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

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
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In Re SRBA	)	**Consolidated Subcase: 92-23**
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Case No. 39576	)	**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**

Summary of Ruling: Holding jurisdiction to preside over declaratory relief pertaining to *Swan Falls Agreement* is properly in SRBA District Court; dismissing cause of action for preliminary injunction ordering Attorney General to repeal Idaho Attorney General Opinion 06-2; holding too premature in proceedings to dismiss cause of action for reformation of trust provision; issuing order separating and staying causes of action against the Director of the Idaho Department of Water Resources and the Idaho Department of Water Resources since neither can be parties to the SRBA; issuing order separating and consolidating objections and issues pertaining to *Swan Falls Agreement* for resolution by Presiding Judge; staying consolidated matter, except discovery, until objection period runs in Basin 02.

I.
APPEARANCES

James S. Lochhead, Michael A. Gheleta of Brownstein Hyatt Farber Schreck, PC, Denver, Colorado; John K. Simpson, Barker Rosholt & Simpson LLP, Boise, Idaho; James Tucker, Idaho Power Company, Boise, Idaho, Attorneys for Idaho Power Company, Boise, Idaho;

Lawrence G. Wasden, Attorney General, State of Idaho; Steven L. Olsen, Karl T. Klein, Michael C. Orr, Deputy Attorneys General of the State of Idaho, Boise, Idaho;

Dave Hensley, Counsel to the Governor, Boise, Idaho;

Josephine Beeman, Beeman & Associates, LLC, Boise, Idaho, Attorney for City of Pocatello.

II.
PROCEDURAL BACKGROUND

1. At issue are twenty-one (21) water right claims filed by Idaho Power Company (Idaho Power), which include thirteen (13) claims in Basin 02[1], three (3) claims in Basin 36 and five (5) claims in Basin 37. The claims are for water rights for hydropower and are subject to the terms of the *Swan Falls Agreement.*[2] Because the claims are located in three different administrative sub-basins, the subcases are proceeding at different stages.

2. The *Director's Report for Basin 36, Reporting Area 3, Irrigation and Other Rights* was filed November 2, 1992, and included recommendations for hydropower claims 36-02013, 36-02018 and 36-02026. The recommendations were uncontested and the claims were decreed as recommended. ***Partial Decrees*** were issued for the three claims in the name of Idaho Power Co. on November 11, 1997. The ***Partial Decrees*** did not refer to the *Swan Falls Agreement.* Interim Administration, pursuant to I.C. § 42-1417 for water rights in Basin 36, was ordered December 13, 2005.

3. The *Director's Report for Irrigation and Other Uses Surface Water, Reporting Area 16,. IDWR Basin 37, Part I* (Surface Water) was filed November 4, 2005, and included recommendations for hydropower claims 37-02128, 37-02471, 37-02472, 37-20709 and 37-

[1] Three of the claims (02-02032, 02-04000, 02-04001) were reported under A & B designations to reflect the issue of split ownership as between Idaho Power and the State of Idaho.

[2] The *Swan Falls Agreement* includes the implementation of a legislation program, the execution of two agreements and the entry of two consent judgments: (1) "Legislative Program" implemented with rules, regulations and administrative practices (*See* 6 A-G, Legislative Program, and Exhibits 1-4 and 8, *Swan Falls Agreement,* "Agreement," October 25, 1984); (2) "Contract to Implement" Chapter 259 Sess. Laws, 1983, entered on October 25, 1984 (commonly referred to as the "S.B. 1180 Agreement" or the "1180 Contract," which implemented the provisions of Senate Bill 1180 of the First Regular Session of the Idaho Legislature, subsequently codified as §§ 61-539 and 61-540); (3) the "Agreement" dated October 25, 1984 that provided for the commencement of the Snake River Basin Adjudication (SRBA); (4) the Swan Falls Consent Judgment in *Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990);* and (5) the Swan Falls Consent Judgment in *Idaho Power Co. v. State of Idaho, Case No. 62237 (Fourth Judicial Dist. Mar. 9, 1990).*

20710. Idaho Power timely objected to the *Director's Recommendation* regarding the remarks pertaining to the *Swan Falls Agreement* included under "Other Provisions Necessary for the Definition or Administration of Water Right." On February 20, 2007, a *Notice of Completed Administrative Proceeding* and *Amended Director's Report* was filed, which recommended a split in the ownership of the three water right claims into legal and equitable title with the State of Idaho holding legal title and Idaho Power and the State of Idaho, in and for the people of the State of Idaho, holding equitable title. The State of Idaho filed late objections to the *Amended Director's Recommendation.* The three subcases are currently pending before Special Master Bilyeu. Interim Administration pursuant to I.C. § 42-1417 for water rights in Basin 37 Part 1 Surface Water was ordered December 13, 2005.

