

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

**IN THE MATTER OF LICENSE
NO. 37-8218**

) **FINAL ORDER ADDING CLARIFYING**
) **LANGUAGE TO ASSIST THE**
) **DEPARTMENT IN ADMINISTRATION**
) **OF WATER RIGHTS ENTITLED TO**
) **UNQUALIFIED SUBORDINATION**
) **(Appendix A List)**

FINDINGS OF FACT

1. In October, 1984, the State of Idaho and Idaho Power Company entered into the Swan Falls Agreement ("Agreement"). This Agreement resolved a controversy that began in the 1970's between the Idaho Power Company ("Idaho Power") and water users diverting surface and ground water upstream of Idaho Power's hydropower facility at the Swan Falls dam. The controversy originated with a ratepayer action against Idaho Power before the Idaho Public Utilities Commission. The action alleged that Idaho Power had failed to protect its Swan Falls hydropower water rights by not enforcing its priority over junior upstream water rights, resulting in overcharges to the utility's customers. After the Idaho Supreme Court found that Idaho Power's Swan Falls water rights were not subordinate to upstream uses, Idaho Power initiated legal action to protect its water rights for power generation against depletions caused by junior users. This lawsuit named approximately 7,500 water right holders and included water rights for diversions stretching across the State along the Snake River Plain.
2. The potential effects of the lawsuit on water users in the Snake River Basin were significant, and in 1983, the Idaho Legislature enacted Senate Bill 1180, which authorized the governor to negotiate and execute a contract with Idaho Power to settle the controversy. This legislation was limited to protecting then existing water rights. Upstream water users filed a legal challenge against Senate Bill 1180 and the Contract to Implement Senate Bill 1180, also known as the "1180 Contract."
3. Unable to resolve the dispute through the 1180 Contract alone, the State and Idaho Power entered into negotiations in 1984 that ultimately resulted in the Swan Falls Agreement. On October 25, 1984, the parties signed both the Agreement itself and the 1180 Contract.

4. The Agreement subordinated Idaho Power's hydropower water rights for facilities on the Snake River and its tributaries between Murphy and Milner Dam⁵⁸¹ to all upstream water uses existing as of October 25, 1984. This included water uses for which no application had been filed, provided that an application was filed for the use before July 1, 1985.⁵⁸² The 1180 Contract also subordinated the company's rights to water rights for which there had been substantial investment⁵⁸³ in irrigation equipment pursuant to a valid permit prior to October 25, 1984.⁵⁸⁴ Idaho Power's hydropower rights are subordinated to water rights that fall into these two categories regardless of whether actual flow conditions⁵⁸⁵ at the Murphy gage exceed the minimum stream flow established by the State in 1985 ("unqualified" subordination).⁵⁸⁶
5. In 1987, the State initiated the Snake River Basin Adjudication ("SRBA"), a general adjudication binding on all water users in the Snake River Basin. A general adjudication is conclusive as to the nature of *all* rights to the use of water in the adjudicated water system.
6. In the SRBA proceedings to adjudicate the hydropower rights of the Swan Falls Settlement, the State filed a motion to identify the water rights that benefit from subordination of hydropower water rights pursuant to the Swan Falls Settlement

⁵⁸¹ The Agreement did not apply to the water rights for Idaho Power's CJ Strike facility because they had previously been subordinated.

⁵⁸² Paragraph 7(D) of the Agreement provides that the hydropower rights enumerated in the Paragraph 7(A) and 7(B) of the Agreement are "subordinate to those persons who have beneficially used water prior to October [25], 1984, and who filed an application or claim for said use by June 30, 1985." While the Agreement references October 1, 1984 as the cutoff date, the parties subsequently agreed in the proceedings in SRBA Subcase No. 00-91013 to use October 25, 1984 as the cutoff date.

⁵⁸³ Substantial investment was defined in the 1180 Contract as the expenditure of \$15,000 or 25% of the total projected cost of developing the permit. 1180 Contract ¶ 1(c).

⁵⁸⁴ While the 1180 Contract uses a cutoff date of November 19, 1982, the parties subsequently agreed in the proceedings in SRBA Subcase No. 00-91013 to use October 25, 1984 as the cutoff date for both the Swan Falls Agreement and the 1180 Contract.

