessary to define the right, and or clarify the elements of the right, and/or administer the right.

Issue and Scheduling, separating and consolidating the common issue into Consolidated Subcase 37-2499 *et al.* The procedure provided for ***Partial Decrees*** for the 346 rights to be issued without delay where the water rights were otherwise uncontested as to the elements, and at the same time allowed the objections to proceed in a consolidated subcase. The Court reasoned if it was later determined in Consolidated Subcase 37-2499 *et al.* that a remark was necessary in a large number of individual decrees, that the matter could procedurally be accomplished through a general provision applying to those rights and incorporated into individual partial decrees through the "savings language" included in all partial decrees. *See* ***Order Re: Uncontested Portions of the Director's Report for Reporting Area 16, Basin 37, Part 1***, (December 11, 2002). The ruling was not a determination that a general provision was necessary. Rather, the ruling merely concluded that if a remark was held to be necessary in a number of decrees, that such a remark could be accomplished through a general provision incorporated into specific rights at a future date.

B. The November 26, 2002, ***Order Separating and Consolidating*** also required counsel who filed the numerous objections to file a more definite statement regarding the substance of the objection. It was not entirely clear whether the objection simply sought to have a memorialization of the *Swan Falls Agreement* in the context of the SRBA so as to avoid future uncertainty, or whether the substance or application of the *Agreement* was at issue. Because of the potential for the issue to extend beyond the boundaries of Basin 37, Part 1 (Groundwater) the Court permitted any party seeking to participate in the consolidated subcase to file a response with the Court.[3] Further, because the issue centers on Idaho Power Co.'s rights at the Swan Falls Complex – which would not be reported out until December of 2005 – the Court required a procedure to allow parties to raise and preserve the issue without filing objections to individual claims.[4] The matter was then set for hearing to determine whether to designate the matter as a

[3] There are 24 administrative basins either fully or partially located upstream from the Swan Falls Complex. As of the date the ***Order*** was issued, about half had yet to be reported.

[4] The problem with having the objections filed in individual rights where there are no objections to the substantive elements of the right is that the subcases would have to be stayed pending the reporting of Idaho Power Co.'s rights in Basin 02. During that period, any intervening administrative transfers have the potential to substantially change the posture of a subcase (split rights, add new owners etc.), which must be addressed in the SRBA after any *Notice of Completed Administrative Proceeding* is ultimately filed. This would result in significant delays and has the potential to raise new issues where none previously existed.

basin-wide issue. At the hearing, then Presiding Judge Roger Burdick suggested that the participating parties meet and attempt to reach an agreement on language that could be included in Idaho Power Co.'s decrees that are subject to the *Swan Falls Agreement* and that would satisfy the issues raised by the parties. *See* ***Order Re: Submittal of Proposed Language in Regards to Swan Falls Agreement.*** After several attempts, the parties notified the Court they were unable to reach agreement.

C. On July 11, 2003, the *Director's Report for Basin 29 Irrigation and Other Uses* was filed. Objections were filed to thirty-eight water rights raising identical issues. On December 5, 2003, the Court issued an ***Order Redesignating Consolidated Subcase 37-2499 et al as Consolidated Subcase 92-37 and Order Separating and Consolidating Issue From Subcases In Basin 29.*** The purpose of the ***Order*** was to separate the issue from the subcases and consolidate with subcase 37-2499 *et al.* The case was renumbered because the objections extended beyond Basin 37 Part 1 (Groundwater).

D. At a January 20, 2004, scheduling conference set by the Court, certain of the parties indicated that they planned to submit a joint *Motion* to designate the matter as a basin-wide issue, and move to stay the action pending the reporting of Idaho Power Co.'s rights in Basin 02. No *Motion* was filed by the parties, however, and the Court set a Status Conference to determine how best to proceed prior to the filing of further *Director's Reports*.