4. The *Director's Report for Irrigation and Other Uses, Reporting Area Basin 02* was filed December 28, 2006, and includes recommendations for hydropower claims 02-02057, 02-02001A, 02-02001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032A & B, 02-04000A & B, 02-04001A & B and 02-00100. To date, no objections have been filed. The objection period for Basin 02 does not close until December 5, 2007. Interim administration has not been ordered for the water rights in Basin 02.

5. On May 10, 2007, Idaho Power filed a *Complaint and Petition for Declaratory and Injunctive Relief* (hereinafter "*Complaint and Petition*"), designated as Subcase 92-23, naming the State of Idaho, the Governor, the Attorney General and the Director of the Idaho Department of Water Resources (hereinafter "IDWR") as parties, seeking the following relief:

A. A declaration that there was no "Trust Water" available when the Swan Falls Agreement was executed in 1984, and therefore no trust *res* and no valid trust established under the Swan Falls Settlement.

B. A reformation of the Swan Falls Settlement based on mutual mistake of fact regarding the existence of Trust Water, eliminating any asserted trust while retaining provisions unrelated to the purported trust.

C. A declaration that to the extent there is a valid trust, the trust *res* is water and not water rights, the State of Idaho does not hold legal title to Idaho Power's

water rights, and title to the water rights referenced in the Swan Falls Settlement is quieted in Idaho Power.

D. A declaration that the State of Idaho's claim of legal title to Idaho Power's water rights is barred by the doctrines of estoppel, waiver and laches.

E. A declaration that Idaho Power's water rights for hydropower generation are not, through the Swan Falls Settlement or otherwise, subordinate to the use of water for ground water recharge.

F. A declaration that the State of Idaho has failed in its administration of water rights priorities in the Snake River Basin to account for the multiple year impacts of ground water pumping.

G. 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 the 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 the therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows, including taking into account the multiple year impacts of ground water pumping in the ESPA.

6. Idaho Power also included the same allegations in its *Responses* filed in subcases 37-02128, 37-02472, 37-02471, 37-20709 and 37-20710 and styled them as a *Counterclaim*.

7. On May 10, 2007, Idaho Power also filed a *Motion for Stay of Proceedings on Idaho Power Company Water Rights in Basins 2, 36, and 37 or Alternatively to Consolidate Proceedings and Request for Expedited Hearing* (hereinafter "*Motion to Stay or Consolidate*"). The same *Motion* was also filed with respect to Basin-Wide Issue 13 (designated as SRBA subcase 92-13).

8. On May 30, 2007, the State of Idaho filed a *Motion to Strike or Alternatively Dismiss Complaint and Petition for Declaratory and Injunctive Relief*, together with a memorandum in support.

9. A hearing was held on Idaho Power's *Motion to Stay or Consolidate* and on the State's *Motion to Strike or Dismiss* on June 25, 2007. The matters were then taken under advisement.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in these matters on June 25, 2007. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, these matters are deemed fully submitted for decision the next business day, or June 26, 2007.

IV.

BACKGROUND AND CURRENT STATUS OF BASIN-WIDE ISSUE 13

On August 23, 2004, this Court issued an *Order Designating Basin-Wide Issue Re: To What Extent if any, Should the Swan Falls Agreement be addressed in the SRBA or Memorialized in a Decree?* The issue arose as a result of objections filed to 346 recommendations to groundwater claims reported in the *Basin 37, Part 1 (Ground Water) Director's Report.* The *Objections* sought to include language regarding the *Swan Falls Agreement* in either a remark included in the individual partial decrees or alternatively decreed as a general provision.[3] Because the *Objections* represented the only objection filed in most of the 346 subcases, the Court separated and consolidated the issue to avoid further delay in issuing partial decrees for each of the 346 claims.[4] Further, because of the large number of affected water rights and the potential for more objections once all of Idaho Power's water rights were reported, the Court

[3] 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.