⁵⁸⁵ "Actual flow conditions" means the flow measured at Murphy gage after adjustments to account for any fluctuations resulting from the operation of Idaho Power Company's hydropower facilities. Agreement ¶ 7B. Acquisitions of water by the Company from above Milner dam are defined as a fluctuation resulting from the operation of Idaho Power Company's hydropower facilities, and therefore, are not counted in the calculation of the actual flow conditions. Agreement ¶ 7E.

⁵⁸⁶ The Swan Falls Agreement also subordinated the hydropower rights to all water rights dismissed from Ada County Case No. 81375. Agreement ¶ 7C.

and to memorialize the protections afforded by the Settlement.⁵⁸⁷ The State argued that, with the exception of a small group of water rights for which there was no recorded beneficial use before October 25, 1984, all water rights with priority dates senior to October 25, 1984 met the criteria necessary to benefit from the unqualified subordination of the hydropower rights.⁵⁸⁸ The SRBA District Court agreed and ordered the following language inserted on the hydropower decrees:

This water right is subordinate to all water rights diverting water from the Snake River and surface and groundwater tributary to the Snake River, with a priority date senior to October 25, 1984, unless otherwise indicated on the face of individual water rights.⁵⁸⁹

7. In addition to the water rights described above, the State also identified a small group of water rights that meet the criteria necessary to benefit from unqualified subordination, despite having a priority date *junior* to October 25, 1984 (“Appendix A water rights”⁵⁹⁰). These are water rights that complied with Paragraph 7D of the Swan Falls Agreement, which required recorded beneficial use prior to October 25, 1984 and an application or claim filed before July 1, 1985. The State argued that it was necessary to memorialize the protections due to this group of water rights by including language to that effect on the faces of the rights. The SRBA District Court agreed and ordered the following language inserted on the decrees of water rights with priority dates junior to October 25, 1984 that nonetheless benefit from the unqualified subordination of the hydropower rights:

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-

⁵⁸⁷ *State of Idaho’s Second Amended Motion to Include Subordination Language on Water Rights Affected by the Swan Falls Agreement*, filed with the SRBA District Court March 21, 2011, in subcase no. 00-91013 (“State’s Motion”).

⁵⁸⁸ This excludes enlargement water rights, which are subordinate to all water rights senior to April 12, 1994.

⁵⁸⁹ This language is listed as Provision 4 on hydropower water right nos. 02-00100, 02-4000A, 02-4001A and 02-02032A, decreed in the name of Idaho Power Company and Provision 5 on hydropower water right nos. 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, decreed in the name of the State of Idaho as Trustee.

⁵⁹⁰ These water rights are found in Appendix A to the State’s Second Amended Motion.

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.

8. A number of Appendix A water rights that were not required to be claimed in the SRBA are entitled to unqualified subordination. These water rights are currently in a license or permit stage with the Department. To assist the Department in administering these water rights in a manner consistent with the Swan Falls Settlement and the SRBA District Court's Order, the permits or licenses should include the same remark inserted in the Appendix A water rights decreed by the SRBA Court. This will allow the Department to ensure that these water rights receive the benefit of unqualified subordination.

Conclusions of Law

1. Idaho Code § 67-5254 provides, in part:

(59) An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license... unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

2. This order satisfies the notice and hearing requirements of I.C. § 67-5254 because this order provides notice to the water right holder of the proposed action and, pursuant to I.C. § 42-1701A, any person aggrieved of this action may request a hearing regarding this order.
3. To assist the Department in administration of this water right, the following language should be added to the 37-8218:

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.

Order

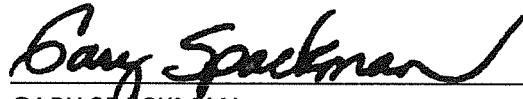
Based on the foregoing, IT IS HEREBY ORDERED that the following language is added to the license for water right no. 37-8218:

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.

IT IS FURTHER ORDERED that this is a final order of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency shall dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the director to contest the action taken provided the person files with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. Idaho Code § 42-1701A(3). Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01.

