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ATTORNEY GENERAL

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JAN 12 2012
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

In Re SRBA

Case No. 39576

) Subcase No: 00-91013
) (Basin-Wide Issue 13)
)
) ORDER GRANTING STATE OF
) IDAHO'S SECOND AMENDED MOTION
) TO INCLUDE SUBORDINATION
) LANGUAGE ON WATER RIGHTS
) AFFECTED BY THE SWAN FALLS
) SETTLEMENT
)
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)
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)
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I.

FACTUAL AND PROCEDURAL BACKGROUND

1. On March 21, 2011, the State of Idaho filed its *Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Settlement* ("*Second Amended Motion*") in the above-captioned matter. The *Second Amended Motion* moved the Court to memorialize the subordination benefits conferred by the Swan Falls settlement by amending a remark on the subject hydropower rights and inserting specific remarks on certain affected water rights claimed in the Snake River Basin Adjudication ("SRBA").

2. In its *Second Amended Motion* the State set forth its 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."

3. The State has 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*, p.2.

4. The State has characterized the term “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.

5. The State’s *Second Amended Motion* requests that a remark be inserted on the face of the *Partial Decrees* for hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 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, which hydropower water rights were the subject of the Swan Falls Agreement, to the effect that all water rights with priority dates senior to October 25, 1984 (i.e., the date which the Swan Falls Agreement and 1180 Contract were signed) enjoy the benefit of unqualified subordination of the hydropower rights that are the subject of the Swan Falls Agreement, *unless otherwise noted on the face of the individual water rights*. The State asserted the italicized language is necessary because individual remarks on the face of a small group of water rights that were either excluded from or not captured by the provision (i.e., exceptions to the above-stated rule) would be necessary. The water rights that are

considered exceptions are identified and attached as Appendix A and Appendix B to the *Second Amended Motion*.

6. Attached as Appendix A to the State's *Second Amended Motion* is a list of 57 water rights with priority dates junior to October 25, 1984, which were determined by the State to enjoy the benefits of unqualified subordination.

7. Attached as Appendix B to the State's *Second Amended Motion* is a list of 154 water rights that while having priority dates senior to October 25, 1984, were determined by the State to receive only the limited benefits of qualified subordination.

8. On April 12, 2011, the Court issued a *Procedural Order* governing the *Second Amended Motion*. Among other things, the *Procedural Order* directed that water users who believed their water rights should be listed on Appendix A file a timely objection to that effect with the Court. The *Procedural Order* additionally directed that water users who believed their water rights should not be listed on Appendix B file a timely objection to that effect with the Court. The express terms of the *Procedural Order* required that the State provide personal service of the following documents on those water users with rights listed on Appendix A and Appendix B: (1) the *Procedural Order*; (2) a court-prepared *Objection* form; and (3) a copy of the *Second Amended Motion*.

9. On April 27, 2011, the State filed a *Certificate of Service* with the Court evidencing that it had complied with the *Procedural Order*'s service requirements.

10. Thirty-one *Objections* to the State's *Second Amended Motion* were subsequently filed by various water users.

11. On July 15, 2011, after reviewing the information provided by the various water users in support of their *Objections*, the Department filed a *Supplemental Director's Report Regarding Basinwide Issue 13* ("706 Report and Recommendation") analyzing the water users' *Objections*. In some instances, the Department agreed with the water users' *Objections*, and determined to add the subject water right to Appendix A and/or remove the subject water right from Appendix B per the *Objection*. In other instances, the Department did not agree with the water user's *Objection*. In both cases, the Department set forth the rationale behind its decision in the *706 Report and Recommendation*.

12. Water users who disagreed with the Department's *706 Report and Recommendation* were required to file an *Objection* to that effect with the Court utilizing a court-prepared *Objection* form.

13. *Objections* to the *706 Report and Recommendation* were filed by various water users with respect to the following water rights: 35-2430, 35-2434, 35-8050, 35-8046, 35-7878, 36-7512, 36-7732B, 36-7732C, 36-7732D, 37-21943, 37-22586, 45-7497, 47-7519A, 47-7519B, 47-7984, and 51-7196.

14. On July 28, 2011, the Court entered a *Scheduling Order Re: Mandatory Settlement Conference*, wherein the Court directed that mandatory settlement conferences be held beginning August 5, 2011, for each *Objection* filed to the *706 Report and Recommendation*.

