

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

In Re SRBA)	
)	ORDER AMENDING FINAL UNIFIED
Case No. 39576)	DECREE
)	
)	
_____)	

On November 1, 2011, the Court entered an *Order Granting Joint Motion for Partial Summary Judgment on the "Rebound Call" Issue* in subcase number 00-91013 ("*Order*").¹ In the *Order*, the Court directed that the following definition of the term "Trust Water Right" be included in the final unified decree entered in the Snake River Basin Adjudication ("SRBA"):

Trust Water Right: A water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho. Trust water rights are subordinate to all water rights that enjoy the benefit of the unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 pursuant to the Swan Falls Settlement.

Order, p.13. The *Final Unified Decree* was entered in the SRBA on August 26, 2014. Due to clerical error resulting from oversight and omission, and contrary to this Court's *Order*, the definition of "Trust Water Right" was omitted from the *Final Unified Decree*. Therefore, pursuant to Idaho Rule of Civil Procedure 60(a), the Court will amend the *Final Unified Decree* for the sole and limited purpose of including the above-quoted definition of "Trust Water Right" consistent with this Court's *Order*.

¹ A copy of the *Order* is attached hereto as Exhibit A.

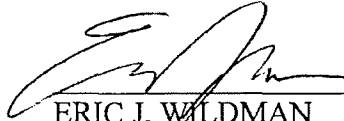
THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The *Final Unified Decree* is hereby amended, consistent with the Court's *Order*, to include the following definition of the term "Trust Water Right":

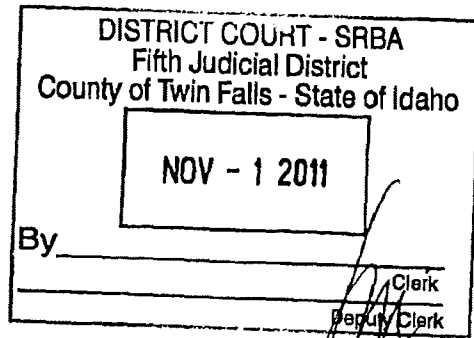
Trust Water Right: A water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho. Trust water rights are subordinate to all water rights that enjoy the benefit of the unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 pursuant to the Swan Falls Settlement.

2. Aside from the amendment set forth in Paragraph 1 above, the remainder of the *Final Unified Decree* is unaltered, and shall remain in full effect and force.

Dated June 25, 2015



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication



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

In Re SRBA) **Subcase No: 00-91013**
) **(Basin-Wide Issue 13)**
Case No. 39576)
) **ORDER GRANTING JOINT MOTION**
) **FOR PARTIAL SUMMARY JUDGMENT**
) **ON THE "REBOUND CALL" ISSUE**
)

Appearances:

Shasta Kilminster-Hadley and Clive J. Strong, Deputy Attorneys General of the State of Idaho, Boise, Idaho, attorneys for the State of Idaho.

Thomas J. Budge of Racine Olson Nye Budge & Bailey, Chartered, Pocatello, Idaho, attorneys for the Idaho Ground Water Appropriators, Inc. and the North Snake Ground Water District.

Josephine P. Beeman, Beeman & Associates, P.C., Boise, Idaho, Attorneys for the City of Pocatello.

Dana L. Hofstetter, Hofstetter Law Office, LLC, Boise, Idaho, Attorneys for Jeff and Jackie Harper and A. W. and Maxine Molyneux.

James C. Tucker, Boise, Idaho and John K. Simpson and Shelley M. Davis of Barker Rosholt & Simpson, LLP, Boise, Idaho, attorneys for the Idaho Power Company.

Jerry R. Rigby of Rigby, Andrus & Rigby, Chtd., Rexburg, Idaho, attorneys for Burgess Canal, Egin Bench Canals, Inc., Enterprise Irrigation District, Harrison Canal, Idaho Irrigation District, New Sweden Irrigation District, North Fremont Canal System, Peoples Canal & Irrigation, Progressive Irrigation District, and Snake River Valley Irrigation.

Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources.



I.

FACTUAL AND PROCEDURAL BACKGROUND

1. On May 26, 2010, the Court entered an *Initial Scheduling Order* in the above-captioned matter identifying five issues that were pending unresolved. Issue No.1 was recognized as “The rebound call issue.” What the parties have referred to as the “rebound call issue” is covered below.

2. On March 25, 2011, the State of Idaho, Idaho Ground Water Appropriators, Inc., North Snake Ground Water District, Burgess Canal, Egin Bench Canals, Inc., Enterprise Irrigation District, Harrison Canal, Idaho Irrigation District, New Sweden Irrigation District, North Fremont Canal System, Peoples Canal & Irrigation, Progressive Irrigation District, and Snake River Valley Irrigation (collectively, “Joint Movants”) filed a *Joint Motion for Partial Summary Judgment on the “Rebound Call” Issue* (“*Joint Motion*”).

3. The Court subsequently entered a *Procedural Order* directing that the State provide personal service of the *Procedural Order*, the *Joint Motion*, and a *Notice of Intent to Participate* form prepared by the Court on the following water users:

Those water users with water rights appearing on Amended Appendix B to the *State of Idaho’s Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Settlement* (“*Second Amended Motion*”).

Any other water users with “trust water rights” with a priority between October 25, 1984 and June 30, 1985, inclusive, which are senior to water rights on Appendix A to the *Second Amended Motion*.

Procedural Order, p.2.

4. Those affected water users that desired to participate in the *Joint Motion* were required by the terms of the *Procedural Order* to file and serve a completed *Notice of Intent to Participate* form in the above-captioned matter. On April 27, 2011, the State filed a *Certificate of Service* evidencing its compliance with the personal service requirements set forth in the *Procedural Order*.

5. *Responses* to the *Joint Motion* were timely filed by Jeff and Jackie Harper, A.W. and Maxine Molyneux, and the City of Pocatello. The *Responses* did not oppose the substance of the *Joint Motion*, but rather raised a separate issue related to the memorialization of the Court’s findings with respect to the rebound call issue in the affected *Partial Decrees*.

6. On September 29, 2011, the Joint Movants filed a *Joint Reply Brief* which, among other things, proposed certain language for the memorialization of the Court's findings with respect to the rebound call issue to be included in the relevant *Partial Decrees*, as well as certain language to be included in the SRBA Final Decree.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on the *Joint Motion* was heard on October 4, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or October 5, 2011.

III.

STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56. The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* When a court considers a motion for summary judgment, all facts are to be liberally construed in favor of the nonmoving party, and the court must draw all reasonable inferences and conclusions in that party's favor. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). Where the case is tried without a jury, the district court, as the trier of fact, is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant the summary judgment motion in spite of the potential of conflicting inferences. *Farm Bureau Insurance Company of Idaho v. Kinsey*, 149 Idaho 415, 418, 234 P.3d 739, 742 (2010).

IV.

DISCUSSION

A. The Swan Falls controversy.

Consideration of the rebound call issue requires an understanding of the Swan Falls controversy. The controversy resulted from tension created between the use of Snake River water for hydropower generation at Swan Falls dam by the Idaho Power Company ("Idaho

Power”) and the use of Snake River water by other water users for upstream development. It originated in the 1970’s when a ratepayer action was commenced before the Idaho Public Utilities Commission against Idaho Power. The action alleged that “Idaho Power had failed to protect and preserve its Swan Falls water rights and that, by doing so, Idaho Power had wasted its assets and overstated its capital investment, thus resulting in overcharges to its ratepayers.” *Idaho Power Co. v. State*, 104 Idaho 575, 582, 661 P.2d 741, 748 (1983). Idaho Power answered the ratepayers’ allegations by commencing legal action in Ada County Civil Case No. 66237 (1977) to protect its Swan Falls water rights against depletions. One of the issues raised in that action was whether Idaho Power could enforce its Swan Falls water rights against junior upstream uses, or whether those rights had been previously subordinated to such uses.¹ *Id.* at 586, 661 P.2d at 752. In a written opinion issued in 1983, the Idaho Supreme Court held that the Swan Falls water rights had not been previously subordinated to junior upstream uses. *Id.* at 590, 661 P.2d at 756.

