

2007 JAN 30 PM 3 50

**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

-) **Consolidated Subcase 03-10022**
-) **(Nez Perce Instream Flow Claims);**
-)
-) **Consolidated Subcase 67-13701**
-) **(Nez Perce Springs or Fountains Claims);**
-)
-) **Subcases 71-10886 et. al**
-) **(State Minimum Stream Flow Claims);**
-)
-) **Consolidated Subcase 92-80**
-) **(Nez Perce Multiple-Use Claims).**
-)
-) **ORDER GRANTING JOINT MOTION**
-) **FOR APPROVAL AND ENTRY OF**
-) **CONSENT DECREE APPROVING**
-) **ENTRY OF FINAL DECREES**
-) **DETERMINING THE RIGHTS OF THE**
-) **UNITED STATES AS TRUSTEE FOR**
-) **THE BENEFIT OF THE NEZ PERCE**
-) **TRIBE TO THE USE OF WATER IN**
-) **THE SNAKE RIVER BASIN WITHIN**
-) **IDAHO AND PARTIAL FINAL**
-) **DECREES DETERMINING MINIMUM**
-) **STREAM FLOW WATER RIGHTS**
-) **HELD BY THE IDAHO WATER**
-) **RESOURCE BOARD**
-)

I.

BRIEF PROCEDURAL BACKGROUND

The Consent Decree Approving Entry of Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe to the Use of Water in

the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resource Board ("Consent Decree") in the above-captioned matter resolves all of the claims of the Nez Perce Tribe to the use of water in the Snake River Basin within the state of Idaho as well as pertains to other terms and conditions not relating to water rights. The *Consent Decree* is based on a Mediator's Term Sheet or "*Agreement*" reached by parties participating in the matter and which was subsequently ratified and confirmed by the Idaho Legislature, the Congress of the United States and the Nez Perce Tribal Executive Committee. The *Consent Decree* resolves four categories of water right claims filed in the Snake River Basin Adjudication, which include:

1) **Off-Reservation Instream Flow Claims.** The United States filed claims as trustee on behalf of the Nez Perce Tribe to instream flows located on numerous stream reaches outside of the present boundaries of the Nez Perce Reservation based on federal law. The Nez Perce Tribe also filed duplicative claims to these same reaches on its own behalf. Abstracts of both sets of claims were reported by the Director of the Idaho Department of Water Resources and proceeded under consolidated subcase 03-10022 in accordance with SRBA procedure. All objections filed to these claims were resolved as a result of the *Agreement*. Pursuant to its terms, the instream flow claims filed by the United States on behalf of the Nez Perce Tribe, as well as the duplicative claims filed by the Nez Perce Tribe on its own behalf, are to be dismissed with prejudice. The claims that are subject to dismissal are included in Attachment 3 to the *Consent Decree*.

2) **Springs or Fountains Claims.** The United States filed claims as trustee on behalf of the Nez Perce Tribe to springs or fountains located on private, state and federal lands outside of the present boundaries of the Nez Perce Reservation based on federal law. The Nez Perce Tribe also filed duplicative claims to these same sources on its own behalf. Abstracts of both sets of claims were reported by the Director of the Idaho Department of Water Resources and proceeded under consolidated subcase 67-13701 according to SRBA procedure. All timely

objections filed to these claims were resolved either pursuant to the *Agreement* or the ultimate dismissal of all springs or fountains claims located on private land except for the late objections filed by Willis D. and Betty DeVeny d/b/a Shingle Creek Ranch LLC ("DeVeny") to thirteen claims located on federal land used in conjunction with a grazing allotment. The Special Master denied the DeVeny's objections and this Court affirmed the Special Master's ruling for reasons set forth at length in a separate memorandum decision and order. *See Memorandum Decision and Order on Challenge*, Consolidated Subcase No. 67-13701 (Nez Perce Tribe and United States "Springs or Fountains" Claims) (July 28, 2006). Pursuant to the terms of the *Agreement*, the instream flow claims filed by the United States on behalf of the Nez Perce Tribe and the duplicative claims filed by the Nez Perce Tribe on its own behalf, to springs or fountains located on private and state land are to be dismissed with prejudice as well as those claims located on federal land filed by the Nez Perce Tribe on its own behalf. The claims that are subject to dismissal are listed in Attachment 3 to the *Consent Decree*. The springs and fountains claims filed by the United States as trustee on behalf of the Nez Perce Tribe located on federal land are to be decreed in accordance with the *Partial Decrees* included as Attachment 5 to the *Consent Decree*.

