

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JAN - 4 2010	
By _____	Clerk
_____	Deputy Clerk

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

<b>In Re SRBA</b>  <b>Case No. 39576</b>          	) <b>Consolidated Subcase No. 00-92023</b> ) <b>(92-23)</b> ) ) <b>Subcase Nos. 02-10135; 36-02013; 36-</b> ) <b>02018; 36-02026</b> ) ) <b>ORDER ON MOTION FOR</b> ) <b>APPROVAL OF SETTLEMENT</b> ) ) 
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**Holding: Approving settlement and granting joint motions, subject to certain modifications clarifying proposed language.**

**I.  
APPEARANCES**

Lawrence G. Wasden, Attorney General; Steven L. Olsen, Deputy Attorney General, Chief, Civil Litigation Division; Karl T. Klein, Michael C. Orr, Shasta Kilminster-Hadley, Deputy Attorneys General; Boise, Idaho, attorneys for the State of Idaho.

James S. Lochhead, Michael A. Gheleta, Mark J. Matthews, Michelle C. Kales, of Brownstein Hyatt Farber Shreck, LLP, Denver, Colorado, attorneys for Idaho Power Company.

John K. Simpson, Shelley M. Davis, of Barker Rosholt & Simpson, LLP, Boise, Idaho, attorneys for Idaho Power Company.

James C. Tucker, Senior Attorney, Idaho Power Company, Boise, Idaho, attorney for Idaho Power Company.

Randall C. Budge, Candice M. McHugh, of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for Aberdeen-Springfield Canal Company and the Ground Water Districts.

Jerry R. Rigby, of Rigby Andrus & Moeller, Chartered, Rexburg, Idaho, attorney for Fremont Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, and United Canal Company.

Dana L. Hofstetter, of Hofstetter Law Office, LLC, Boise, Idaho, attorney for Jeff C. and Jackie Harper, Basin and Range Resource Company, LLC, and Interested Water Users.

Josephine P. Beeman, of Beeman and Associates, P.C., Boise, Idaho, attorney for the City of Pocatello.

## II. 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.<sup>1</sup>

For purposes of case management, some issues in this consolidated subcase were addressed in separate summary judgment proceedings. Previously, the Court decided the issue of the ownership of the portion of the subject water rights exceeding the established minimum flows measured at the Murphy gauge. This Court held that the rights were placed in a trust held by the State and made “subordinateable” to “subsequent beneficial upstream uses” pursuant to the terms of the Swan Falls Agreement. See *Memorandum*

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<sup>1</sup> 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).



*Decision and Order on Cross-Motions for Summary Judgment*, consolidated subcase 00-92023 (April 18, 2008) (“*April 18, 2008, Memorandum Decision*”). This Court’s *April 18, 2008, Memorandum Decision* included a detailed procedural background for this consolidated subcase as well as an extensive historical and factual background surrounding the Swan Falls Agreement. Except as otherwise determined to be necessary, the procedural and factual background is not repeated in this opinion but is nonetheless incorporated herein by this reference. As such, this opinion assumes familiarity with the historical and factual components surrounding the Swan Falls Agreement. See *April 18, 2008, Memorandum Decision* for context.

On May 7, 2008, the State filed a *Motion for Summary Judgment on Subordination to Ground Water Recharge*. On June 16, 2008, Freemont Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, the United Canal Company, and the Aberdeen-Springfield Canal Company (collectively as the “Upper Snake Water Users” or “USWU”) filed a *Joint Motion to Participate and Memorandum in Support*.<sup>2</sup> After briefing and oral argument, this Court granted the *Joint Motion to Participate* on August 6, 2008. On October 17, 2008, the Upper Snake Water Users filed a *Motion for Summary Judgment*. On that same date, the State filed its *Amended Motion for Partial Summary Judgment* and Idaho Power filed its *Motion for Partial Summary Judgment on Recharge Subordination*.

After extensive briefing by the State, Idaho Power, and the Upper Snake Water Users, this Court took the motions for summary judgment under advisement on December 5, 2008. Thereafter, the Court granted two joint motions by the State and Idaho Power to delay issuance of the Court’s decision on the motions for summary judgment in order to facilitate a settlement. On March 26, 2009, the State and Idaho Power filed a *Joint Motion to Enter Order Temporarily Withholding Rulings on Pending Summary Judgment*, indicating that the State and Idaho Power had finalized a proposed settlement of the subcase and requesting that the Court withhold ruling for 90 days to

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<sup>2</sup> The City of Pocatello filed responses to Idaho Power’s objections in subcases that were consolidated into 00-92023, and have therefore participated in the consolidated subcase since its inception. Similarly, Jeff C. and Jackie Harper, and Basin and Range Resource Company, LLC (collectively as “Interested Water Users”) are respondents in subcase nos. 02-0100, 02-2032A, 02-2032B, 02-4000A, 02-4000B, 02-4001A, and 02-4001B.



allow time for review and implementation of the proposed settlement. The *Joint Motion* was granted March 27, 2009. To date, the Court's decision has not been filed or released.

