

**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 ON STATE OF IDAHO'S**
) **MOTION FOR PARTIAL SUMMARY**
) **JUDGMENT ON ISSUE NO. 2**
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Appearances:

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

Josephine Beeman of Beeman & Associates, PC, Boise, Idaho, attorneys for the City of Pocatello.

Jerry R. Rigby of Rigby, Andrus & Rigby, Chtd., Rexburg, Idaho, attorneys for Burgess Canal, Egin Bench Canals, Inc., Enterprise Irrigations 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.

I.

FACTUAL AND PROCEDURAL BACKGROUND

1. On May 26, 2010, this Court entered an *Initial Scheduling Order* in the above-captioned matter identifying five issues that were pending unresolved in this matter. Issue No. 2 was recognized as “Identifying and preserving protections for third-party beneficiaries to the Swan Falls Agreement.”

2. On March 24, 2011, the State of Idaho filed its *Motion for Partial Summary Judgment on Issue No. 2* (“*Motion*”). In its *Motion*, the State identified certain classes of water users it asserts are third-party beneficiaries to the Swan Falls settlement.

3. On May 12, 2011, the Burgess Canal, Egin Bench Canals, Inc., Enterprise Irrigations 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, “Upper Valley Storage Holders”) filed a *Response Brief* in support of the State of Idaho’s *Motion*. In their *Response Brief*, the Upper Valley Storage Holders concurred with the arguments set forth by the State in its *Motion*.

4. On May 20, 2011, the City of Pocatello filed a *Reply Brief* to the Upper Valley Storage Holders’ *Response Brief*. The City alleged that the State’s *Motion* was too limited in its identification of third-party beneficiaries.

5. On May 23, 2011, the State filed a *Motion to Strike*, requesting that this Court strike the City of Pocatello’s *Reply Brief* as untimely. Among other things, the State argued that while the City’s *Brief* was styled as a *Reply Brief* to the Upper Valley Storage Holders’ *Response Brief*, it was in reality a response in opposition to the State’s *Motion*. As such it was the State’s position that the City’s *Brief* should have been filed consistent with the Court’s scheduling deadline for responsive briefing.

6. On May 25, 2011, the State of Idaho filed its *Reply to City of Pocatello’s Reply* in the above-captioned matter.

7. Arguments on the State’s *Motion for Partial Summary Judgment* and its *Motion to Strike* were heard before the Court on May 26, 2011. At the hearing, the Court ruled from the bench on the State’s *Motion to Strike*. The Court exercising its discretion denied the *Motion to Strike*, but gave the State an additional five days within which to file any supplemental briefing it felt necessary in light of the City’s *Reply Brief*. *Reporter’s Transcript for May 26, 2011 Hearing*, pp.15–18.

8. On May 31, 2011, the State filed its *Supplemental Reply Brief* in the above-captioned action.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument on the *Motion for Partial Summary Judgment* was heard on May 26, 2011. At the hearing the Court gave the State of Idaho an additional five days to submit supplemental briefing. On May 31, 2011, the State filed its *Supplemental Reply Brief*. The matter is therefore deemed fully submitted the following business day, or June 1, 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 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). The filing of cross motions for summary judgment does not change the standard of review; the court must evaluate each party's motion on its own merits. *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.

The Swan Falls 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 The governor's power to negotiate and execute a contract with Idaho Power was, however, expressly limited by the following:

Each contract shall provide, among other things, that (1) all consumptive water users who have beneficially used water for any consumptive purpose prior to November 19, 1982, or any person or persons who have previously made substantial investments in irrigation wells and irrigation equipment and have pending a water permit or application, even though such irrigation wells and irrigation equipment were not in operation prior to November 19, 1982, may continue the water licensing process, (2) persons included within the provisions of (1) above are third party beneficiaries of said contract, (3) the electrical corporation shall, where any suit is pending in which a person is within the class of consumptive users identified in (1) above, move the court for the dismissal from the suit of such person or persons, (4) said contract shall be conditional upon the passage and approval of this act but shall terminate if section 61-539 or 61-540, Idaho Code, be subsequently amended or repealed, and (5) in the event this act be amended or repealed, the defenses of statute of limitations, abandonment, adverse possession, statutory forfeiture, laches [laches], waiver, estoppel and other applicable common law defenses shall not be available against said

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.

electrical corporation following said contract termination for a period of two (2) years, unless the parties mutually consent to keep said contract in effect by addendum.