15. *Stipulations* resolving the *Objections* were subsequently filed by the parties with respect to the following water rights: 35-8050, 35-8046, 35-8201, 35-7878, 36-7512, 36-7732B, 36-7732C, 36-7732D, 37-21943, 37-22586, 45-7497, 47-7519A, 47-7519B, 47-7984, and 51-7196. In all of the *Stipulations*, the parties agreed and stipulated that the subject water right be removed from Appendix B to the State's *Second Amended Motion*.

16. With respect to the *Objections* filed pertaining to water rights 35-2430 and 35-2434, the Court entered an *Order* dismissing the same with prejudice on December 2, 2011. Also on December 2, 2011, the Court entered an *Order on Stipulations to Resolve Objections to IDWR's 706 Report and Recommendation*, directing that water rights 35-8050, 35-8046, 35-8201, 35-7878, 36-7512, 36-7732B, 36-7732C, 36-7732D, 37-21943, 37-22586, 45-7497, 47-7519A, 47-7519B, 47-7984, and 51-7196 be removed from the list of water rights constituting Appendix B to the State's *Second Amended Motion*.

17. On December 19, 2011, the State filed its *Reply Brief* in support of its *Second Amended Motion*. In its *Reply Brief* the State attached a revised Appendix A containing a list of 23 water rights (as opposed to the original 57 water rights listed in its *Second Amended Motion*) with priority dates junior to October 25, 1984, which were determined by the State to enjoy the benefits of unqualified subordination. The revised Appendix A constitutes those water rights out

of the original 57 that have been claimed in the SRBA. The remainder of the 57 water rights have not been claimed in the SRBA and will be addressed administratively by IDWR.¹

18. The State also attached a revised Appendix B to its *Reply Brief* containing a list of 42 water rights (as opposed to 154 water rights listed in its *Second Amended Motion*) that while having priority dates senior to October 25, 1984, were determined by the State to receive only the limited benefits of qualified subordination. The revised Appendix B constitutes those water rights out of the original 154 that have been claimed in the SRBA. The remainder of the 154 water rights have either not been claimed in the SRBA and will be addressed administratively by IDWR,² or were removed from Appendix B via this Court's December 2, 2011, *Order on Stipulations to Resolve Objections to IDWR's 706 Report and Recommendation*.

19. In the *Reply Brief*, the State requested that the following language be inserted on the face of the *Partial Decrees* for hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 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, which hydropower water rights were the subject of the Swan Falls Agreement:

This water right is subordinate to all water rights diverting water from the Snake River and sources tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on individual water right decrees.

State's *Reply Brief*, p.4.³

20. The State further requested that the following language be inserted on the face of the *Partial Decrees* of the water rights listed on Appendix A to the *Second Amended Motion*:

¹ Pursuant to Idaho Code § 42-1420, claims meeting certain criteria did not require filing in the SRBA and could be perfected administratively through the statutory licensure procedure. Although not filed in the SRBA, these water rights were identified as enjoying the benefit of unqualified subordination.

² Although not filed in the SRBA, these water rights were identified as receiving the limited benefit of qualified subordination.

³ For purposes of finality, *Partial Decrees Pursuant to I.R.C.P. 54(b)* were previously issued for these water rights as to the elements and remarks that had been resolved to date. The *Order* issued with the *Partial Decrees* expressly acknowledged the *Partial Decrees* would be amended upon resolution of the remaining issues in Basin-Wide Issue 13. See *Order on Motions for Reconsideration; Order Consolidating Issue with Basin-Wide Issue 13; Order Partially Decreeing Water Rights; Order Dismissing Complaint and Petition for Declaratory and Injunctive Relief*, Consolidated Subcase No. 00-92023 (92-23), Subcase Nos. 02-10135, 36-02013, 36-02026, 00-91013 (Basin-Wide Issue 13) (Mar. 25, 2010).

This water right enjoys the benefit of unqualified subordination of hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 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.

State's *Reply Brief*, p.4.

21. Last, the State requested that the following language be inserted on the face of the *Partial Decrees* of the water rights listed on Appendix B to the *Second Amended Motion*:

This water right enjoys the benefit of subordination of hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 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 only so long as the average daily flows as measured at the Murphy Gaging station meet or exceed the minimum stream flows established by state action.

State's *Reply Brief*, p.4.

22. A hearing on the State's *Second Amended Motion* was held on December 20, 2011. Aside from some minimal proposed wording changes to the language proposed by the State in its *Reply Brief*, all parties at the hearing agreed that there were no issues remaining unresolved in the above-captioned matter that would preclude the Court from issuing *Amended Partial Decrees* for the hydropower water rights that are the subject of the Swan Falls Agreement, as well as for those water rights listed on Appendix A and B to the *Second Amended Motion*.