On June 25, 2009, the State of Idaho and Idaho Power Company filed the following *Joint Motions*:

1. *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;*
2. *State of Idaho's and Idaho Power Company's Joint Motion to Consolidate Water Right 02-10135 With Consolidated Subcase 92-23;*
3. *State of Idaho's and Idaho Power Company's Stipulation and Joint Motion to Dismiss Complaint and Petition for Declaratory and Injunctive Relief; and*
4. *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.*

The *Joint Motions* are based on a proposed settlement reached between the State of Idaho and Idaho Power. As part of the settlement, the State of Idaho and Idaho Power agreed to the inclusion of a number of conditions on the face of the *Partial Decrees*. The City of Pocatello and the Upper Snake Water Users, and the Interested Water Users (collectively as "Third Party Respondents") were not signatories to the proposed settlement. The Court therefore allowed the Third Party Respondents to file responses to the *Joint Motions* identifying areas of disagreement with the proposed conditions.

### III. MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on November 6, 2009. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, the matter is deemed fully submitted for decision on the next business day, or November 9, 2009.

#### **IV. ISSUES**

The Interested Water Users, the City of Pocatello, and the Upper Snake Water Users raise a number of issues. The Court summarizes those issues as follows:

##### **A. Issues Raised by Interested Water Users.**

1. Whether the proposed language inappropriately suggests that water rights owned by Idaho Power are to be considered fluctuations resulting from operation of Company facilities?
2. Whether the meaning of the term “future beneficial uses” is unclear?
3. Whether a list of water rights dismissed from Case No. 81375 should be included in the record?
4. Whether senior beneficial use water rights first claimed in the SRBA would be protected by subordination?

##### **B. Issues Raised by the City of Pocatello.**

1. Whether the language contemplated by the Swan Falls Agreement provides sufficient data to calculate daily flows at Murphy Gauge?

##### **C. Issues Raised by the Upper Snake Water Users.**

1. Whether the Court should amend the language of provision no. 1 in the proposed partial decrees to clarify the manner in which the minimum flows will be calculated?
2. Whether provision no. 1 should be revised to clarify that “future beneficial uses” means all beneficial uses made after October 25, 1984?



3. Whether the proposed partial decrees should be revised to subordinate the water right to qualifying beneficial use water right claims in the SRBA?

## V. STANDARD OF REVIEW

This matter came before the Court pursuant to a joint motion to approve a stipulation (as opposed to a motion to approve a consent decree). *Administrative Order 1 (AOI)* 4.d. (3) *Stipulated Elements of a Water Right* provides in relevant part:

Where parties reach an agreement on a contested water right recommendation, they shall file either a stipulation with the Court using a Standard Form 5 or some other stipulation acceptable to the court.

(c) When IDWR does not concur with a proposed settlement, the Presiding Judge or Special Master shall conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right as stipulated in the Standard Form 5 or proposed settlement.

As a general rule stipulations are conclusive as to all matters properly contained or included therein, provided such are not contrary to law or public policy. *Big Lost Irr. Dist. v. Zollinger*, 83 Idaho 401, 406-07, 363 P.2d 706, 711-716 (1961). However, parties cannot by stipulation affect the rights of third parties not joining in the stipulation. *Perry v. Schaumann*, 110 Idaho 596, 598, 716 P.2d 1368, 1370 (Ct. App. 1986) (citing *Arnett v. Throop*, 75 Idaho 331, 272 P.2d 308 (1954)). The Court also has the legal obligation to avoid the issuance of ambiguous decrees. This obligation was spelled out clearly in the proceedings related to the recommended general provision on conjunctive management where the SRBA Court (Hon. Roger S. Burdick, Presiding) discussed this concern:

The legal issues of concern to the Court pertain to the language ‘shall be administered conjunctively.’ The term ‘conjunctively’ is not specifically



defined in the general provision. A significant part of these proceedings has been devoted to ascertaining exactly what is meant or intended by the use of the term 'conjunctively.' In this case, the Court would unequivocally be creating an ambiguity by including the undefined term in the general provision. Even if the parties were now in agreement as to the meaning of the term without including more specifics in the general provision, the potential for litigation in the future over the use of the term is virtually certain. The SRBA Court already expends a considerable amount of effort interpreting the meaning and application of prior existing decrees.<sup>FN</sup>

[FN] For example, in Basin 36, the Court spent a considerable amount of effort interpreting what the 'other purposes' language contained in the *New International Decree* meant. *Memorandum Decision and Order on Challenge; Order Granting State of Idaho's Motion for the Court to Take Judicial Notice of Adjudicative Facts; Order of Recommitment with Instructions to Special Master* (Subcases 36-00003A *et al.*) (Nov. 23, 1999). In 1934 when the decree was issued all parties were probably in agreement as to what was intended by the use of the terms. Today, nobody agrees on the meaning, and the Court must use canons of interpretation in order to rule on the matter.