[4] The Court concluded that any necessary remark could be incorporated into the individual partial decrees *via* a general provision and the savings language contained in the face of the partial decree.

designated the matter as a Basin-Wide Issue and stayed the matter pending the reporting of the remainder of Idaho Power's rights covered under the *Swan Falls Agreement* and the reporting of any other water rights alleged to be effected by the terms of the *Swan Falls Agreement*. The Court's rationale for staying the matter, in part, was to see how the *Swan Falls Agreement* was reported by IDWR in the recommendations for Idaho Power's hydropower rights. The Court's reasoning was that the *Director's Report* recommendations may potentially resolve the concerns raised in the *Objections* consolidated into Basin-Wide Issue 13.

V.
DISCUSSION

1. MOTION TO STRIKE, OR IN THE ALTERNATIVE, TO DISMISS

The State of Idaho asked the Court to strike or alternatively to dismiss the *Complaint and Petition* based on the following grounds: 1) That the *Complaint* is an unauthorized, immaterial and redundant pleading that should be stricken; 2) that the *Complaint* and the private quiet title action it purports to initiate are not authorized in the SRBA under the applicable procedural rules and statutes; 3) that the underlying claims raised in the *Complaint* are already at issue in the conventional subcase proceedings; 4) that the SRBA Court lacks authority to judicially reform the *Swan Falls Agreement* to eliminate the "trust" provisions; 5) that the Director of the Idaho Department of Water Resources and the Idaho Department of Water Resources cannot be parties to the SRBA; and 6) that the Court lacks authority and jurisdiction to grant the declaratory and injunctive relief sought.

A. The State of Idaho's Motion to Dismiss on the Grounds that Idaho Power's *Complaint and Petition* do not follow SRBA Procedure is Denied.

The State of Idaho's first three asserted grounds for dismissal are essentially that the filing of a *Complaint and Petition* in the SRBA is not authorized by, and is inconsistent with, the established procedural process for adjudicating water rights as set forth in ***SRBA Administrative Order 1 (AO1).*** Further, that the issue over which the SRBA Court has jurisdiction can be

addressed through the conventional objection and response process. Idaho Power argues that given the complexity of the issues it should not be limited to "checking boxes" contained in the standard form pleadings authorized by ***AO1.*** Idaho Power further argues that through the *Complaint and Petition* it is not only responding to the director's recommendation, but also to the Attorney General's interpretation of the State's obligations under the terms of the *Swan Falls Agreement.*

This Court agrees with the State of Idaho that the filing of a *Complaint and Petition* separate from the standard forms is not specifically authorized under ***AO1***. However, the Court disagrees that dismissal solely on that basis is appropriate. The SRBA Court has entertained a number of separate actions seeking declaratory and/or injunctive relief. The case of *Riley v. Rowen,* 131 Idaho 831, 965 P.2d 191(1998) (SRBA subcase 94-00012) originated as a declaratory judgment action filed in the SRBA to determine the ownership of a water right. *See also, State ex rel. Higginson v. Dickon,* SRBA Subcase 92-0006 (1991) (petition for preliminary injunction); *Rim View Trout Co. v. Idaho Dept. of Fish and Game*, SRBA Subcase 92-0002 (1992) (motion for preliminary or permanent injunction); *Jones v. Naf Irrigation Co.*, SRBA Subcase 92-0014 (1995) (complaint for preliminary injunctive relief); and *Big Lost River Water Users Assn. v. Idaho Dept. of Water Resources*, SRBA Subcase 92-00013 (1995) (petition for declaratory relief).

Usually the basis for an action which does not conform with ***AO1*** is that the dispute involves a water right claim that is not scheduled to be investigated and reported until sometime in the future. Where immediate relief is sought alternative pleadings have long been recognized. The situation has also arisen when the SRBA Court did not have jurisdiction over all of the causes of action alleged in the pleading but where the cause of action nonetheless involved the preliminary determination of the validity or elements of a water right. Such actions are filed in the SRBA because the SRBA has exclusive jurisdiction over adjudicating the elements or validity of the water right. The SRBA Court in such cases must decide the preliminary issue. *Walker v. Big Lost Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993) (defining scope of jurisdiction of SRBA). For example, a cause of action for trespass or breach of contract may turn on the preliminary issue of an element such as place of use or the existence of a water right. The SRBA Court's practice, consistent with existing case law, has been to determine the issues that require definition of the elements of a water right. The SRBA Court has exclusive jurisdiction of these

issues. Other issues that do not involve the elements of a water right but nonetheless turn on the outcome of the SRBA proceedings are also determined by the SRBA Court which then transfers those remaining portions of the case to a district court of appropriate jurisdiction.