3) **Multiple-Use Claims.** Following the execution of the *Agreement* and pursuant to its terms, the United States filed claims as trustee on behalf of the Nez Perce Tribe to multiple-use claims to the use of water located on reservation and tribal fee lands pursuant to federal law. Abstracts of these claims were reported by the Director of the Idaho Department of Water Resources and proceeded under consolidated subcase 92-80 in accordance with SRBA procedure. All objections filed to these claims were dismissed for lack of standing in the SRBA, resolved, or dismissed without prejudice subject to objectors having the opportunity to re-raise the objections in conjunction with the instant proceedings regarding approval of the *Consent Decree*. The objections dismissed without prejudice were dismissed because the issues raised pertained more generally to the terms of the *Consent Decree* rather than to individual water right claims. This Court set

forth at length its reasoning in a separate memorandum decision and order. See *Memorandum Decision and Order Dismissing Objections in Part With Prejudice and in Part Without Prejudice*, Consolidated Subcase No. 92-80 (Nez Perce Tribe Multiple-Use Claims) (Sept. 5, 2006). However, none of the objections were re-asserted in conjunction with the proceedings on approval of the *Consent Decree*. The multiple-use claims filed by the United States as trustee on behalf of the Nez Perce Tribe located on reservation and tribal fee lands are to be decreed in accordance with the *Partial Decrees* included as Attachment 4 to the *Consent Decree*.

4) **Idaho Water Resource Board Claims.** Also, following the execution of the *Agreement* and pursuant to its terms, the Idaho Water Resource Board filed claims to minimum stream flows on various stream reaches located in the Salmon and Clearwater River basins based on state law. Director's reports for these claims were filed by the Director of the Idaho Department of Water Resources. No objections were filed to the recommendations for these claims following compliance with SRBA procedure, and the time for filing objections has now expired. The minimum stream flow claims filed by the Idaho Water Resource Board are to be decreed in accordance with the *Partial Decrees* included as Attachment 6 to the *Consent Decree*.

A hearing on the approval of the *Consent Decree* was held in open court on January 9, 2007. Only one party (DeVeny), through counsel, filed objections and appeared in opposition to the entry of the *Consent Decree*. No other party to the adjudication opposed entry of the *Consent Decree*. Counsel for DeVeny made it clear that their objections did not go to the overall entry of the *Consent Decree*, but rather pertained to the entry of the thirteen Partial Decrees to springs or fountains claims located on federal land for which DeVeny holds grazing rights. For reasons set forth at length on the record in open Court, the Court denied the objections raised by De Veny.

In summary, the Court held that, based on the applicable standard of the review, the elements of the individual water rights as set forth in the *Agreement* need not be the

same as if the matter had been fully litigated and decided by the Court. The Court discussed further that although the entry of the *Partial Decrees* came before the Court pursuant to a joint motion for the entry of the *Consent Decree*, all claims still followed standard SRBA procedures thereby allowing parties to the adjudication to file and litigate objections to individual claims. As such, this Court held that the proceedings on the entry of the *Consent Decree* were not intended to be a substitute for either re-litigating issues pertaining to individual claims or raising issues for the first time that should have been also raised in objections to individual claims.

II.

STANDARD OF REVIEW APPLIED

Prior to the hearing the Court limited the scope of the objections that could be raised in opposition to the entry of the *Consent Decree* and discussed the standard of review that the Court would apply given the procedural background of each of the individual water right claims. In *Scheduling Order on Joint Motion for Entry of Consent Decree*, Consolidated Subcase 03-10022 *et al.* (Oct. 13, 2006), this Court stated:

The *Snake River Water Rights Agreement of 2004* (“*Agreement*”), now sought to be memorialized by the entry of the proposed consent decree, was entered into before all of the water rights covered by the *Agreement* were abstracted, reported and parties were given the opportunity to object. In an abundance of caution, rather than deviating from established SRBA procedure and proceeding directly with the *Joint Motion for Entry of Consent Decree*, the court required that all remaining claims be reported in order to give parties to the adjudication the opportunity to file objections to individual claims and have those objections heard. All claims have now been reported, parties to the adjudication have all had the opportunity to file objections, and all objections have now been ruled on with one exception. That exception being objections pertaining to the terms of the *Agreement* in general, as opposed to individual claims, were dismissed without prejudice with the proviso that such objections could be reasserted in conjunction with the proceedings on the *Joint Motion for Entry of Consent Decree*. The Court included objections to the proposed decrees not affecting a specific water right of the party filing the objection as falling into this category. The Court finds that in keeping with constitutional due process requirements all parties to the adjudication have now been provided notice and the opportunity to be heard on each of the subject claims filed on behalf of the Nez Perce Tribe. Accordingly, the scope of the objections that can be raised in conjunction with the proceedings will be limited consistent with

the appropriate standard of review as set forth below. The proceedings are not intended to be a substitute for raising issues to individual claims which should have been previously raised in objections, nor as a means for re-litigating objections to individual claims nor are the proceedings intended to be a trial on the merits.