E. On June 10, 2004 a *Joint Motion for Designation of Basin-Wide Issue and for a Stay of the Proceedings* was filed by the State of Idaho and Idaho Power. Faulkner Land & Livestock, North Snake Groundwater District and Idaho Ground Water Appropriators submitted a *Notice of Joinder* to the *Joint Motion* on June 14, 2004. On June 14, 2004 the City of Pocatello submitted its own *Motion for Designation of Basin-Wide Issue and Stay of Proceedings.* Also on June 14, 2004, Clear Springs Foods submitted a *Notice of Opposition to the Joint Motion for Designation of Basin-Wide Issue and For a Stay of the Proceedings.* On June 15, 2004 a hearing was held, and an ***Order Setting Expedited Oral Argument on Motion to Designate Basin-Wide Issue and Stay Proceedings*** was entered on June 18, 2004. The parties submitted briefs and oral argument was heard July 20, 2004.

II. MATTER DEEMED SUBMITTED

Oral argument occurred in this matter on July 20, 2004. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or July 21, 2004.

III. DISCUSSION

A. **Primary Issues/Concerns Raised by Parties:**

The parties raised several main issues. They are:

1. That the *Swan Falls Agreement* needs to be addressed at some point in the SRBA to ensure that the *Agreement* is binding and is not subsumed by an SRBA final decree.

2. It was alluded to, without specifics, that issues exist regarding the scope and substance of the *Swan Falls Agreement*. Some of the parties discussed having a forum for addressing such issues.

3. The United States asserted that negotiations involving the Nez Perce instream flow claims rely on the minimum flows defined in the *Swan Falls Agreement*. The United States urged that any issues regarding those flows be resolved as soon as possible in keeping with the time tables imposed in the Nez Perce negotiations.

4. The State of Idaho asserted that procedural problems could arise if the matter is not designated as a basin-wide issue because of the large number of anticipated objections filed to individual water rights recommended in forthcoming *Director's Reports* that may raise the identical issue.

5. Lastly, Clear Springs opposed designating the matter as a basin-wide issue based on the argument that all of the basin-wide issues should have been raised and resolved in the three test basins. Clear Springs is concerned that a general provision resulting from a basin-wide issue in effect would "re-open" subcases that have been completed to more litigation.

Each of these concerns is addressed below.

B. **Analysis of Issues.**

1. **The *Swan Falls Agreement* needs to be addressed in the context of the SRBA to avoid future ambiguity regarding the subsequent effect of the SRBA.**

The Court acknowledges that the *Swan Falls Agreement* needs to be addressed to a certain extent at some point in the SRBA proceedings just the same as any other prior decree, license or pre-existing agreement regarding a water right is addressed in the SRBA. A significant number of claims in the SRBA are based on former decrees. However, after the partial decree has been issued for the right in the SRBA, the former decree for the right becomes subsumed, as the partial decree issued in the SRBA defines the elements for that right. The prior decree is evidence of the water right in the SRBA proceedings, binding on the parties to the prior adjudication. It is addressed in the SRBA proceedings because the prior decree is considered as the basis for IDWR's recommendation. Consequently, the partial decree should be consistent with the former decree or alternatively a determination by the Court is made as to why the two are not consistent. In any event, the applicability of the former decree is addressed in the SRBA proceedings.

In this case, the concern is raised that if the *Swan Falls Agreement* is not addressed in the SRBA, the *Agreement* at a minimum could be perceived to be subsumed or vitiated by the SRBA. This Court agrees, in part, that the *Swan Falls Agreement* needs to be addressed at some point in the SRBA. Even if the *Swan Falls Contract* and *Agreement*, which was not integrated into the former consent degrees, would survive without being addressed in the context of the SRBA, it would make no sense to leave room for uncertainty and create an ambiguity requiring litigation in the future.[5]

The issue can therefore be framed as: When in the SRBA (and to what extent), if any, should the *Swan Falls Agreement* be addressed or memorialized in a decree? This Court is not convinced, at this time, that the issue needs to be addressed in individual decrees. Nor is the Court convinced the issue is ripe until Idaho Power Co.'s hydropower rights in Basin 02 are reported and the parties have the opportunity to review how such rights are reported. Presumably, the rights will be reported with some reference to the *Swan Falls Agreement*, as the

[5] Uncertainty is what led to the Swan Falls controversy in the first place.

agreement forms the basis for the subordination of certain flows.[6] Following the issuance of the *Director's Report*, parties will have the opportunity to raise issues regarding a recommended remark or absence thereof.