Id. Negotiations subsequently commenced between the State and Idaho Power. An agreement was reached, and 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.

Among other things, the Swan Falls Agreement identified those water rights associated with Idaho Power’s hydropower facilities and detailed the extent to which they would be subordinated to junior water rights. 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. average daily flow from April 1 to October 31, and 5600 c.f.s. average daily flow from November 1 to March 21”³ The Agreement thereafter goes on to detail the subordination of Idaho Power’s hydropower water rights to other water uses. The 1180 Contract was entered into by the parties to implement and satisfy the conditions set forth by the Idaho Legislature in Senate Bill 1180. Among other things, the 1180 Contract expounds upon and further defines the subordination of Idaho Power’s hydropower water rights.

B. Third-party beneficiaries to the Swan Falls Agreement and 1180 Contract.

The issue placed before the Court has been characterized as the identification of those water right holders that are third-party beneficiaries to the Swan Falls Agreement and 1180 Contract. Under Idaho law, “when a contract is made expressly for the benefit of a third person, the contract may be enforced by the third person at any time before the parties to the contract rescind it.” *Partout v. Harper*, 145 Idaho 683, 687, 183 P.3d 771, 775 (2008); I.C. § 29-102. The test for determining a party’s status as a third-party beneficiary is whether the agreement reflects an intent to benefit the third party. *Fenwich v. Idaho Department of Lands*, 144 Idaho 318, 323, 160 P.3d 757, 762 (2007). The Idaho Supreme Court has instructed that “the contract

³ Those 19 water rights were identified in the Agreement as “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).” *Swan Falls Agreement*, ¶7A.

itself must express an intent to benefit the third party,” and that “this intent must be gleaned from the contract itself unless the document is ambiguous, whereupon the circumstances surrounding its formation may be considered. *Idaho Power Company v. Hulet*, 140 Idaho 110, 112–13, 90 P.3d 335, 337–38 (2004). In addition the contract must be made for the third-party’s “direct benefit, or as sometimes stated primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary.” *Id.*

The parties in this case are largely in agreement concerning the third-party beneficiaries of the Swan Falls Agreement and 1180 Contract. With respect to the Swan Falls Agreement the State’s *Motion* asserts that those classes of water users identified in Paragraphs 7C and 7D are third-party beneficiaries of the subordination benefits conferred therein. Paragraphs 7C and 7D provide 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.

The State’s *Motion* is unopposed in this respect. All of the parties agree that those classes of water users identified in Paragraph 7C and 7D of the Swan Falls Agreement are third-party beneficiaries of the subordination benefits conferred therein.⁴

With respect to the 1180 Contract, the State’s *Motion* asserts that those classes of water users identified in Paragraphs 2(a), 2(d) and 2(e) are third-party beneficiaries to the Contract under the plain language of Paragraph 4:

Third Party Beneficiaries

Persons coming within the class of users identified in paragraphs 2(a), 2(d) or 2(e) above are third party beneficiaries of this contract who may seek enforcement of applicable provisions, except as to paragraph 3, in accordance with the laws of the State of Idaho. By executing this contract, the Company agrees that its claimed water rights are subordinate to the rights coming within the provisions of paragraphs 2(a), 2(d) and 2(e).

⁴ At oral argument, counsel for the City of Pocatello stated the City’s position with respect to the State’s *Motion* as follows: “the reply that the City filed is not to say what the state filed is incorrect. It’s just not broad enough. It’s fine as far as it goes, but it doesn’t go far enough.” *Reporter’s Transcript for May 26, 2011 Hearing*, p.10.

In addition to the subordination benefit conferred via the last sentence of Paragraph 4, the State's *Motion* asserts that the water users identified in Paragraphs 2(a), 2(d) and 2(e) are also entitled to enforce the applicable provisions of the 1180 Contract and the benefits conferred thereby:

(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), and all consumptive water users who have beneficially used water prior to November 19, 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 Count 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 uses coming within the provisions of Idaho Code § 61-539.