Meanwhile, Idaho Power commenced another legal action in Ada County Civil Case No. 81375 (1983) against approximately 7,500 upstream water rights holders. Idaho Power asserted that its water rights at Swan Falls were senior to the water rights held by the Defendant water users, and sought injunctive relief in the form of curtailment of those rights. The potential ramifications of Idaho Power’s lawsuits on water right interests in the Snake River Basin were significant, and in 1983 the Idaho Legislature enacted Senate Bill 1180 authorizing the governor to negotiate and execute a contract with Idaho Power in settlement of the controversy. 1983 Idaho Sess. Laws 689.² Negotiations subsequently commenced between the State and Idaho Power and an agreement was reached. On October 25, 1984 the parties entered into two written contracts. The first, entitled simply “Agreement,” will be referred to herein as the “Swan Falls Agreement” or “Agreement.” The second, entitled “Contract to Implement Chapter 259, Sess. Law, 1983,” will be referred to herein as the “1180 Contract.”

Paragraph 7A of the Swan Falls Agreement identifies 19 water rights held by Idaho Power and states that those rights entitle the Company to an unsubordinated right of 3900 c.f.s.

¹ More specifically, the issue was whether certain subordination language contained in Idaho Power’s Hells Canyon license issued by the Federal Power Commission in 1955 had the effect of subordinating all of Idaho Power’s hydropower water rights to future upstream uses, including those associated with Swan Falls dam.

² Subsequently codified as Idaho Code § 61-540.

average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 21:

State Water License Numbers 36-2013 (Thousand Springs), 37-2128 & 37-2472 (Lower Malad), 37-2471 (Upper Malad), 36-2018 (Clear Lake), 36-2026 (Sand Springs), 02-2057 (Upper Salmon), 02-2001A, 02-2001B, 02-2059, 02-2060 (Lower Salmon) 02-2064, 02-2065 (Bliss), 02-2056 (Twin Falls), 02-2036 (Shoshone Falls), 02-2032, 02-4000, 02-4001 and Decree Number 02-0100 (Swan Falls) entitle the Company to an unsubordinated right of 3900 c.f.s. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 31, both to be measured at the Murphy U.S.G.S. gauging station immediately below Swan Falls. These flows are not subject to depletion.

Swan Falls Agreement, p.3. The average daily flows established in favor of Idaho Power in paragraph 7A will be referred to herein as “the Murphy gaging station minimum flows.” The Murphy gaging station minimum flows quantify the extent of Idaho Power’s unsubordinated hydropower water right.

Paragraph 7B of the Agreement provides that “such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A).” Swan Falls Agreement, p.4. In paragraph 7B it was agreed that any hydropower water rights held by Idaho Power in excess of the Murphy gaging station minimum flows would be subordinate to future development consistent with the terms of the Agreement.

B. Unqualified v. qualified subordination.

It is the Joint Movants’ position that the Swan Falls settlement created two categories of water rights that benefit from the subordination of the hydropower rights at Swan Falls – those that receive “unqualified subordination” and those that receive “qualified subordination.” The Joint Movants’ position in this respect is unopposed; however, a review of the two categories of subordination set forth by the Joint Movants is necessary to frame the rebound call issue.

i. Unqualified subordination

The Joint Movants have characterized the term “unqualified subordination” in these proceedings as follows:

The Swan Falls Agreement and the 1180 Contract granted complete, unconditional subordination (“unqualified subordination”) to qualifying water rights.^{FN}

^{FN} This category of subordination is described as unqualified because it is not dependent on the minimum stream flows at Murphy gage being met or exceeded. *This unconditional subordination is conferred by Paragraphs 7(C) and 7(D) of the Swan Falls Agreement and by provisions 2(A) and 2(D) of the 1180 Contract.*

*State’s Second Amended Motion,*³ p.2 (emphasis added).