The Court cannot find that the *Agreement* would be less enforceable if included in Idaho Power Co.'s rights as opposed to the individual decrees of the upstream affected rights. Further, until such time as an issue arises regarding enforcement, the issue of which upstream rights are affected is not ripe. The same is true for those flows that are not subordinated. Administration of affected rights should be determined when and if the need arises, just the same as any other stream reach is administered after being adjudicated.

The Court is only making a preliminary determination as to whether a remark should be included in individual decrees for purposes of this motion. Parties will be afforded the opportunity to put this issue before the Court in future proceedings after the hydropower rights of Idaho Power Co. in Basin 02 are reported. If it is ultimately determined that a remark is necessary in certain individual decrees, such a remark can be incorporated into those specific decrees through a general provision via the savings language contained in the individual decrees. *See* ***Order Re: Uncontested Portions of the Director's Report for Reporting Area 16, Basin 37, Part 1,*** (December 11, 2002). A general provision need not apply to every water right. *See A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 421, 958 P.2d 568, 578 (1998).

2. **Issues pertaining to the Interpretation or Substance of the Swan Falls Agreement are not ripe, jurisdictionally proper or properly before the Court.**

The second issue raised concerns as to what extent the scope and substance of the *Swan Falls Agreement* should be addressed in the SRBA. It is not the intent of the Court to extend the scope of the proceedings beyond the issues raised in the objections and in effect open the terms of the *Swan Falls Agreement* to litigation. The objections raised a concern about the terms and conditions of the *Swan Falls Agreement* surviving a final decree in the SRBA if not addressed at some point in the proceedings. Issues pertaining to the scope and substance of the Swan Falls *Agreement* are not properly before the Court at this time, as no dispute has been raised regarding the interpretation or application of the *Swan Falls Agreement*. Furthermore, even if an issue

[6] The Court acknowledges that some of Idaho Power Co.'s rights in Basin 36 covered by the *Swan Falls Agreement* were reported and ultimately decreed without reference to the Swan Falls Agreement. This has subsequently been acknowledged as an oversight.

were raised over interpretation of the *Agreement*, the Court would essentially be deciding the matter in a vacuum, as there are no set of facts within which to decide or interpret its application. Moreover, because the *Agreement* deals with the administration of water rights, any disagreement over the interpretation or application of the *Swan Falls Agreement* should first be decided administratively if and when an issue arises, based on the attendant facts at the time enforcement of a term of the *Agreement* is being sought. Jurisdictionally, this would occur before the Idaho Department of Water Resources and under the Administrative Procedures Act.

The issue appropriately before the Court is whether the *Swan Falls Agreement* should be addressed in the context of the SRBA proceeding so as to avoid any future issues regarding the effect of a SRBA final decree on the *Agreement*, and, if so, where in the proceedings it should be addressed. This Court intends to only address this specific question. The Court does not intend to open the *Agreement* to interpretation.

3. **Concerns regarding the Nez Perce negotiations.**

Because the Court does not intend these proceedings to alter the terms and conditions of the *Swan Falls Agreement*, the outcome of these proceedings should not affect the on-going negotiations which rely on those terms and conditions.

4. **The Designation of a Basin-Wide Issue Will Allow the SRBA to Proceed Efficiently.**

The designation of a basin-wide issue will preclude the filing of similar objections in individual subcases, allowing the SRBA to proceed in a timely, efficient manner.

5. **Concerns regarding the designation of a Basin-Wide Issue.**

Clear Springs opposed the designation of a basin-wide issue because of the potential of the resolution resulting in a general provision affecting rights that have been adjudicated, and, in particular, affecting administrative basins that are essentially completed. While the Court acknowledges these concerns, the designation of a basin-wide issue does not automatically result in the decreeing of a general provision. Additionally, a general provision need not apply to every water right.