The case of *O'Crowley v. Olivas*, (SRBA subcase 94-00013) is illustrative of this separation of issues. The case originated with the filing of a complaint involving a dispute over a water right claim which also included causes of action in tort such as trespass, nuisance and damage claims. The SRBA Court resolved the issues over which it had exclusive jurisdiction such as ownership, validity and scope of the disputed water right and then transferred the remainder of the causes of action to the district court in the county where the tort causes of action originated. *See Order Transferring SRBA Subcase to the District Court for Owyhee County for Disposition of Remaining Issues,* subcase 94-00013 (July 30, 2002). The Idaho Supreme Court has also acknowledged that portions of a lawsuit involving both water and other issues may have to be segregated. In *Bischoff v. Salem Union Canal Co.*, 130 Idaho 455, 943 P.2d 45 (1997), the Idaho Supreme Court stated:

> In *Walker* [*Walker v. Big Lost Irr. Dist.*], this Court held that '[t]hus, once SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA district court only. Jurisdiction remains with the SRBA district court until it issues a final order concerning the particular water right at issue.'
>
> Until all of the underlying issues of fraud and self-dealing are determined by the trial court, there is no determination necessary of any essential element of a water right in the present action. If we held otherwise, the SRBA would be swamped with innumerable divorce, real estate transactions and other litigation that might, dependent on the outcome of the underlying litigation, require a subsequent determination of or transfer of water rights.

Bischoff, 130 Idaho at 456, 943 P.2d at 46 (citing *Walker*, 124 Idaho at 81, 856 P.2d at 868). *See also, Riley v. Rowan*, 131 Idaho 831, 965 P.2d 191 (1998).

For purposes of fashioning temporary relief pending the filing of the director's report, the Court has been reluctant to adjudicate water rights at issue in advance of the filing of the *Director's Reports* for the entire basin. Adjudicating a single water right in advance of the basin requires IDWR to investigate and report the right in advance of the rest of the basin. Aside from logistical concerns, this also raises notice problems for other claimants in the SRBA. As such, the Court has often focused on preliminary relief pending the filing of the *Director's Report* for

the disputed claim. Once the *Director's Report* is filed, most if not all of the issues raised in the complaint or petition are ultimately addressed and subsumed through established SRBA procedures. After the elements of the right are determined and a partial decree issued, any remaining causes of action (such as damages for trespass, breach of contract, etc.) are then transferred to a Court of appropriate jurisdiction. However, in deciding the remaining causes of action, the prerequisite determination of the water right made in the SRBA is binding. Many times the ruling on the scope of water right by the SRBA is dispositive of the remaining causes of action. The Court has handled a number of these types of cases on a case-by-case and step-by-step basis. Accordingly, dismissal of the *Complaint and Petition* on the basis that the procedure is not authorized by ***AO1*** or that the issues can be addressed through conventional SRBA procedures is inappropriate. Rather, the Court will parse out the issues over which it has jurisdiction and consolidate and hear them in conjunction with the issues raised in Idaho Power's objections. Following resolution of the scope of Idaho Power's water rights any remaining issues over which the Court concludes it does not have jurisdiction can be dealt with accordingly.

Irrespective of whether Idaho Power's twenty-one (21) claims proceed as individual subcases, a consolidated subcase, or through the *Complaint and Petition* in subcase 92-23, Idaho Power and the other parties will be provided a full and complete opportunity to litigate all issues resolvable in the SRBA. Any decision by the Court to deviate from the standard subcase procedures- through consolidation or otherwise- will be made with due regard to such factors as judicial economy, the convenience to the parties, and due process considerations for both the current parties to the subcases, and other parties to the SRBA.

The State's motion to dismiss on the grounds that the *Complaint and Petition* do not follow SRBA procedure is Denied.