Paragraphs 7C and 7D of the Swan Falls Agreement subordinate Idaho Power’s hydropower water rights as follows:

C. The Company’s rights listed in paragraph 7(A) and 7(B) are also subordinate to the uses of those persons dismissed from Ada County Case No. 81375 pursuant to the contract executed between the State and Company implementing the terms of I.C. §§ 61-539 and 61-540.

D. 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.

Swan Falls Agreement, p.4.

Paragraphs 2(a) and 2(d) of the 1180 Contract extend the subordination of Idaho Power’s hydropower water rights pursuant to the following terms:

(a) Notwithstanding the pending district court action in Ada County Civil No. 81375 all water users as defined in paragraphs 1(a), and 1(b),⁴ and all consumptive water users who have beneficially used water prior to November 19,

³ The *State’s Second Amended Motion* refers to the *State of Idaho’s Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Fall Agreement* filed in the above-captioned matter on March 21, 2011.

⁴ Paragraphs 1(a) and 1(b) provide in pertinent part as follows:

(a) The phrase “consumptive water uses for domestic uses” means water for one or more households and water used for all other purposes including irrigation of a residential lot in connection with each of said households where total use, other than water for irrigation of the residential lot, does not exceed thirteen thousand (13,000) gallons per day. The above definition applies whether such uses are direct or from a municipal water supply. . . . The term “consumptive water for domestic uses” shall include, in addition to the uses listed above, use of water for livestock.

(b) “Nonconsumptive Commercial, Nonconsumptive Municipal, Nonconsumptive Industrial Use” means any CMI use which does not deplete the water of the Snake River system above Swan Falls more than two acre-feet per day.

1180 Contract, pp.1–2.

ORDER GRANTING JOINT MOTION FOR PARTIAL SUMMARY
JUDGMENT ON THE “REBOUND CALL” ISSUE

S:\ORDERS\Basin Wide Issues\Basin-Wide Issue 13\Order Granting SJM Re Rebound Call Issue.docx

1982, pursuant to a valid permit, license or decreed right existing prior to November 19, 1982, or valid beneficial use claim, and any persons who have previously made substantial investments in irrigation wells or equipment for use pursuant to a water right application filed prior to November 19, 1982, even though such irrigation wells or irrigation equipment were not in operation prior to November 19, 1982, may continue the perfection of such water right in compliance with Idaho law without protest or interference by the Company.

...
(d) the Company and Idaho shall not assert any claim for injunctive relief or compensation for depleted flows at the Swan Falls Dam or other Company dam from those persons dismissed from Ada County Civil No. 81375, and will not protest the issuance of a permit or license to such persons on account of the depletion of flows at the Company's hydro dams for water users coming within the provisions of Idaho Code § 61-539.

1180 Contract, pp.2-4.

It is the Joint Movants' position that those water rights falling within paragraphs 7C and 7D of the Swan Falls Agreement and 2(a) and 2(d) of the 1180 Contract are entitled to "unqualified subordination" because the subordination protection provided by those paragraphs is neither qualified by nor subject to Idaho Power's right to the Murphy gaging station minimum flows. In other words, even if the Murphy gaging station minimum flows are not being met, Idaho Power is precluded from initiating a delivery call to satisfy those minimum flows against water rights benefitting from unqualified subordination.

ii. Qualified subordination.

The Joint Movants have characterized "qualified subordination" in these proceedings as follows:

The legislation contemplated by the [Swan Falls] Agreement, and subsequently enacted as Idaho Code § 42-203B created a second category of subordination ("qualified subordination") benefitting all those water rights diverting from the Snake River and surface and ground water tributary to the Snake River below Milner dam which did not receive the benefit of the provisions of contractual [unqualified] subordination. The water rights benefitting from Idaho Code § 42-203B receive the benefit of subordination of the hydropower rights at Swan Falls, but the subordination is conditional on the minimum flows at the Murphy gage being exceeded

State's Second Amended Motion, pp.2-3.