The legislature has also enacted I.C. § 42-1427 to address the problem of claims based on prior ambiguous decrees. At the very least, one of the goals of the Court is to avoid the issuance of ambiguous decrees so that the same issues do not have to be relitigated in the future. The inclusion of an ambiguous term in the partial decree also clearly compromises the finality and certainty of the decree as enunciated by the Supreme Court in *Nelson* [referring to *State v. Nelson*, 131 Idaho 12, 16, 951 P.2d 943, 947 (1998)].

***Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits, Subcase 91-00005 (Basin-Wide Issue 5), July 2, 2001.*** Consistent with this obligation, to the extent the Court finds the stipulated wording to be ambiguous; the Court may reject, modify, add additional explanatory language or allow the parties the opportunity to modify the wording.



## VI. ANALYSIS AND DISCUSSION

The *Stipulation and Joint Motion* provide for the inclusion of provisions or conditions to be included on the face of the *Partial Decrees* issued for Idaho Power's rights and the rights held in trust by the State of Idaho. The provisions incorporate operative terms and conditions of the Swan Falls Agreement.<sup>3</sup> The State of Idaho and

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<sup>3</sup> For the rights held in trust these provisions include:

### OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

1. Legal title to this water right is held in trust by the State of Idaho, by and through the Governor, for the benefit of Idaho Power Company as the user of the water for power purposes and for the benefit of the people of the State of Idaho. In addition to the subordination defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by future beneficial uses under water rights acquired pursuant to applicable state law, unless any such water right is unlawfully exercised or such use depletes or will deplete the average daily flow of the Snake River below 3900 CFS from April 1 to October 31 or below 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2. Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.
2. The "Murphy Gaging Station" is located at latitude 43 degrees 17 minutes 31 seconds, longitude 116 degrees 25 minutes 12 seconds, in T01S R01W, S35, NWNESE, Boise Meridian, Ada County Hydrologic Unit 17050103, on the right bank 4.2 miles downstream from Swan Falls Power Plant, 7.5 miles NE of Murphy, Idaho at river mile 453.5.
3. Idaho Power Company, as user of the water for power purposes and a beneficiary of the trust referenced above, is entitled to use the water available at the facility identified herein to the extent of its actual beneficial use but not to exceed the "QUANTITY" set forth above, and to protect its rights to such use of the water as provided by state law against depletions or claims not in accordance with state law.
4. This water right is subordinate to the lawful exercise of water rights of those persons dismissed from Idaho Power Co. v. State of Idaho, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990).
5. This water right is subordinate to the lawful exercise of water rights of those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985.



Idaho Power assert that the intended purpose of the provisions is to 1) reaffirm the intent and effect of the Swan Falls Agreement with respect to the issues raised in the summary judgment proceedings, and 2) to translate the contractual language of the Swan Falls Agreement into *Partial Decree* language for purposes of defining Idaho Power's hydropower rights.

On April 24, 2009, the Idaho State Legislature approved Senate Bill 1169, which reaffirmed the Swan Falls Agreement. Effective July 1, 2009, S.B. 1169 provided in part:

The Governor, Attorney General and Idaho Power Company have executed a Framework Reaffirming the Swan Falls Settlement dated March 25, 2009, as maintained in the files of the Idaho Department of Water Resources, that resolves pending litigation regarding the intent of the parties with respect to certain aspects of the settlement. The

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6. For the purposes of the determination and administration of this water right, no portion of the waters of the Snake River or surface or ground water tributary to the Snake River upstream from Milner Dam shall be considered. This water right may not be administered or enforced against any diversion or uses of the waters identified in this paragraph.

7. This partial decree is consistent with the Swan Falls Agreement dated October 25, 1984, the Contract to Implement Chapter 259, Sess. Laws, 1983 dated October 25, 1984 and the Consent Judgments entered in Ada County Civil Cases Nos. 62237 (Mar. 9, 1990) and 81375 (Feb. 16, 1990). The Swan Falls Agreement dated October 25, 1984, shall not be merged into nor integrated with this partial decree, but shall remain in full force and effect independent of this partial decree.

8. This partial decree is subject to such general provisions necessary for the definition of the water rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time no later than the entry of a final unified decree. I.C. Section 42-1416(6).