B. The Court has Jurisdiction over Idaho Power's Causes of Action for Declaratory Relief.

The State of Idaho next asserts that the SRBA Court lacks jurisdiction to entertain the declaratory relief sought by Idaho Power. This Court disagrees in part. The jurisdictional boundaries of the SRBA are not entirely "black and white." There are some gray areas. Frequently, provisions or conditions dealing with the administration of a particular water right are recommended to be included in a partial decree for a variety of reasons, including recognition

of prior agreements or consent decrees. Such provisions or conditions may expressly affect how the right is to be administered relative to other rights on a given source which very well may differ from a simple tabulation of priorities. For example, the remark may state under what conditions a right is immune from a delivery call as against other rights. A "rotation for credit" provision authorized by a former decree is another example. *See Order of Partial Decree for General Provisions in Administrative Basin 34* (subcase no. 91-00005-34) (May 9, 2001) (dispute over validity of general provisions affecting administration originating in *Utah Construction Decree*). Although arguably the provisions pertain solely to how water rights are to be administered, they can also be integral to the nature and extent of the water right and they may impact the tabulation of priorities on the same source. Frequently, disputes over water rights are settled by the incorporation of an agreement into a decree specifying how the respective rights are to be administered. The argument that the remark or conditions go solely to the issue of administration and are therefore outside the scope of the jurisdiction of the SRBA oversimplifies the issue. There can be a significant amount of overlap between an administrative provision and the definition of a water right. Furthermore, simply including a provision from a former decree or referencing an agreement into a partial decree and requiring the parties to litigate its meaning, operation or validity in another forum results in the Court issuing unsettled partial decrees and ultimately not performing its essential function. Additionally, any Court other than the SRBA which would otherwise rule on the dispute would lack jurisdiction to amend the elements of the affected water rights in the event it becomes necessary as a result of the outcome of the proceedings.

The *Swan Falls Agreement* in part defines the ownership, nature and extent of the subject hydropower rights and how they are to be administered relative to other rights on the same or connected sources. Accordingly, to the extent there is a dispute over the meaning, operation or validity of the *Swan Falls Agreement*, the dispute, at least in part, is properly under the jurisdiction of the SRBA Court. Simply incorporating by reference the *Swan Falls Agreement* into the partial decrees for the affected water rights or through a general provision as contemplated by Basin-Wide Issue 13, would leave unresolved a number of issues pertaining to the nature and extent of the subject hydropower claims.

A significant number of claims in the SRBA based on prior consent decrees or stipulated agreements contain provisions which have resulted in disputes over their interpretation, meaning,

and validity. Frequently, the intended meaning or interpretation of a provision in a former consent decree gets clouded over time or conditions change which may call into question the operation of a particular provision. *See Memorandum Decision and Order on Challenge*, subcase Nos. 36-00003A *et. al.* (Nov. 23, 1999) (dispute over intended meaning of "other purposes" language contained in former decree issued in *New International Mortgage Bank v. Idaho Power Co.*, In Equity No. 1602 (D. Idaho March 22, 1932)(unpublished opinion). The Court has been unable to issue partial decrees for such claims without first resolving the underlying dispute. The procedure has not been to transfer the former decree back to another court for resolution or to include the provision in the partial decree and require the parties to litigate its meaning administratively before IDWR.

Recently, in ***Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference***, consolidated subcase 91-63, (Ownership of Water Rights Between Irrigation Entities and Bureau of Reclamation) (Sept. 2, 2004), a case involving the ownership of the water rights associated with certain Bureau of Reclamation projects, it was argued that the ownership of the water rights should be divided between equitable and legal title, similar to the recommendations for the subject water rights where the Director recommended split ownership. One of the arguments raised was this Court's lack of jurisdiction over the issue because the matter was a dispute over the meaning of a federal contract and should be resolved in the federal court of claims. Ultimately, this Court rejected the argument holding that ownership was an element of a water right over which the SRBA has jurisdiction. On appeal the Supreme Court did not dismiss the case for lack of jurisdiction. *U.S. v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

Finally, the Court acknowledges that, in its *Order Designating Basin-Wide Issue 13*, it preliminarily determined:

> [B]ecause 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.

Order at 7.

In the *Order*, the Court was making the general assumption in the absence of attendant facts and specific objection. Now, upon review of Idaho Power's allegations, it is clear that the

dispute goes beyond the administration or enforcement of the *Swan Falls Agreement*. Issues exist over fundamental terms, which define the nature, scope and extent of Idaho Power's hydropower rights and should be decided in the SRBA. For example, whether the subordinated portions of Idaho Power's hydropower rights are also subordinated to recharge? As stated previously, the jurisdiction of the SRBA is not always easy to specifically define. To the extent this ruling is inconsistent with the Court's prior ruling, the prior ruling is hereby superseded.

For the foregoing reasons, this Court holds that jurisdiction to preside over the declaratory relief being sought by Idaho Power resides with the SRBA.