As previously stated, the Court would consider a general provision if it was determined that reference to the *Swan Falls Agreement* needed to appear in individual partial decrees, or

alternatively, as a means for referring to the *Agreement* in the final unified decree. At this point, the Court is not convinced that a reference in individual decrees is necessary. Further, because of the limited scope of the proceedings – specifically, that the Court does not intend to entertain issues pertaining to the interpretation of or changes to the *Swan Falls Agreement* – any reference to the *Swan Falls Agreement* in a partial decree or final unified decree would not alter existing law or how affected water rights are to be administered under the *Swan Falls Agreement*.

Finally, even though the three test basins are substantially complete, the designation of a basin-wide issue is not limited to those three test basins. Not all issues affecting a large number of rights could be anticipated at the outset of the adjudication. At the time the three test-basins were adjudicated, it was not unreasonable to expect that issues surrounding the *Swan Falls Agreement* would not arise until Idaho Power's rights were reported out. In addition, any party to the adjudication can file an objection on the basis of IDWR's failure to recommend a general provision, so the potential for raising a general provision could occur at any time in the SRBA proceedings.

C. **The criteria for Designating a Basin-Wide Issue are Satisfied.**

***SRBA Administrative Order I* 16 (1)(a)** sets forth the criteria for designating a basin-wide issue. Based on the respective *Motions* and arguments, the Court states the issue as follows:

To what extent, if any, should the *Swan Falls Agreement* be addressed in the SRBA or memorialized in a decree?

The Court finds that the issue as stated satisfies the criteria for designating a basin-wide issue. The issue is broadly significant because the *Swan Falls Agreement* affects a significant number of water rights. The matter is better resolved as a basin-wide issue because it avoids the further potential for the issue to be raised in individual water right claims and in most cases to otherwise uncontested claims. This avoids delay in decreeing otherwise uncontested water rights. In this regard, designation of a basin-wide issue provides an early resolution to objections filed in individual rights that would otherwise have to be stayed pending the reporting of Idaho Power's rights in Basin 02 and the ultimate outcome of the issue.

IV.

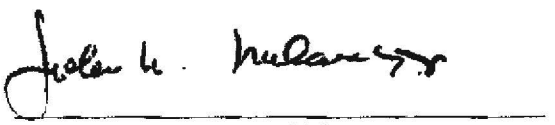
ORDER DESIGNATING BASIN-WIDE ISSUE; JOINING PARTIES TO CONSOLIDATED SUBCASE 92-00037; AND ORDER STAYING PROCEEDINGS

IT IS ORDERED that based on, and in accordance with the foregoing, the *Motions to Designate a Basin-Wide Issue* are GRANTED, and the case number designated as 91-13. Basin-Wide Issue 13 is designated as follows: To what extent, if any, should the *Swan Falls Agreement* be addressed in the SRBA or memorialized in a decree?

IT IS FURTHER ORDERED that all parties to Consolidated Subcase 92-00037 are automatically joined as parties and will appear on certificate of mailing for subcase 91-13.

IT IS FURTHER ORDERED that the matter is STAYED pending the reporting of Idaho Power Co.'s water rights in Administrative Basin 02. At that time parties to the adjudication will be again provided notice and the opportunity to participate. Objections to individual rights – other than to Idaho Power's Rights covered by the agreement – alleged to be burdened or benefited by the *Swan Falls Agreement* should not be filed in individual rights, as the issue will be preserved and addressed in subcase 91-13.

DATED August 23, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DESIGNATING BASIN-WIDE ISSUE was mailed on August 23, 2004, with sufficient first-class postage to the following:

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TO WHAT EXTENT IF ANY SHOULD THE SWAN FALLS AGREEMENT BE ADDRESSED IN THE SRBA OR BE MEMORIALIZED IN A DECREE

Deputy Clerk