The provisions are the same for the rights decreed to Idaho Power, with the following exceptions: Paragraph 3 is omitted and the first part of paragraph 1 provides:

Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A collectively entitle Idaho Power Company to an unsubordinated water right, except as provided in paragraph nos. 3 and 4 below, to average daily flows of 3900 CFS from April 1 to October 31 and 5600 CFS from November 1 to March 31 as measured at the "Murphy Gaging Station" described below in paragraph no. 2. These flows are not subject to depletion, except for depletions caused by the lawful exercise of those water rights identified in paragraph nos. 3 and 4 below, and except for depletions resulting from any diversions or uses of the waters identified in paragraph 5 below. Water right nos. 02-00100, 02-02032A, 02-04000A, and 02-04001A are satisfied when the average daily flows set forth herein are met or exceeded. Average daily flow . . . .



Legislature finds that Article II of said Framework and the exhibits thereto are in the public interest for all purposes including, but not limited to, all purposes under the public utilities law, as amended. Implementation of the Framework will resolve continuing controversy and litigation over electric utility water rights in the Snake River Basin above the Murphy U.S.G.S. gaging station and reaffirm the terms and original purposes of the Swan Falls settlement and further the implementation thereof.

S.L. 2009, ch. 241, p.741. Article IV of the “Framework Reaffirming the Swan Falls Settlement” provides:

The parties through this Framework and its Exhibits reaffirm all aspects of the Swan Falls Settlement. This Framework and its Exhibits are consistent with the Swan Falls Settlement and clarify the original intent of the Swan Falls Settlement. Nothing in this Framework or its Exhibits changes, modifies, amends or alters any aspect of the Swan Falls Settlement.

*Framework Reaffirming Swan Falls Settlement* at 7.

In the *Memorandum Decision and Order of Cross-Motions for Summary Judgment, Consolidated Subcase No. 00-92023*, (April 28, 2008), this Court decided the issues raised based on principles of contract law and the plain meaning of the language of the October 25, 1984, Swan Falls Agreement. The Court found the contractual language unambiguous and decided the issues based on the plain meaning of the Agreement. *Memorandum Decision* at 26-32. The Court will review the proposed conditions in the same manner to determine whether the provisions are consistent with, and give effect to, the plain meaning of the express terms of the Swan Falls Agreement.

The Court acknowledges that this is a review of a proposed settlement as opposed to a review following the development of full record and hearing on the meaning and intent of the specific provisions of the Swan Falls Agreement put at issue. While it may indeed be possible to re-state some of the proposed terms with better clarity, the need for clarity must be balanced against the re-opening of the entire matter for litigation based on a perceived ambiguity of a single aspect of the entire agreement.<sup>4</sup> Further, because the

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<sup>4</sup> The *Stipulation and Joint Motion* provides:

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



settlement (and the terms of the Swan Falls Agreement) states that the Swan Falls Agreement does not merge into the *Partial Decrees*, the Court is sensitive to the concern of avoiding ambiguity created by departing from the Agreement's original language. Where there is no disagreement over the interpretation of the provision, but rather a dispute over the selection of the wording used, the Court may be able to craft a solution acceptable to all parties.

**A. The Proposed Language Regarding How Flows are to be Calculated at Murphy Gauge (Provision 1).**

The State and Idaho Power proposed the following language to be included in Provision 1:

Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities.

The proposed language is based on paragraphs 7B and 7E of the Swan Falls Agreement. Paragraph 7B provides in relevant part:

Average daily flow, as used herein, shall be based upon actual flow conditions; thus, any fluctuations resulting from the operation of Company facilities shall not be considered in the calculation of the minimum daily stream flows set forth herein, This paragraph shall constitute a subordination condition.

Paragraph E provides:

Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its

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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.



power plants below Milner Dam shall not be limited by this agreement. Such flows shall be considered fluctuations resulting from operation of Company facilities.

**1. Upper Snake Water Users' Objections to the Provision.**

The Upper Snake Water Users ("USWU") argue that the proposed language, as well as the original language in the Swan Falls Agreement, is ambiguous regarding the treatment of fluctuations caused by operations and flows of water purchased, leased etc. by entities other than Idaho Power. The USWU argue that in the past Idaho Power has advanced the position that water acquired by other entities is cause for adjustment to the average daily flow calculation. The USWU have proposed alternative language in an attempt to resolve the ambiguity.<sup>5</sup>

The State of Idaho and Idaho Power are in agreement that the provision is intended to apply only to Idaho Power's operations.

The State and Idaho Power agree that fluctuations resulting from Idaho Power's operations are the "sole exclusion" to the rule that all flows actually present at the Murphy Gaging Station constitute actual flow conditions. Flows of water purchased, leased, owned or otherwise acquired by other entities such as the Bureau of Reclamation are not considered fluctuations for purposes of enforcement of the proposed decrees.