C. **Reformation of the *Swan Falls Agreement***

Aside from the declaratory and injunctive relief sought, Idaho Power has also alleged a cause of action for mutual mistake and reformation of the portions of the *Swan Falls Agreement* pertaining to the "trust water" provision. Idaho Power is thus seeking reformation of the *Swan Falls Agreement* regarding the existence of trust water. The State of Idaho argues that the SRBA Court lacks jurisdiction to reform portions of the *Swan Falls Agreement*. The Court agrees in part. To the extent an agreement inaccurately reflects actual conditions on the ground making definition or administration of the right impossible or unclear, this Court may reform the agreement. An example of such a situation would be a case involving is a series of mense conveyances of land with appurtenant water rights where the land has been repeatedly split into smaller parcels where some of the instruments of conveyance expressly address water rights and others are silent. Ultimately, the sum of the quantity of the claims appurtenant to the individual parcels cannot exceed the original parent right from which the rights were split. Often the aggregate SRBA claims exceed the total quantity granted in the original right, requiring the Court to trace the chains of title determine what was decreed. The essence of the agreement is critical to determine how the right is decreed in each case. However, reformation of an agreement having nothing to do with the definition or administration of a water right or other defenses to the validity of a contract may be outside of the jurisdiction of the SRBA. *See Bischoff*, 130 Idaho at 456, 943 P.2d at 46. At this early stage of the proceeding, it is too early for the Court to determine how the disputed "trust" provision may affect the definition or

administration of Idaho Power's water rights. **Therefore dismissal or transfer of the reformation cause of action would be premature.**

D. **The Director of IDWR or IDWR cannot be parties to the SRBA.**

Idaho Power has sought preliminary and permanent injunctive relief against the Director of IDWR and IDWR. The State of Idaho asserts as a basis for its *Motion to Dismiss* that the Director or the Idaho Department of Water Resources cannot be a party to the SRBA. Idaho Power argues that in addition to filing the matter in the SRBA, this Judge also has the capacity to hear the matter in his capacity as district judge. Whether or not this Court can hear the case in its capacity as a district judge, the *Complaint and Petition* were filed in the SRBA and this Court agrees with the State that IDWR cannot be a party to the SRBA. I.C. § 42-1401A(3) (defining role of director and department in SRBA); *see also In Re SRBA Case No. 39576, Twin Falls Canal Co. v. IDWR*, 127 Idaho 688 (1995) (declaratory judgment action against IDWR may not be brought in the SRBA). This Court does however, have jurisdiction to decide the preliminary issues involving the meaning of the *Swan Falls Agreement* which defines the scope and administration of Idaho Power's hydropower rights. These issues must first be resolved before any determination on the issues of compliance and enforcement of the decree can be made by this Court or any other court or administrative body. Except for the hydropower rights in basin 36, no partial decrees have been issued which define the elements and scope of Idaho Power's water rights. Following the determination of the preliminary issues regarding the scope of Idaho Power's water rights, this Court will transfer the issues of compliance and enforcement to an administrative body or a court of appropriate jurisdiction.

The Court recognizes, however, that one of Idaho Power's causes of action could require resolution before adjudication of the water right claims in question. Specifically, Idaho Power seeks a preliminary injunction "ordering IDWR to 'take reasonable steps in its administration of water rights in the Snake River basin, and therefore to meet its obligation to insure and guarantee the Swan Falls Daily Minimum Flows . . . .'" *Complaint* p.26, ¶.G. One reading of this cause of action is a request for immediate relief if flows at the Murphy Gauge are expected to be less than 3,900 cfs at some point in the summer. Should this be the case the Court will revisit the issue

upon appropriate motion.[5] The Court notes that interim administration has not been ordered for Basin 02 and so a motion for temporary relief pending interim administration may be brought before the SRBA Court. However, IDWR need not be named a party in order for the Court to fashion such temporary relief.

Accordingly, pursuant to *AOI* § 11 and I.R.C.P. 42, **the causes of action for preliminary and permanent injunctive relief brought specifically against the Director of IDWR and IDWR are separated from the remaining causes of action and stayed pending resolution of the remaining issues or until further order of the Court.**

E. **The Court cannot order the Idaho Attorney General to repeal Idaho Attorney General Opinion 06-2.**

As part the injunctive relief sought, Idaho Power also seeks an order from this Court repealing 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 Agreement*. Attorney General Opinion 06-2 addresses the issue of whether under the terms of the *Swan Falls Agreement*, Idaho Power subordinated its hydropower rights to recharge. The Attorney General opinion may represent the State's position on interpretation of the *Swan Falls Agreement* but it is not an adjudication or judicial determination of Idaho Power's hydropower rights. Once the scope of Idaho Power's water rights, including subordination to recharge, has been fully litigated, all parties will be obligated to abide by the terms of the decrees ultimately issued, whatever those terms may be.