23. With respect to the language proposed by the State in its *Reply Brief* pertaining to the hydropower water rights that are subject to the Swan Falls Agreement, the parties at the hearing agreed to the following amendments:

This water right is subordinate to all water rights diverting water from the Snake River and surface and groundwater sources tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on the face of individual water rights decrees.⁴

24. Since there is no opposition to the State's *Second Amended Motion*, the Court will grant the same as unopposed.

⁴ The amendment clarifies that the provision includes groundwater sources as well as applies to licensed rights that were not claimed in the SRBA pursuant to Idaho Code § 42-1420.

II. ORDER

BASED ON THE FORGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The State of Idaho's *Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Settlement* is **hereby granted**.

2. Pursuant to a separate *Order* to be issued contemporaneously herewith, the *Partial Decrees* previously issued for water right numbers 02-00100, 02-4000A, 02-4001A, and 02-02032A shall be **amended and decreed** by replacing Provision 4 of the respective *Partial Decrees* with the following language:

This water right is subordinate to all water rights diverting water from the Snake River and surface and groundwater sources tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on the face of individual water rights.

3. Pursuant to a separate *Order* to be issued contemporaneously herewith, the *Partial Decrees* previously issued for water right numbers 02-4000B, 02-4001B, 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 shall be **amended and decreed** by replacing Provision 5 of the respective *Partial Decrees* with the following language:

This water right is subordinate to all water rights diverting water from the Snake River and surface and groundwater sources tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on the face of individual water rights.

4. Pursuant to a separate *Order* to be issued contemporaneously herewith, the *Partial Decrees* previously issued for those water rights listed on Appendix A, attached hereto, shall be **amended and decreed** by adding the following language to the "Other Provisions" section of the respective *Partial Decrees*:

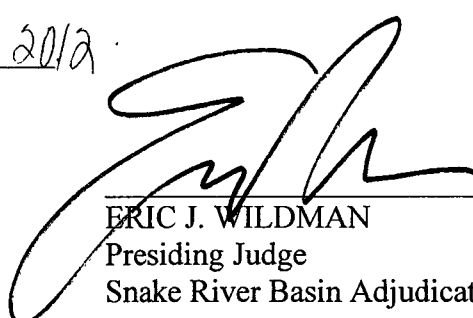
This water right enjoys the benefit of unqualified subordination of hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 02-02032B, 02-02036, 02-02056, 02-02065, 02-02064, 02-10135, 02-02060, 02-02059, 02-02001B, 02-02001A, 02-02057, 37-02128, 37-02472, 37-02471, 37-20710, 37-20709, 36-02013, 36-02018 and 36-02026.

5. Pursuant to a separate *Order* to be issued contemporaneously herewith, the *Partial Decrees* previously issued for those water rights listed on Appendix B, attached hereto, shall be **amended and decreed** by adding the following language to the “Other Provisions” section of the respective *Partial Decrees*⁵:

This water right enjoys the benefit of subordination of hydropower water right nos. 02-00100, 02-4000A, 02-4001A, 02-02032A, 02-4000B, 02-4001B, 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 only so long as the average daily flows as measured at the Murphy Gaging station meet or exceed the minimum stream flows established by state action.

IT IS SO ORDERED.

DATED January 12, 2012



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

⁵ One of the water right listed on Appendix B – 37-7620 – has not yet been partially decreed in the SRBA as it is still pending before the Special Master. With respect to water right claim 37-7620, the Court will not issue an *Order of Amended Partial Decree*, but rather will issue an *Order Regarding Language to be Placed in the Partial Decree for Water Right 37-7620 Should Such a Partial Decree Be Issued* directing that the above-quoted language be placed in the “Other Provisions” section of the *Partial Decree* should one be issued for water right claim 37-7620.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING STATE OF IDAHO'S 2ND AMENDED MOTION TO INCLUDE SUBORDINATION LANGUAGE ON WATER RIGHTS was mailed on January 12, 2012, with sufficient first-class postage to the following:

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ORDER

(Certificate of mailing continued)

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ORDER

(Certificate of mailing continued)

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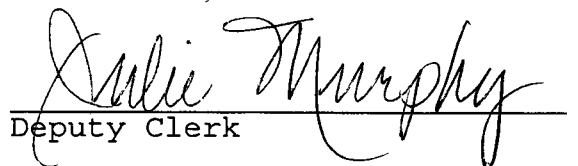
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A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the printed text "Deputy Clerk".