*State of Idaho and Idaho Power Company's Joint Reply Brief ("Joint reply Brief")*  
at 3. The State of Idaho and Idaho Power are reluctant to adopt the USWU's

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<sup>5</sup> The USWU proposed the following alternatives:

...Average daily flow, as used herein, shall be based upon actual flow conditions; ~~thus, any~~ Fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered ~~in the calculations of such~~ actual flows. Fluctuations resulting from flows of water purchased, lease, owned, or otherwise acquired by Idaho Power Company, from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall not be considered actual flows. Fluctuations resulting from flows of water purchased, leased, owned or otherwise acquired by others shall be considered actual flows.

...Average daily flow, as used herein, shall be based upon actual flow conditions; ~~thus, any, with~~ two exceptions: 1) fluctuations resulting from the operation of Idaho Power Company facilities shall not be considered in the calculations of such constitute actual flows conditions; and 2) fluctuations resulting from flows of water purchased, leased, owned, or otherwise acquired by Idaho Power Company, from sources upstream of its power plants, including above Miler Dam, and conveyed to and past its plants below Milner Dam Shall not constitute actual flow conditions. All other fluctuations shall constitute actual flow conditions.



proposals, citing further ambiguity in the proposed alternative language as well as concern over departing from the original language of the Swan Falls Agreement in light of the non-merger clause.

This Court finds that a fair reading of the original language can be interpreted to imply that the exclusion is not solely limited to Idaho Power. The Court, however, also agrees that the language should not be modified given the non-merger clause. All parties are in agreement as to the intended application of the provision. The dispute is over wording the provision so as to avoid ambiguity. The Court also has an interest in avoiding the issuance of ambiguous *Partial Decrees*. The Court therefore orders the following two sentences to be added to the end of the provision in order to resolve the ambiguity:

**Fluctuations resulting from Idaho Power's operations are the sole exclusion to the rule that all flows actually present at the Murphy Gaging Station constitute actual flow conditions. Flows of water purchased, leased, owned or otherwise acquired by other entities are not considered fluctuations.**

*Joint Reply Brief* at 3. The use of this language clarifies the ambiguity without altering or departing from the original language of the Swan Falls Agreement. This is the same language used by Idaho Power and the State of Idaho in their brief in order to clarify the intended meaning of the provision.

## **2. The Interested Water Users' Objections.**

The Interested Water Users ("IWU") also assert an ambiguity with the phrase:

Flows of water purchased, leased, owned or otherwise acquired by Idaho Power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power Company facilities

The IWU argue that the provision can be interpreted to suggest that the subject water rights owned by Idaho Power can be considered fluctuations resulting from the "operation of Idaho Power Company facilities." This Court finds the language to be



abundantly clear that the provision is intended to apply to flows that are not the subject of the Swan Falls Agreement. Paragraph 7E of the Swan Falls Agreement provides:

Company's ability to purchase, lease, own, or otherwise acquire water from sources upstream of its power plants and convey it to and past its power plants below Milner Dam *shall not be limited by this agreement*. Such flows shall be considered fluctuations resulting from operation of Company facilities.

(emphasis added). The interpretation offered by IWU, when read in the context of the entire Swan Falls Agreement, as opposed to independently from the Agreement, would be internally inconsistent with the purpose of the Agreement. Therefore, the Court does not find further clarification necessary.

### **3. The City of Pocatello's Objections.**

Initially, the City of Pocatello also raised questions regarding the calculation of actual flow conditions. Apparently, subsequent joint briefing submitted by the State of Idaho and Idaho Power satisfied Pocatello's concerns over the interpretation of the provision. Pocatello offered this proposed language to eliminate its concerns:

Average daily flow, as used herein, shall be based upon actual flow conditions, the flows that would have occurred without the operation of Idaho Power facilities; thus, any fluctuations resulting from operation of Idaho Power company facilities shall not be considered in the calculation of such flows. Flows of water purchased, leased, owned or otherwise acquired by Idaho power Company from sources upstream of its power plants, including above Milner Dam, and conveyed to and past its plants below Milner Dam shall be considered fluctuations resulting from the operation of Idaho Power company facilities and shall not include flows that are intended to benefit other water users (e.g., Bureau of Reclamation flow augmentation releases).

*City of Pocatello's Reply to Responses of (1) The Upper Snake Water Users, and (2) The Interested water Users Regarding the June 25, 2009 Joint Motions* at 1. The Court finds that the additional language added by the Court as previously discussed adequately addresses Pocatello concerns with respect to resolving the ambiguity in the formula for calculating actual flow conditions.



Pocatello also raised concerns over the absence of comprehensive data needed for administration based on actual flow conditions. Pocatello raises issues regarding how adjustments to the actual flow at the Murphy gauge will be made to account for “fluctuations resulting from the operation of Company facilities.” Pocatello argues the procedure currently in place is rudimentary and does not account for a number of relevant variables. *See Affidavit of Gregory K. Sullivan, P.E.* The Court finds the issue over the lack of data necessary to calculate fluctuations resulting from Idaho Power Company’s operations is an issue that is administrative in nature and beyond the scope of these proceedings. Specifically, whether or not all relevant variables are properly being considered to determine fluctuations resulting from Idaho Power’s operations is an administrative determination and should be addressed if and when an issue arises over the administration of Idaho Power’s rights.