In 1985, the Idaho legislature drafted and passed Idaho Code § 42-203B pursuant to the Swan Falls settlement. That legislation put into law the trust arrangement agreed to by the parties with respect to Idaho Power's hydropower rights in excess of the Murphy gaging station minimum flows:

A water right for power purposes which is defined by agreement with the state as unsubordinated to the extent of a minimum flow established by state action shall remain unsubordinated as defined by the agreement. Any portion of the water rights for power purposes in excess of the level so established 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; provided, however, that application of the provisions of this section to water rights for hydropower purposes on the Snake river or its tributaries downstream from Milner dam shall not place in trust any water from the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, 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. The rights held in trust shall be subject to subordination to and depletion by future upstream beneficial users whose rights are acquired pursuant to state law, including compliance with the requirements of section 42-203C, Idaho Code.

I.C. § 42-203B(2) (emphasis added). Simply stated, it was agreed that Idaho Power's hydropower water rights in excess of the Murphy gaging station minimum flows would be held in trust by the State. The Director of the Idaho Department of Water Resources is authorized to reallocate the water which is held in trust by the State to subsequent applicants intending to appropriate the same pursuant to the criteria set forth in Idaho Code § 42-203C. The parties have referred to water rights so appropriated as "trust water rights," because they are deemed to divert the water first appropriated under hydropower rights placed into trust.

It is the Joint Movants' position that the subordination protection provided by Idaho Code § 42-203B in favor of "trust water rights" is best termed as "qualified subordination" because it is qualified by and subject to Idaho Power's right to satisfy the Murphy gaging station minimum flows. *See* I.C. § 42-203B; Swan Falls Agreement, ¶7B (providing "such rights in excess of the amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A)"). In other words, unlike water rights entitled to unqualified

subordination, trust water rights entitled to qualified subordination may be called by Idaho Power in the event the Murphy gaging station minimum flows are unmet.

C. The rebound call issue.

What is referred to herein as the rebound call issue has been described by the Joint Movants as follows:

The “rebound call issue” describes the concern that the holder of a “trust water right” could, in response to administration of the hydropower rights, make a call on certain junior water rights that benefit from unqualified subordination under the Swan Falls Agreement and 1180 Contract. This would be conceptually possible because water users who applied for a water right before the date of the Agreement, but who neither developed that right nor substantially invested in its development before October 25, 1984, hold “trust water rights” despite a priority earlier than some rights that receive the benefit of unqualified subordination.

Joint Motion, p.7. That the rebound call is conceptually possible stems from the following language set forth in the Swan Falls Agreement:

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.

Swan Falls Agreement, ¶7D (emphasis added). The issue turns on the fact that in the Swan Falls Agreement, Idaho Power subordinated its hydropower water rights to those persons who “beneficially used” water prior to October 1, 1984, and not those water users having a priority date before October 1, 1984.

An example is illustrative. Take two hypothetical surface water users diverting water from the Snake River below Milner Dam for irrigation purposes. Water user A applies for an irrigation water right in 1982 and is issued a permit subject to a condition that proof of beneficial use be submitted within five years. In 1987, water user A installs his irrigation works, begins irrigating, and timely submits proof of beneficial use to the Department. The Department subsequently issues water user A a license for an irrigation water right with a priority date that relates back to the date of the permit – 1982. Water user B applies for an irrigation water right in 1983. Water user B installs his irrigations work, begins irrigating, and submits proof of beneficial use to the Department in 1983. The Department issues water user B a license for an irrigation water right with a priority date of 1983.

Meanwhile Idaho Power's Murphy gaging station minimum flows are not being met and Idaho Power initiates a delivery call to satisfy those minimum flows. Idaho Power is precluded from calling water user B's water right under paragraph 7D of the Swan Falls Agreement since water user B beneficially used water under his right "prior to October 1, 1984." Idaho Power can however call water user A's water right since he did not beneficially use water under his right, or substantially invest in his irrigation infrastructure, prior to October 1, 1984. So Idaho Power calls water user A's 1982 water right but does not call water user B's 1983 water right.

