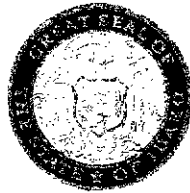


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SRBA



42188

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WARDEN

December 22, 2006

Idaho Department of Water Resources  
322 East Front Street  
P.O. Box 83720  
Boise, ID 83720-0098

Re: Notices of Change in Water Right Ownership Under Swan Falls Agreement and Implementing Legislation.

Dear Sir/Madam:

Please find attached two Notices of Change In Water Right Ownership for water rights nos. 02-2001A, 02-2001B, 02-2036, 02-2056, 02-2057, 02-2059, 02-2060, 02-2064, 02-2065, 02-10135, 36-2013, 36-2018, 36-2026, 37-20709, 37-20710, 02-4000, 02-4001, and 02-2032. These notices and the supporting documentation are submitted in accordance with and pursuant to the terms of the Swan Falls Agreement. This submission is ministerial in character and required under the agreement and the implementing legislation.

As you know, the Swan Falls Agreement was executed on October 25, 1984, to resolve a lawsuit between the State of Idaho and Idaho Power Company regarding the nature and extent of Idaho Power's hydropower water rights at Swan Falls dam on the Snake River. At issue was whether Idaho Power had subordinated its hydropower rights to junior upstream water rights. The lawsuit and the underlying controversy raised questions of the utmost importance to the State and water users throughout the Snake River basin.

The Swan Falls Agreement and the legislation enacted to implement it settled many of these questions by recognizing unsubordinated water rights for seasonal minimum flows measured at the Murphy gauge for Idaho Power Company, and by vesting the State with legal title to the remainder of the hydropower water rights for projects covered by the agreement. The State holds these water rights in trust for the

benefit of both Idaho Power and people of the State of Idaho, as the Swan Falls Agreement itself, the implementing legislation and the legislative history make quite clear.

Indeed, the Swan Falls Agreement requires the State to “assert the existence of water rights held in trust by the State,”<sup>1</sup> and was expressly conditioned on the passage of legislation providing that flows exceeding the unsubordinated minimums “shall be held in trust by the State of Idaho, by and through the Governor, for the use and benefit of the user of the water for power purposes, and of the people of the State of Idaho.”<sup>2</sup> This proposed legislation was enacted and codified as Idaho Code § 42-203B(2).

The legislative history of the legislation implementing the Swan Fall Agreement confirms the State’s ownership of these hydropower water rights. The Senate unanimously adopted the “Statement of Legislative Intent” for the centerpiece of the Swan Falls legislation, which was read into the record in the Senate on February 6, 1985. In reference to the provision of the legislation that ultimately became Idaho Code § 42-203B, the Statement of Legislative Intent states that:

this section establishes a trust in which title to certain specified water rights will be held. The trust pertains to water rights for power purposes which are in excess of minimum stream flows established by state action. . . . Any portion of such water rights above the established minimum flows will be held in trust by the State of Idaho, by and through the Governor of the State of Idaho. This trust will hold these water rights for the benefit of the power user so long as they are not appropriated as provided by law by future upstream beneficial users. The trust also operates, however, for the use and benefit of the people of the State of Idaho, to assure that water is made available for appropriation by future upstream users who satisfy the criteria of Idaho law for reallocation of the water rights held in trust. . . .

Hydropower rights in excess of such flows will be held in trust by the State and are subject to subordination to, and to depletion by lawful beneficial uses. . . .<sup>3</sup>

The Statement of Legislative Intent goes on to state that:

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<sup>1</sup> Swan Falls Agreement of October 25, 1984 (“Swan Falls Agreement”) at 1 ¶ 4. A copy of the Swan Falls Agreement is included in the “Attachments to Notices of Change of Water Right Ownership” (“Attachments”) at Tab 1.

<sup>2</sup> Swan Falls Agreement at Exhibit 7B ¶ 4; Attachments at Tab 1.

<sup>3</sup> Journal of the State Senate, 1<sup>st</sup> Reg. Sess., 48<sup>th</sup> Leg., 1985 at 59 (Feb. 6, 1985). A copy of the portion of the Senate Journal containing the Statement of Legislative Intent is included in the Attachments at Tab 4.a.

As applied to the agreement between Idaho Power Company, the Governor and the Attorney General, this trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream flows and Idaho Power Company holds equitable title to those water rights subject to the trust.<sup>4</sup>

The parties' statements before various legislative committees likewise confirm the State's ownership of the hydropower water rights referenced in the agreement. They demonstrate that the parties viewed the agreement and the legislation as creating a trust in which legal title to the water rights for flows exceeding the minimums was held by the State, for the benefit of Idaho Power and the people of the State of Idaho. As Idaho Power's attorney stated before the Senate Resources and Environment Committee on January 18, 1985:

In the course of the negotiations, in the final stages, we were "laugerheaded" on the question of whether the Company's water rights above the minimum flow, would be immediately subordinated by implementation of the agreement or remain in place unsubordinated until such time as the state permitted that water to someone else's use. . . . The trust concept was adopted to get around it so that water was placed in trust. The agreement clearly says it is unsubordinated, so far as the agreement goes, it is an unsubordinated block of water. **The state then takes that water and places it in the trust, subject to reallocation.** This does two things; it makes clear the state's control of the allocation of the water and it left the water unsubordinated. . . . The state then does not have to allow the water to go to the first guy who comes down the pike. The trust got around that problem and I think tied it together to a point where it is a little more effective mechanism to accomplish the purchase<sup>5</sup> of the agreement.<sup>6</sup>

At the same hearing, the Governor's attorney observed that the trust "simply was a mechanism to cut the legal and equitable title to the water immediately so there is some immediate change in position of the parties. Soon as this agreement becomes binding this statute takes effect. Legal title to the water will go to the state and the Company maintains the beneficial use of the

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<sup>4</sup> Journal of the State Senate, 1<sup>st</sup> Reg. Sess., 48<sup>th</sup> Leg., 1985 at 60 (Feb. 6, 1985); Attachments at Tab 4.a.

<sup>5</sup> So in original. Presumably, this word was intended to be "purpose."

<sup>6</sup> Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 3 (Tom Nelson) (emphasis added). A copy of these minutes is included in the Attachments at Tab 4.b.iii.

water as long as the trusts last.”<sup>7</sup> Idaho Power’s attorney concurred in this observation,<sup>8</sup> and further explained to the committee, on February 1, 1985:

The Company said it didn’t want to be watermaster; the state said OK, then take yourself totally out of vestige of any control over the rights that you have defined. We said alright, but if you are going to be the watermaster then you get out and you take care of it . . . .The trust provision was an idea I think of the state. I seized upon it because it filled what I saw as a major problem the Company had in this thing throughout, which was we could get the state to sign, but how did we get the state to live up to what they said they would do and that was a major problem from our side. The trust provision could get us around the subordinated versus subordinatable nature of the water above minimum flow. It remains unsubordinated but its held in trust by the state. . . .<sup>9</sup>

In sum, the trust severed legal and equitable title to the rights to flows above the agreed-upon minimums, with legal title vesting in the State. This solved an impasse that had developed: Idaho Power had demanded that the rights to the excess flows should only be subject to subordination at some future time, while the State had demanded that the rights be subordinated immediately. The trust put the State in immediate control of the excess flows while allowing such flows to remain available for power generation until such time as future upstream beneficial uses were approved in accordance with State law.

Although the Swan Falls legislation provides that the rights are held by the State of Idaho “by and through the Governor,” the legislative history makes clear that the legislature has the ultimate control over the trust:

This is strictly a passive trust over which the Governor will not exert any active discretions. . . . The Governor is named as trustee just because you need an individual to be sued in the event of some scrabble over the trust assets. Beyond that it is automatic that water rights flow out of the trust into private hands in accordance with state law.<sup>10</sup>

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<sup>7</sup> Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11 (Pat Costello); Attachments at Tab 4.b.iii.

<sup>8</sup> Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11-12 (Tom Nelson); Attachments at Tab 4.b.iii.

<sup>9</sup> Minutes of the Senate Resources & Environment Comm., Feb. 1, 1985, at 4-5 (Tom Nelson); Attachments at Tab 4.b.vii.

<sup>10</sup> Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11 (Pat Costello); Attachments at Tab 4.b.iii.

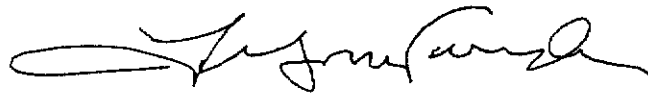
The Governor of course is a passive trustee. The intent here was that the Director would be the individual who would make the re-allocation determination. . . .

On that trust provision, it should be noted that the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary.<sup>11</sup>

As the preceding discussion demonstrates, the attached notices of change in water right ownership do not of themselves affect any change in the water rights that are subject to the Swan Falls Agreement. Rather, the notices simply recognize that the agreement and the implementing legislation vested legal title to the rights for the flows above the agreed-upon minimums in the State, to be held in trust for the benefit of Idaho Power Company and the people of the State of Idaho. Now that the SRBA has reached the portion of the Snake River that includes the Swan Falls dam, filing the notices is necessary to discharge a portion of the State's contractual and statutory obligations, and to protect the interests that the people of the State of Idaho acquired under the agreement and the implementing legislation.

The supporting attachments submitted with the notices include copies of the documents and transcripts quoted herein, as well as additional legislative history and other supporting documentation. In the interests of keeping this package as compact as possible, the attachments do not include survey maps or plats because this matter does not involve a change in ownership of land or any changes in points of diversion or places or purposes of use. Please contact us if you need any further information or have any questions. Thank you.

Very Truly Yours,



LAWRENCE G. WASDEN  
Attorney General, State of Idaho

LGW/olv

Enclosures

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<sup>11</sup> Minutes of the Senate Resources & Environment Comm., Jan. 18, 1985, at 11- 12 (Pat Kole); Attachments at Tab 4.b.iii.