**B. The Intent of the Parties to the Swan Falls Agreement Regarding the Subordination of Idaho Power’s Hydropower Rights to Those Existing Beneficial Uses for Which a Claim or Application was Filed Before July 1, 1985.**

Paragraph 7(D) to the Swan Falls Agreement provides:

The Company’s rights listed in paragraph 7(A) and 7(B) are also subordinate to those persons *who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.*

(emphasis added). The proposed provision to be included in the *Partial Decrees* intended to give effect to this language provides:

This water right is subordinate to the lawful exercise of water rights of those persons who have beneficially used water prior to October 1, 1984, and who have filed an application or claim for said use by June 30, 1985.

The original language of the Swan Falls Agreement and the proposed language are essentially the same. The USWU and the IWU argue that the intention of the Swan Falls Agreement was that the filing deadline be consistent with the statutory deadline of Idaho Code § 42-243 for the filing of “statutory claims.” In 1978, the Idaho legislature amended Idaho Code § 42-243 and enacted Idaho Code § 42-245 requiring that all



beneficial use claims be filed with the Idaho Department of Water Resources by June 30, 1983, or be conclusively relinquished. 1978 Idaho Sess. Laws, ch. 345, §§ 6 & 8, p. 884. In 1983, the deadline for filing late claims was extended to June 30, 1985. 1983 Idaho Sess. Laws, ch. 61 § 1, p.141. In 1994, the date was extended to June 30, 1990, if the claim was filed in a general adjudication (SRBA) commenced prior to June 30, 1988. 1988 Idaho Sess. Laws, ch. 152 § 1, p.272. In 1994, the June 30, 1990, deadline was eliminated provided the claim was filed in the general adjudication (SRBA). 1994 Idaho Sess. Laws, ch. 63 § 1, p.121.

The USWU and the IWU argue that not extending the subordination protections to water users who missed the June 30, 1985, deadline but ultimately filed a claim in the SRBA, is not only contrary to the intent of the Swan Falls Agreement but also undermines the purpose of the subordination provision. The USWU and the IWU argue that senior priority water users that missed the deadline (and are not protected by the subordination provision) but later filed valid SRBA claims could file “rebound calls” in response to a call by Idaho Power against junior water users that met the filing deadline and are protected by the subordination provision. In effect, Idaho Power’s rights would not be subordinated to the rights of those juniors who timely met the June 30, 1985, deadline. The USWUs and the IWU offer the following modifications to the proposed provision:

This water right is subordinate to the lawful exercise of water rights of those persons who beneficially used water prior to October 1, 1984, and who filed an application ~~or claim~~ for said use by June 30, 1985 or claimed said use in the SRBA.

Idaho Power and the State of Idaho argue that the extension of the filing deadline is contrary to the intent of the Agreement. Idaho Power and the State of Idaho point out that various press releases issued after the statutory deadline was extended specifically notified water users to file claims prior to the June 30, 1985, deadline in order to have contractual priority over Idaho Power Company’s water rights. *Supplementary Affidavit of Michael C. Orr Aff.* Exhibits 1-3.

The language proposed by Idaho Power and the State of Idaho is taken directly from the Swan Falls Agreement. In contrast, the proposed modification greatly expands



the scope of the provision. In *Memorandum Decision and Order of Cross-Motions for Summary Judgment, Consolidated Subcase No. 00-92023 (Memorandum Decision)*, (April 28, 2008), this Court decided the matter at issue based on intent of the parties as determined from the plain meaning of language used within the four corners of the Agreement. The Court does not find the subordination language in the instant case to be ambiguous. Furthermore, the Swan Falls Agreement relied upon the enactment of various pieces of legislation. One of the issues addressed in the Court's previous decision was the effect of subsequent changes in law on the Agreement:

This is further supported by the fact that once the initial legislation defining the rights placed in trust was passed, any subsequent changes in the law were not intended to affect the validity of the Agreement. Paragraph 17 of the [Swan Falls] Agreement provides:

This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, legislative enactment or administrative ruling shall not affect the validity of the Agreement.

As such, if the status of the State's regulatory authority changed in the future, it would not affect the status of Idaho Power's rights as originally agreed.