The Attorney General performs legal services and provides legal advice to the State and its departments, agencies, offices and officers. One of the duties of the Attorney General is: "To give an opinion in writing, without fee, to the legislature or either house thereof, or any senator or representative . . . when requested, upon any question of law relating to their respective offices." I.C. § 67-1401(6). Attorney General's Opinions are not binding on the court but they are entitled to consideration. *Echo Ranch, Inc. v. State of Idaho ex rel. Evans*, 107 Idaho 808,

[5] For reasons of judicial economy, if any portion of the case requires transfer to a district court of appropriate jurisdiction, the Court intends to transfer those portions of the case to the District Court for the Fifth Judicial District in Twin falls County and request that the administrative Judge assign the case to the undersigned.

811, 693 P.2d 454, 457 (1984), *see also State v. Bennett*, 142 Idaho 166, 173, 125 P.3d 522, 529 (2005) (Jones, J., concurring in part and dissenting in part). In a case such as this one, where the State and its officers and agencies are named as parties, and the Attorney General's Opinion deals with the subject matter and merits of the case, the Court would tend to give the Attorney General's Opinion the same weight as any other argument of counsel. The Court, if requested to do so, would consider the Opinion (subject to admissibility) but only in the same way that it considers the arguments raised by the attorneys representing all of the parties in the case. The Court can find no authority standing for the proposition that it or any other court can order the Attorney General to repeal Attorney General's Opinion No. 06-02 nor is the Court persuaded that there is any reason to do so as a matter of law. Idaho Power has failed to state a claim upon which relief can be granted. I.R.C.P. 12(b)(6).

Therefore, Idaho Power's cause of action for a preliminary injunction ordering the Attorney General to repeal Opinion No. 06-02 shall be dismissed.

2. ORDER ON MOTION TO STAY OR CONSOLIDATE

Idaho Power filed a motion to stay the proceedings on Idaho Power's hydropower water right in Basin 02, 36, and 37 pending the outcome of the proceedings on Idaho Power's *Complaint and Petition* or alternatively to have the subcases consolidated and heard in a single proceeding. Idaho Power filed a motion to stay the proceedings in Basin-Wide Issue 13. The Court finds that the issues raised in the *Complaint and Petition* and the *Counterclaim*, which are in the jurisdiction of the SRBA, can be resolved in conjunction with the objection and response resolution process set forth in ***AO1*** and therefore a special proceeding on the *Complaint and Petition* is unnecessary because the *Director's Report's* have been filed for all of the subject hydropower claims. The Court also finds that consolidation is appropriate because the issues raised by Idaho Power are common to all of its hydropower claims covered under the *Swan Falls Agreement* and share common issues of law and fact. For purposes of judicial economy the issues should be resolved in a common proceeding rather than in three separate proceedings before the different special masters.

In Basins 36 and 37, the time for filing objections has expired. The *Director's Report for Irrigation and Other Uses, Reporting Area Basin 02* was filed on December 28, 2006. The objection period closes on December 5, 2007. The Court has considered moving the objection period to an earlier date for the claims in Basin 02 in order to expedite hearing all of Idaho Power's hydropower claims together. As a practical matter, the notice requirements of such a change would result in a relatively short time-savings and may not entirely eliminate the potential for a due process challenge by a party trying to later enter the consolidated subcase. Furthermore, it is likely that the parties will need to conduct discovery and that they will need adequate time to prepare for trial. The court has determined that a more practical approach would be to stay the proceedings, except discovery, until the close of the objection period in Basin 02. The issues shall then be set for trial thereafter.

Therefore, **THE FOLLOWING ARE HEREBY ORDERED:**

A. **Separation and Consolidation of Issues:** Pursuant to ***AO1*** §11 and I.R.C.P 42, in order to avoid unnecessary costs or delay, issues pertaining to ownership and interpretation and/or application of the *Swan Falls Agreement* in subcases 36-02013, 36-02018, 36-02026, 37-02128, 37-02471, 37-02472, 37-20709, 37-20710 and with respect to claims for which no objections have yet been filed, including 02-02057, 02-02001A, 02-2001B, 02-02059, 02-02060, 02-02064, 02-02065, 02-02056, 02-02036, 02-02032 A & B, 02-04000 A & B, 02-04001 A & B and 02-00100, shall be separated and consolidated with subcase 92-23 into a single consolidated subcase for purposes of resolution.