The rebound call issue is derived from the argument and/or perception that once Idaho Power initiates its call against water user A, water user A as the senior to water user B could rebound and initiate a call against water user B under the prior appropriation doctrine, even though water user B's water right is entitled to unqualified subordination and could not have originally been called by Idaho Power. Hence water user B would be subject to a rebound call from water user A, and the subordination protection granted to him as a result of the Swan Falls settlement would be meaningless. However, for the reasons stated below the argument that a rebound call is possible is unavailing.

D. The holders of trust water rights can acquire no greater right or interest than that held by the trustee.

As discussed above, Idaho Power's hydropower water rights in excess of the Murphy gaging station minimum flows were placed in trust to be held by the State of Idaho via the terms of the Swan Falls settlement and Idaho Code § 42-203B. As new water uses were applied for and approved by the Director under the criteria set forth in Idaho Code § 42-203C, the subject water was reallocated from the water rights in trust to the new water use. It is the Joint Movants' unopposed position that under trust law a water right that diverts "trust water" cannot receive any greater right than the hydropower water rights held in trust. This Court agrees.

The Idaho Supreme Court has instructed that an express trust is created "if the settlor manifests an intention to create a trust." *Carter v. Carter*, 143 Idaho 373, 379, 146 P.3d 639, 645 (2006). The manifestation of intent "requires no particular words or conduct; the settlor simply must evidence his intention, upon transferring the property, or res, to the trustee, that the trustee will hold the res for the benefit of a third person, the beneficiary." *Id.*

The trust property at issue in this case consists of Idaho Power's hydropower water rights in excess of the Murphy gaging station minimum flows. It is undisputed that at the time those water rights were placed in trust they had been subordinated via the plain language of the Swan Falls Agreement and 1180 Contract to junior-priority rights that met the criteria for unqualified subordination. By agreeing to the terms of the Swan Falls Agreement and 1180 Contract, Idaho Power expressed its clear intent that the water rights it would place in trust would be subordinate to those water users entitled to unqualified subordination. *See e.g.*, 76 Am.Jur.2d Trusts § 258 (stating, "the settlor's intent is crucial in determining the nature and extent of the beneficiary's interest in the trust"). Thus the State, as trustee, held water rights in trust that had been subordinated to those water users entitled to unqualified subordination under the Swan Falls Agreement and 1180 Contract. It follows that the beneficiaries who applied for and acquired water rights from water held in trust could receive no greater right or interest in that water than that held by the State as trustee.

Therefore, trust law precludes a rebound call situation such as the one described above between hypothetical water users A and B. It is undisputed between the parties that since Idaho Power could not make a delivery call against water rights benefitting from unqualified subordination at the time the trust water was placed in trust, those individuals that acquired a trust water right likewise cannot make a call against water rights benefitting from unqualified subordination. As no genuine issues of material fact have been raised by any party, a grant of partial summary judgment in favor of the Joint Movants on the "rebound call issue" is appropriate as a matter of law.

E. Language to be placed in the affected *Partial Decrees*.

Last, in their *Reply Brief*, the Joint Movants proposed that the following language be included on the *Partial Decrees* for water rights listed on Appendix B to the *State's Second Amended Motion* and any other trust water rights with priority dates senior to July 1, 1985:

This water right is a trust water right as defined in the SRBA Final Decree and therefore cannot make a delivery call on any water rights with a priority date senior to October 25, 1984, or any water rights identified on its face as receiving the benefit of unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-

20709, 36-02013, 36-02018 and 36-02026. This water right may only make a delivery call against other junior trust water rights.

Reply Brief, p.4. The Joint Movants additionally proposed that the following language be included in the definitional section of the SRBA Final Decree:

Trust Water Right: A water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho. Trust water rights are subordinate to all water rights that enjoy the benefit of the unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 pursuant to the Swan Falls Settlement.

Reply Brief, p.4.