*Memorandum Decision* at 32. The same contract principles and reasoning apply in this instance. The Agreement acknowledged that legislation is subject to change and expressly addressed the issue to prevent subsequent changes from affecting the terms of the Agreement. In this case, the legislature amended the deadline three times. However, the Agreement specifically addressed these subsequent changes in law. Furthermore, one of the terms of the Swan Falls Agreement was the enactment of legislation authorizing the commencement of the SRBA. The commencement of a general adjudication was not an afterthought but rather was integral to the Agreement. The Court finds, based on the record currently before it with respect to this matter, that had the intent been to subordinate Idaho Power's hydropower rights to those who beneficially used water prior



to October 1, 1984, and who filed claims in the SRBA, the Agreement would have provided as such. A showing of unintended consequences arising from the literal application of the provision may well establish a latent ambiguity. However, without evidence first establishing a latent ambiguity and evidence establishing an intent of the parties differing from that of the plain meaning of the language used, the Court has no legal basis to vary from the plain unambiguous meaning of the terms used within the four corners of the Agreement. A full summary judgment or evidentiary hearing would be necessary in order to establish such ambiguity and intent, before the Court could address the position advanced by the USWU and the IWU.

**C. Clarification of Provision 1 to Trust Rights Regarding “Future Beneficial Uses” Benefitting from Subordination Under Idaho Code § 42-203B.**

At issue is the following language in Provision 1 for the trust rights:

In addition to the subordination defined in paragraph nos. 4 and 5 below, this water right shall be subject to subordination to and depletion by *future* beneficial uses under water rights acquired pursuant to applicable state law, unless any such water right is unlawfully exercised or such use depletes or will deplete the average daily flow of the Snake River below 3900 CFS from April 1 to October 31 or below 5600 CFS from November 1 to March 31 as measured at the “Murphy Gaging Station” described below in paragraph no. 2.

(emphasis added). The IWU and USWU argue that the term “future” beneficial uses is ambiguous because the phrase does not refer to the operative date from which future beneficial uses are determined. Specifically, the term “future” could be interpreted to suggest that covered beneficial uses would be those subsequent to the issuance date for the respective *Partial Decrees* issued in the SRBA as opposed to uses occurring at some point in time after the Swan Falls Agreement. In lieu of the use of the term “future,” the IWU and USWU propose the inclusion of the following language:

. . . shall be subject to subordination to and depletion by beneficial uses made after October 25, 1984 under water rights acquired pursuant to applicable state law . . . .



The State and Idaho agree that the phrase is ambiguous, but assert that the inclusion of an operative date would add confusion. The State and Idaho Power proposed the following modification:

. . . shall be subject to subordination to and depletion by ~~future~~ beneficial uses under water rights not described in paragraphs nos. 4 and 5 below that are acquired pursuant to applicable state law . . . .

On balance, the Court finds the inclusion of a date certain to be more consistent with the original language of the Swan Falls Agreement. A date certain also minimizes the potential of implicating issues with respect to the scope of paragraph 1 should issues arise in the future over the application of paragraphs 4 or 5. Therefore, the proposal offered by the IWU should be included.

**D. The List of Water Right Holders Dismissed From *Idaho Power Co. v. State of Idaho*, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990).**

Paragraph 3 for Idaho Power's rights and paragraph 4 for the trust water rights subordinates the respective rights to those water rights of persons dismissed from Ada County Civil Case No. 81375 (Feb 16, 1990) ("the 7500 case") as follows:

This water right is subordinate to the lawful exercise of water rights of those persons dismissed from *Idaho Power Co. v. State of Idaho*, Case No. 81375 (Fourth Judicial Dist. Feb. 16, 1990).

IWU propose that the Court include in the record a list of those water right holders dismissed from the 7500 case and to which the subordination provision applies. The State of Idaho and Idaho Power do not object to the list being made part of the record, provided that it is made clear that the list is not static and includes subsequent changes to the original rights resulting from ongoing transfers, splits, and water right renumbering. The Court will make the original Notices of Dismissal filed by Idaho Power part of the record as reflected in Exhibit A 1-7 to the *Affidavit of Dana L.*



*Hofstetter*, filed in conjunction with these proceedings. The Court will also add the following language to the provision:

**(A list of the original dismissed water right holders is made part of the record in SRBA Consolidated Subcase No. 00-92023. The list does not reflect subsequent changes to the original water rights resulting from transfers, splits and renumbering.)**

## VII.

### CONCLUSION

Accordingly, the Court will approve the Settlement and grant the *Joint Motions*, subject to the foregoing modifications:

1. The terms “future” will be deleted from Provision 1 in the *Partial Decrees* for the trust rights and the following language added as underlined below:

**. . . shall be subject to subordination to and depletion by ~~future~~ beneficial uses made after October 25, 1984 under water rights acquired pursuant to applicable state law . . . .**

2. The following language will be added to the end of Provision 1 for both sets of rights:

**Fluctuations resulting from Idaho Power’s operations are the sole exclusion to the rule that all flows actually present at the Murphy Gaging Station constitute actual flow conditions. Flows of water purchased, leased, owned or otherwise acquired by other entities are not considered fluctuations.**

3. The following language will be added to Provision 3 for Idaho Power’s rights and Provision 4 for the trust water rights:



(A list of the original dismissed water right holders is made part of the record in SRBA Consolidated Subcase No. 00-92023. The list does not reflect subsequent changes to the original water rights resulting from transfers, splits and renumbering.).