B. **Designation of Consolidated Subcase**: The consolidated subcase shall be designated as Consolidated Subcase 92-23. Future pleadings addressed to the issues of ownership and interpretation and/or application of the *Swan Falls Agreement* should be filed in said consolidated subcase.

C. **Limited Order Rescinding *Orders of Reference*:** The ***Orders of Reference*** for the above named subcases are hereby rescinded as to issues of ownership and interpretation and/or application of the *Swan Falls Agreement* only. The consolidated subcase shall proceed before the SRBA Presiding Judge. Matters other than ownership of the water rights and interpretation

and/or application of the *Swan Falls Agreement* shall remain with the assigned special master and may proceed as determined by the special master.

D. **Stay of Proceedings Other than Discovery:** The proceedings in Consolidated Subcase 92-23, with the exception of discovery, are stayed pending the close of the objection period for Basin 02 on December 5, 2007. However, the parties may commence discovery.

E. **Notice of Scheduling and Status Conference:** A scheduling and status conference is set **for 3 p.m. on Tuesday, December 17, 2007**, at the Snake River Basin Adjudication Courthouse, 253 – 3rd Avenue North, Twin Falls. **Parties may participate by telephone by dialing the number 1-918-583-3445 and when prompted entering code 406128.**

F. **Status of Basin Wide Issue 13:** The Court views the proceedings in Basin-Wide Issue 13 as being stayed also pending the close of the objection period in Basin 02. The Court will set a status conference by separate notice to also be held on December 17, 2007, for purposes of determining whether the issues in Consolidated Subcase 92-23 need to be resolved before the Court can address Basin-Wide Issue 13.

Dated: July 23, 2007

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER GRANTING IN PART, DENYING IN PART MOTION TO DISMISS; CONSOLIDATING COMMON ISSUES INTO CONSOLIDATED SUBCASE; AND PERMITTING DISCOVERY PENDING OBJECTION PERIOD IN BASIN 01; AND NOTICE OF SCHEDULING CONFERENCE** were mailed on July 24, 2007, by first-class mail to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

State of Idaho
Represented by:
Chief Natural Resources Division
Office of the Attorney General
PO Box 44449
Boise, ID 83711-4449

Idaho Power Company
Represented by:
James C. Tucker
PO Box 70
Boise, ID 83707

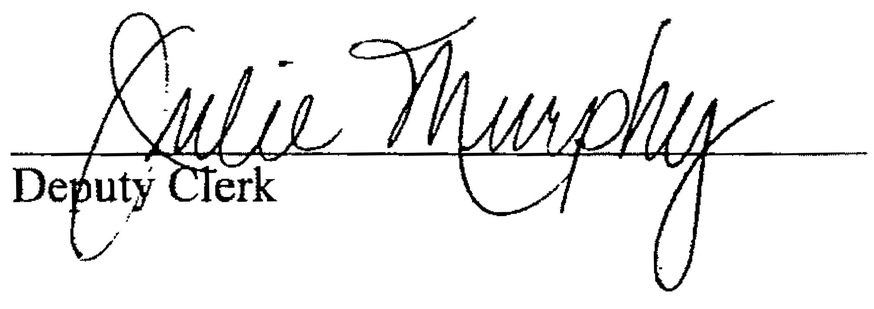
Idaho Power Company
Represented by:
James S. Lochhead
Adam T. DeVoe
Mark J. Mathews
Michael A. Gheleta
Michelle C. Kales
BROWNSHEIN HYATT
410 17th Street, Ste. 2200
Denver, CO 90202

Idaho Power Company
Represented by:
John K. Simpson
Shelley M. Davis
PO Box 2139
Boise, ID 83701-2139

IGWA Inc.
Represented by:
Randall C. Budge
201 E Center, Ste. A2
PO Box 1391
Pocatello, ID 83204-1391

Fund of the Land & Water
Represented by:
Elizabeth P. Ewens
221 Main St., 16th Floor
San Francisco, CA 94105

City of Pocatello
Gary & Helen DeMoss
Represented by:
Josephine P. Beeman
409 W. Jefferson St.
Boise, ID 83702



Deputy Clerk