An issue was raised by some of the parties who filed *Responses* to the *Joint Motion* as to whether the term “trust water right” was sufficiently defined in the proposed language to be included in the SRBA Final Decree. This Court finds that the above-quoted proposed language, when viewed in conjunction with the language to be included on the *Partial Decrees* for water rights listed on Appendix B to the *State’s Second Amended Motion* and other trust water rights with priority dates senior to July 1, 1985, is sufficient for the purposes of administration. The Court notes that the proposed language simply cites and refers to the legislation that put the trust arrangement into law – Idaho Code § 42-203B. Therefore, the Court finds that no modifications of the above-quoted language are necessary for purposes of addressing the rebound call issue.

V.

ORDER

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

1. The Joint Movants’ *Joint Motion for Partial Summary Judgment on the “Rebound Call” Issue* is **hereby granted**.
2. The following language shall be included on the *Partial Decrees* for water rights listed on Appendix B to the *State’s Second Amended Motion* and any other trust water rights with priority dates senior to July 1, 1985:

This water right is a trust water right as defined in the SRBA Final Decree and therefore cannot make a delivery call on any water rights with a priority date senior to October 25, 1984, or any water rights identified on its face as receiving

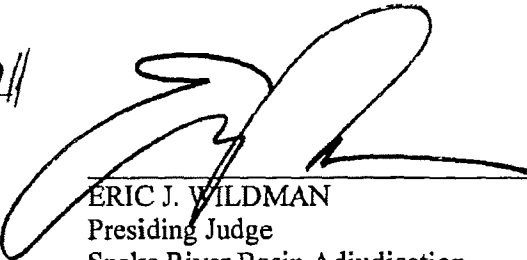
the benefit of unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026. This water right may only make a delivery call against other junior trust water rights.

3. The following language shall be included in the definitional section of the SRBA Final Decree:

Trust Water Right: A water right acquired pursuant to Idaho Code § 42-203B which diverts water first appropriated under hydropower rights held in trust by the State of Idaho. Trust water rights are subordinate to all water rights that enjoy the benefit of the unqualified subordination of hydropower water rights nos. 02-00100, 02-04000A, 02-04001A, 02-02032A, 02-04000B, 02-04001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026 pursuant to the Swan Falls Settlement.

IT IS SO ORDERED.

DATED: *November 1, 2011*



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE "REBOUND CALL" ISSUE was mailed on November 01, 2011, with sufficient first-class postage to the following:

LARRY BETHKE
Represented by:
CANDICE M MC HUGH
101 S CAPITOL BLVD, STE 300
BOISE, ID 83702
Phone: 208-395-0011

BASIN AND RANGE RESOURCE
INTERESTED WATER USERS
JEFF & JACKIE HARPER
Represented by:
DANA L. HOFSTETTER
608 WEST FRANKLIN STREET
BOISE, ID 83702
Phone: 208-424-7800

SCI PROPERTIES LLC
Represented by:
JAMES P. SPECK
SPECK & AANESTAD
120 EAST AVENUE
PO BOX 987
KETCHUM, ID 83340
Phone: 208-726-4421

BLF LAND LLC
BURGESS CANAL
EGIN BENCH CANALS INC
ENTERPRISE IRRIGATION COMPANY
HARRISON CANAL AND IRRIGATION
IDAHO IRRIGATION DISTRICT
LARRY & CAROLYN LEE
L2 LIMITED PARTNERSHIP
NEW SWEDEN IRRIGATION DISTRICT
NORTH FREMONT CANAL SYSTEMS
PEOPLES CANAL & IRRIGATION
PROGRESSIVE IRRIGATION DIST
RALPH L HILLMAN
RANDY J HILLMAN
SNAKE RIVER VALLEY IRRIGATION
Represented by:
JERRY R. RIGBY
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250
Phone: 208-356-3633

CLEAR SPRINGS FOODS INC
IDAHO POWER COMPANY
Represented by:
JOHN K SIMPSON
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

CITY OF POCATELLO
Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702
Phone: 208-331-0950