(e) The Company and Idaho shall not name as defendants in any action, or assert any claim against, holders of consumptive water uses for domestic, nonconsumptive commercial, nonconsumptive industrial, or nonconsumptive municipal uses from the Snake River watershed above Swan Falls Dam occurring from and after November 19, 1982, unless such action or claim is unrelated to such uses, or unless such uses would result in a violation of the Company's water right as defined in paragraph 7(A) of the contract attached hereto as Exhibit A, or in a violation of the minimum stream flow established by the State Water Plan.

1180 Contract, ¶¶ 2(a), 2(d) and 2(e). The State's *Motion* is unopposed in this respect. All of the parties agree that those classes of water users identified in Paragraphs 2(a), 2(d) and 2(e) are third-party beneficiaries of the 1180 Contract.

The Court finds that there exists no genuine issue of material fact that the classes of water users identified in Paragraphs 7C and 7D of the Swan Falls Agreement and Paragraphs 2(a), 2(d) and 2(e) of the 1180 Contract are third-party beneficiaries of the respective contracts and may enforce the respective contracts to the extent provided therien. The State is entitled to a legal determination to that effect as a matter of law.

C. The geographic scope of potential third-party beneficiaries is not limited by the Milner divide under either the plain language of the Swan Falls Agreement or the 1180 Contract.

The State argues that those water users that can be termed third-party beneficiaries under Paragraphs 7C and 7D of the Swan Falls Agreement and Paragraphs 2(a), 2(d) and 2(e) of the 1180 Contract are limited geographically to those water users located below Milner Dam. The State asserts that water rights diverting above Milner dam are completely insulated from any administration based on the hydropower rights below Milner dam pursuant to Idaho Code § 42-203B and the State Water Plan. As such it is the State's position that the protections provided by the Swan Falls Agreement and 1180 Contract are unnecessary with regard to those water users diverting above Milner. The City of Pocatello disagrees, and argues that the geographic scope of potential third-party beneficiaries includes the entire Snake River watershed above Swan Falls dam under the plain language of the contracts.

Under Idaho law, the interpretation of a contract begins with the language of the contract itself. *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006). Where the contract's terms are clear and unambiguous, "the determination of the contract's meaning and legal effect are questions of law and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract's own words." *Page v. Pasquali*, 150 Idaho 150, 152, 244 P.3d 1236, 1238 (2010). Where the contract is determined to be ambiguous, "the interpretation of the document is a question of fact which focuses upon the intent of the parties." *Id.* Determining whether the language of a contract is ambiguous or unambiguous is a question of law. *McKoon*, 146 Idaho, at 109, 190 P.3d, at 928. The Idaho Supreme Court has further instructed that "[i]n determining whether a contract is ambiguous, this Court ascertains whether the contract is reasonably subject to conflicting interpretation." *Page*, 150 Idaho at 152, 244 P.3d at 1238.

In this case, absent from the Swan Falls Agreement and the 1180 Contract is any language expressly limiting the benefits conferred therein to third-party water users located below Milner dam. For instance, Paragraphs 7C and 7D of the Swan Falls Agreement provide for subordination of Idaho Power's hydropower water rights to "those persons dismissed from Ada County Case No. 8137" and "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."

Those Paragraphs contain no express geographic limitations limiting the classes of water users identified to those diverting below Milner dam. Likewise, absent from Paragraphs 2(a), 2(d) and 2(e) of the 1180 Contract is any geographic limiting language. Since there is no indication from the plain language of the contracts that the parties thereto intended for the third-party beneficiaries identified therein to be limited geographically to those diverting water below Milner dam, the Court finds that the State's argument that the contacts contain such a limitation unavailing as a matter of law.

That said, the Court does note that the State is correct in its assertion that Idaho Code § 42-203B(2) places certain limitations on the ability to administer those hydropower rights that are the subject of the Swan Falls Agreement as against water users above Milner. It provides:

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*

(emphasis added).⁵ However, this limitation stems from statute, and not from the plain language of the subject contracts.

Paragraph 13 of the Swan Falls Agreement entitled "Conditions on Effectiveness" also provides:

⁵ Likewise, the *Partial Decrees* for hydropower rights that are the subject of the Swan Falls Agreement contain the following limiting remark under the "Other Provisions" element:

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 diversions or uses of waters identified in this paragraph.

Order Partially Decreeing Elements of Water Rights, dated March 25, 2011, Consolidated Subcase No. 00-92023.