## VIII. ORDER

Subject to the above-stated modifications, THE FOLLOWING ARE HEREBY ORDERED:

1. 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* is GRANTED.
2. The *State of Idaho's and Idaho Power Company's Joint Motion to Consolidate Water Right 02-10135 With Consolidated Subcase 92-23* is GRANTED.
3. The *State of Idaho's and Idaho Power Company's Stipulation and Joint Motion to Dismiss Complaint and Petition for Declaratory and Injunctive Relief* is GRANTED.
4. 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* is GRANTED.
5. The Court will separately issue the following:
  - a. The proposed *Order Dismissing Complaint and Petition for Declaratory and Injunctive Relief* submitted jointly by the State of Idaho and Idaho Power.
  - b. The respective *Partial Decrees* and *Amended Partial Decrees*.

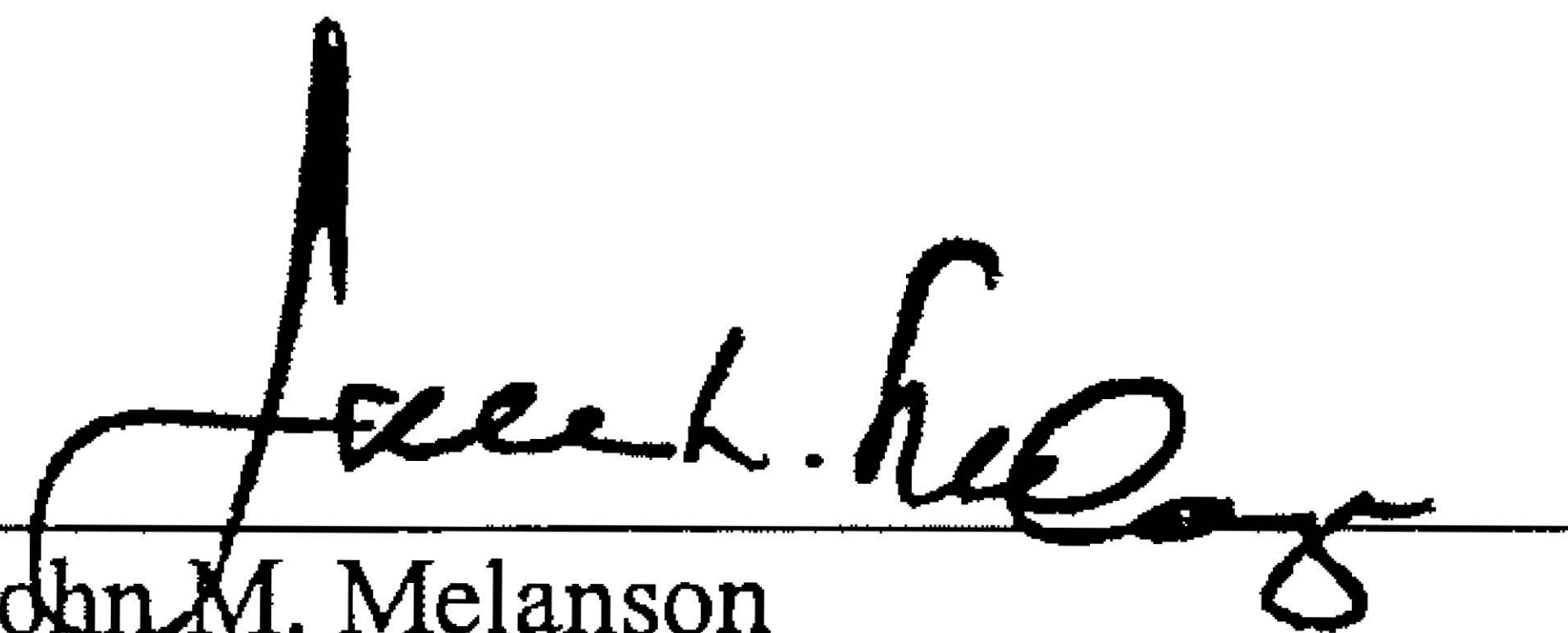


**IX.**  
**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

Dated: January 4, 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 ON MOTION FOR APPROVAL OF SETTLEMENT was mailed on January 04, 2010, with sufficient first-class postage to the following:

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ORDER



(Certificate of mailing continued)

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ORDER

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FILE COPY FOR 00135

Deputy Clerk

A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the printed text "Deputy Clerk".