DEAN R ROGERS INC
Represented by:
LAIRD B. STONE
PO BOX 83
TWIN FALLS, ID 83303-0083
Phone: 208-733-2722

RICHARD YOUNG
TIMOTHY R EAMES
Represented by:
MATTHEW C DARRINGTON
ROBINSON ANTHON & TRIBE
615 H STREET
PO BOX 396
RUPERT, ID 83350
Phone: 208-436-4717

STATE OF IDAHO
Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

ORDER

(Certificate of mailing continued)

IDAHO GROUND WATER

Represented by:
RANDALL C BUDGE
201 E CENTER, STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

B-4 DAIRY LLC

LUIS & SHARON L BETTENCOURT
Represented by:
ROBERT E WILLIAMS
FREDERICKSEN WILLIAMS ET AL
PO BOX 168
JEROME, ID 83338
Phone: 208-324-2303

FARMLAND RESERVE INC

Represented by:
RYAN B FRAZIER
KIRTON & MC CONKIE
60 E SOUTH TEMPLE
PO BOX 45120
SALT LAKE CITY, UT 94145-0120
Phone: 801-328-3600

IDAHO POWER COMPANY

Represented by:
SHELLEY M DAVIS
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

FAULKNER LAND & LIVESTOCK CO
NORTH SNAKE GROUND WATER
PERRY & AFTON VAN TASSELL
WRIDE FARMS INC (BART WRIDE)

Represented by:
THOMAS J BUDGE
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

USDI BLM

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC O33
BOISE, ID 83724

GORDON G & ROSE M KING

PO BOX 36
MURPHY, ID 83650
Phone: 208-834-2051

JASON M & RACHEL L REYNOLDS

PO BOX 613
MOUNTAIN HOME, ID 83647
Phone: 208-580-2840

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098

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

RICHARD WINBERG

1027 S 2600 W
ABERDEEN, ID 83210
Phone: 208-681-0220

ROBERT A THOMAS

17947 SHORT CUT RD
MURPHY, ID 83650
Phone: 208-834-2638

PAUL BEHREND

2706 W 1800 S
ABERDEEN, ID 83210
Phone: 208-221-0341

NICHOLAS BEHREND

2976 W 2000S
ABERDEEN, ID 83210
Phone: 208-221-0342

ORDER

Page 2
11/01/11

(Certificate of mailing continued)

CHRIS WRIDE
3139 WILLOW
AMERICAN FALLS, ID 83211
Phone: 208-221-8125

BART WRIDE
3166 W 1300 S
ABERDEEN, ID 83210
Phone: 208-397-4634

DUANE W DRAKE FAMILY TRUST
3633 COUNTY RD 106
ELIZABETH, CO 80107
Phone: 303-648-3332

RICHARD SVANCARA
3954 N 750 E
BUHL, ID 83316
Phone: 208-543-8835

BILLY D & MAURINE JACOBSEN
535 BUTTE DR
TWIN FALLS, ID 83301
Phone: 208-733-8034

VIRGINIA CANAVERO
58409 MANSFORD AVE
ROGERSON, ID 83302
Phone: 208-857-2252

HAROLD A & MARLENE FUNK
865 FILLMORE
AMERICAN FALLS, ID 83211
Phone: 208-226-7735

ORDER

Page 3 11/01/11

FILE COPY FOR 60019


Deputy Clerk

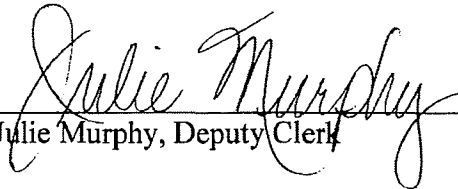
CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER AMENDING FINAL UNIFIED DECREE**, were mailed on June 25, 2015, by first-class mail to the following:

DIRECTOR OF IDWR
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 83720
Boise, ID 83720-0010

U.S. Department of Justice
Environment & Natural Resources Division
550 W Fort St, MSC 033
Boise, ID 83724


Julie Murphy, Deputy Clerk