A. The provisions of paragraphs 7, 8, and 11 shall not be binding and effective until each of the following conditions have been implemented:

i. Amendment of the State Water Plan to implement the provisions of Exhibit 6.

Exhibit 6 to the Swan Falls Agreement provides in relevant part that “2. The minimum daily flow at the Milner gauging station shall remain at zero c.f.s.” While the practical effect of this provision may eliminate the need for enforcement of the Agreement above the Milner divide by third-party beneficiaries, the Agreement does not limit the scope of potential third-party beneficiaries to below the Milner divide.

D. Neither the Swan Falls Agreement nor the 1180 Contract reflect an intent to designate the Idaho public at large as third-party beneficiaries.

The City of Pocatello argues that the State’s *Motion* is too limited in its identification of third-party beneficiaries in that it fails to recognize the public at large as being a third-party beneficiary to the Swan Falls settlement. The City argues that “the Swan Falls Settlement was also an allocation of the State’s water resources, a more general and pervasive action affecting all persons” and that the settlement conferred benefits that include “the apportionment of water in an arid state (a broad public interest, represented by the State of Idaho) separate and apart from the subordination of Idaho Power Company water rights.” *Pocatello Reply*, pp.6 & 8.

This Court finds the City of Pocatello’s argument in this respect unavailing as a matter of law. This City has failed to present to the Court any express language from either the Swan Falls Agreement or the 1180 Contract designating the Idaho public at large third-party beneficiaries to those contracts. While the public at large may arguably be considered incidental beneficiaries of the Swan Falls settlement, that alone is insufficient to confer a third-party beneficiary right to the public at large to enforce the provisions of the contracts. *See e.g., Idaho Power Company v. Hulet*, 140 Idaho 110, 112–13, 90 P.3d 335, 337–38 (2004) (stating, the contract must be made for the third-party’s “direct benefit, or as sometimes stated primarily for his benefit, and that it is not sufficient that he be a mere incidental beneficiary”). The direct and primary third-party beneficiaries of the Swan Falls Agreement and 1180 Contract have been identified above as those classes of water users identified in Paragraphs 7C and 7D of the Swan Falls Agreement and

Paragraphs 2(a), 2(d) and 2(e) of the 1180 Contract. None of those Paragraphs express an intent that all residents of Idaho be conferred a third-party beneficiary right to enforce the Swan Falls Agreement or the 1180 Contract.

E. The third-party protections conferred in the Swan Falls Agreement and the 1180 Contract will not be superseded by the issuance of a final decree in the SRBA.

The State finally argues that this Court find that the third-party protections provided in the 1180 Contract and Swan Falls Agreement are contractual in nature and should not be superseded by the issuance of a final decree in the SRBA even though many of those protections will be memorialized in the *Partial Decrees* issued for those hydropower water rights that are the subject of the Swan Falls Agreement. No party has opposed the State's argument in this respect. As such, the Court finds that there exists no genuine issue of material fact that the third-party protections conferred in the Swan Falls Agreement and the 1180 Contract will not be superseded by the issuance of a final decree in the SRBA.

V.

CONCLUSION

There is no genuine issue of material fact that those classes of water users identified in Paragraphs 7C and 7D of the Swan Falls Agreement and Paragraphs 2(a), 2(d) and 2(e) of the 1180 Contract are third-party beneficiaries to the Swan Falls Agreement and the 1180 Contract respectively and may enforce those respective agreements to the extent provided therein. Within those classes of water users, there is no geographic limitation contained in either the Swan Falls Agreement or 1180 Contract limiting third-party beneficiary status to those water users diverting below Milner dam. Last, there is no genuine issue of material fact that the third-party protections conferred in the Swan Falls Agreement and the 1180 Contract will not be superseded by the issuance of a final decree in the SRBA.

Dated

July 12, 2011




ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

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.

DATED: July 12, 2011.


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON STATE OF IDAHO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ISSUE NO. 2 was mailed on July 12, 2011, with sufficient first-class postage to the following:

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

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(Certificate of mailing continued)

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FILE COPY FOR 60019

Deputy Clerk

A handwritten signature in black ink, reading "Julie Murphy", is written over a horizontal line. The signature is cursive and extends above and below the line.