Dated this 27th day of JULY, 2012.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2012, a true and correct copy of the documents described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: **Department in Administration of Water Rights Entitled to Unqualified Subordination (Appendix A List)**

2-7418
DAVID M AYARRA JR TRUST DATED
APRIL 17 2009
PO BOX 247
BEND OR 97709

21-7358
TREVOR LARSON
KATRINA LARSON
625 N 2586 E
ST ANTHONY ID 83445

21-7158
DOROTHY A DRAKE
RT 1 BOX 202-14
ST ANTHONY ID 83445

21-7358
RIGBY ANDRUS & MOELLER CHTD
PO BOX 250
REXBURG ID 83440

21-7358
JON M ANGELL
KATHY BUSHMAN
623 NORTH 2586 EAST
ST ANTHONY ID 83445

21-7358
DUANE W DRAKE
3633 COUNTY RD 106
ELIZABETH CO 80107-6302

21-7358
EFRAN MURILLO
621 NORTH 2586 EAST
ST ANTHONY ID 83445

22-7493
KIRT SUTTON
LORI SUTTON
864 E 7156 S
REXBURG ID 83440

22-7493
STAN & PAULINE SUTTON LIVING
TRUST
578 E 7000 S
REXBURG ID 83440

22-7495
KIRT SUTTON
LORI SUTTON
864 E 7156 S
REXBURG ID 83440

22-7495
STAN & PAULINE SUTTON LIVING
TRUST
578 E 7000 S
REXBURG ID 83440

22-7508
CANYON CREEK LATERAL DITCH
ASSN
12241 E 3749 N
NEWDALE ID 83436

22-13968
STANLEY SUTTON
578 E 7000 S
REXBURG ID 83440

22-13969
KIRT SUTTON
LORI SUTTON
864 E 7156 S
REXBURG ID 83440

22-13969
STAN & PAULINE SUTTON LIVING
TRUST
578 E 7000 S
REXBURG ID 83440

32-7150
WAHOO INC
3930 E 2000 N
SUGAR CITY ID 83448

32-7150
BHA INC
2983 E 2000 N
SUGAR CITY ID 83448

33-7174
LITTLE LOST RIVER LAND & CATTLE
LTD
3776 N 1800 W
HOWE ID 83244

33-7174
DONALD M ISHAM
KAREN R ISHAM
3836 N 1300 W
HOWE ID 83244-8711

35-8608
DE LOY Z WARD
VIOLA J WARD
1305 S 200 E
REXBURG ID 83440

35-8610
IDAHO AGCREDIT FLCA
PO BOX 985
BLACKFOOT ID 83221-0985

35-8610
MERLIN SMITH SR
833 S STOUT
BLACKFOOT ID 83221

35-8611
JOYCE C TALBOT
H EUGENE TALBOT
1547 W 400 N
BLACKFOOT ID 83221

35-13467
MICHAEL G LARSEN
862 W 650 N
BLACKFOOT ID 83221

35-13467
IDAHO AGCREDIT FLCA
PO BOX 985
BLACKFOOT ID 83221-0985

35-13468
NEAL D & VIOLA J WARD
DE LOY Z & SHELLY M WARD
1305 S 200 E
REXBURG ID 83440

35-13660
ROCKY MOUNTAIN ENVIRONMENTAL
C/O KEITH C WILSON
482 CONSTITUTION WAY
IDAHO FALLS ID 83402

35-13660
SNAKE RIVER EQUIPMENT CO INC
C/O DANE WATKINS
PO BOX 50781
IDAHO FALLS ID 83405-0781

35-13660
WELLS FARGO BANK NA
EASTERN ID BUSINESS BANKING GRP
320 A ST
IDAHO FALLS ID 83402

35-13660
THE BANK OF COMMERCE
C/O WESTERN AG CREDIT
PO BOX 95850
SOUTH JORDAN UT 84095-0850

35-13706
SNAKE RIVER EQUIPMENT CO INC
C/O DANE WATKINS
PO BOX 50781
IDAHO FALLS ID 83405-0781

35-13706
WELLS FARGO BANK NA
EASTERN ID BUSINESS BANKING GRP
320 A ST
IDAHO FALLS ID 83402

35-13707
FOSTER COMPANY
PO BOX 626
RIRIE ID 83443

36-8164
JIM D SCARROW
3184 S 1900 E
WENDELL ID 83355

36-8164
HARTFORD ACCIDENT & INDEMNITY
C/O HIMCO
5260 N PALM AVE STE 205
FRESNO CA 93704

36-8256
IDAHO YOUTH RANCH INC
1275 N 400 E
RUPERT ID 83350

36-8266
ESTATE OF RAY CHUGG
C/O MARY ALLEN
734 GOLF COURSE RD
JEROME ID 83338

36-8282
WELLS FARGO BANK N A
ATTN BOISE LOAN OPERATION
3033 ELDER ST
BOISE ID 83705

36-8282
SARA D CRANE
270 E 577 LN N
RUPERT ID 83350

36-8285
DONALD M ANDERSON
JOAN ANDERSON
91 HORSESHOE CIR
JEROME ID 83338

36-8289
STAR FALLS FARMS LLC
1369 S 2000 E
HAZELTON ID 83335

36-8290
EUGENE HRUZA
PO BOX 66
MINIDOKA ID 83343

37-8218
CLOYD W GARDNER
RUTH HELEN GARDNER
PO BOX 470
BELLEVUE ID 83313

37-8218
ROBERT E GARDNER
PO BOX 1200
HAILEY ID 83333

37-8219
ROBERT E GARDNER
RUTH HELEN GARDNER
PO BOX 1200
HAILEY ID 83333

37-8221
REDCLIFF PARTNERS L.P. A
CALIFORNIA LIMITED PARTNERSHIP
567 SAN NICOLAS DR, SUITE 340
NEWPORT BEACH CA 92660

47-8001
LEE LUCICH
952 TROTTER DR
TWIN FALLS ID 83301

47-8002
JR SIMPLOT REVOCABLE TRUST
C/O JR SIMPLOT, TTEE
999 MAIN ST, STE 1300
BOISE ID 83702

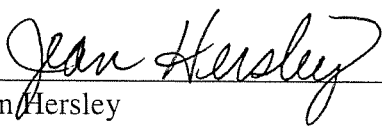
47-8/007A
LANTING ENTERPRISES
2219 E 2200 N
TWIN FALLS ID 83301

47-8007B
LANTING ENTERPRISES LLC
C/O JAMES W LANTING
2181 N 2300 E
TWIN FALLS ID 83301

47-8008
LYNN S MC MASTER
KATHY A MC MASTER
3145 N 3500 E
KIMBERLY ID 83341

61-7569
GARY & FRANCES ELLIS
LIVING TRUST
HC 63
HAMMETT ID 83627

61-75569B
H W & K PARTNERSHIP LLC
504 N PHILLIPPI ST
BOISE ID 83706



Jean Hersley
Technical Specialist I
Water Management Division



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C.L. "BUTCH" OTTER

Governor

GARY SPACKMAN

Director

July 30, 2012

ROBERT E GARDNER
PO BOX 1200
HAILEY ID 83333

Re: Water Right No. 37-8218

Dear Water User:

The State of Idaho previously sent you a letter informing you that your water right (referenced above) may be entitled to unqualified subordination protection if the minimum stream flows at Murphy gage are not met. To assist the Department in administering water rights subject to a delivery call to protect the minimum stream flow at Murphy, the Department is adding a condition to the water rights determined to be entitled to the benefit of unqualified subordination. Please review the attached final order.

If you have any questions, please contact Shelley Keen at 208-287-4947 or shelley.keen@idwr.idaho.gov.

Sincerely,

Shelley W. Keen, Manager
Water Right Permits Section

Enclosure



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C.L. "BUTCH" OTTER

Governor

GARY SPACKMAN

Director

July 30, 2012

CLOYD W GARDNER
RUTH HELEN GARDNER
PO BOX 470
BELLEVUE ID 83313

Re: Water Right No. 37-8218

Dear Water User:

The State of Idaho previously sent you a letter informing you that your water right (referenced above) may be entitled to unqualified subordination protection if the minimum stream flows at Murphy gage are not met. To assist the Department in administering water rights subject to a delivery call to protect the minimum stream flow at Murphy, the Department is adding a condition to the water rights determined to be entitled to the benefit of unqualified subordination. Please review the attached final order.

If you have any questions, please contact Shelley Keen at 208-287-4947 or shelley.keen@idwr.idaho.gov.

Sincerely,

A handwritten signature in black ink that reads "Shelley W. Keen". The signature is written in a cursive, flowing style.

Shelley W. Keen, Manager
Water Right Permits Section

Enclosure