Administrative Order 1 (AO1) 4.d.(3) Stipulated Elements of a Water Right provides in relevant part:

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

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

In the case of both federal and state-law based claims the claimant has the ultimate burden of persuasion for each element of a water right. See I.C. §§ 42-1411(5) and 42-1411A(12). However, *AO1* 4.d.(3) does not implicate exactly the same issues when applied to claims based on federal law. In the situation of claims based on state law, the claims are investigated and reported by IDWR. The director's report, which contains the recommendation for the right, carries *prima facie* weight. To the extent IDWR does not concur with a settlement proposal there is a conflict between the evidentiary weight to be accorded IDWR's concurrence and the weight accorded the stipulation. As a result, a hearing is required in order for the Court to resolve the conflict by determining whether the "facts, data, expert opinions and law support the issuance of a partial decree." The depth of the proceeding would depend on the state of the record existing at the time the settlement was reached. A more in-depth proceeding may be required if a settlement were reached from the outset and a record had yet to be developed.

The same issue does not arise in the context of claims based on federal law. IDWR does not investigate and recommend claims based on federal law and therefore IDWR does not sign off on stipulations based on federal law. Instead, the Office of the Idaho Attorney General is required to represent the State of Idaho in all matters regarding claims to water rights established under federal law. I.C. § 42-1411A(16). The issue of a conflict between the director's report and the stipulation does not arise. Although the claimant of a federal claim still has the burden of persuasion

on each element, the Court can give evidentiary weight to the stipulation in finding that a *prima facie* case has been established. The Court has never treated an uncontested federal claim, which by statute requires an evidentiary hearing so that the claimant can establish a *prima facie* case, the same as contested federal claims where a settlement was ultimately reached. Although the Court is not obligated to “rubberstamp” the stipulation, the Court can nonetheless rely on the weight of the stipulation and the developed state of the record in determining whether there is a reasonable basis in fact and law supporting the stipulation. To do otherwise essentially undermines the purpose of ordering mandatory settlement conferences in cases based on federal law.

In limiting the scope of the objections, the Court takes into account the following:

1) The claims for which decrees are sought to be entered are based solely on federal law. As such, the Idaho Department of Water Resources does not investigate the basis for the claim. The Office of the Attorney General is required to represent the State of Idaho in all matters regarding claims based on federal law. The Office of the Attorney General is a signatory to the *Agreement* and the *Agreement* has been approved by the Idaho legislature and Governor’s Office.

2) The negotiations leading to the *Agreement* were Court ordered and extended over a six-year period. All parties who participated in the instream flow claims and the springs or fountains claims had the full opportunity to participate in the Court ordered mediation. Only those individuals who filed objections to the multiple-use claims were not afforded the opportunity to participate in the on-going mediation. Nonetheless, those individuals were afforded the opportunity to object to any of the multiple-use claims affecting their claims or decreed rights.

3) The record in the matter includes numerous affidavits from which the Court can make findings of fact and conclusions of law. There have been lengthy summary judgment proceedings with respect to both the instream flow claims and the springs or fountains claims. The filings were extremely voluminous in both proceedings.

4) All parties to the SRBA were afforded the opportunity to object to individual claims affecting their claims or decreed rights and have those objections fully and fairly litigated. All objections have now been decided.

5) As to components of the *Agreement* not specifically dealing with water rights and falling outside the scope and jurisdiction of the SRBA (other than through enforcement of the terms of the *Agreement*),

parties had the opportunity to be heard through their respective political representatives.

Therefore, based on the foregoing criteria, the proceedings will be limited to the presentation of legal arguments and/or evidence on the issues of whether: (1) the proposed decree represents a reasonable factual and legal determination (*United States v. City of Miami*, 664 F.2d at 441 (5th Cir. 1981)); (2) whether it is a fundamentally fair, adequate and reasonable settlement of the entirety of the Tribe's claims (*U.S. v. State of Or.*, 913 F.2d 576, 20 *Envtl. L. Rep.* 21,232 (9th Cir.(Or.), Aug 27, 1990) (NO. 88-4311, 88-4316, 88-4347 and *Davis v. City & County of San Francisco*, 890 F.2d 1438, 1445 (9th Cir. 1989); and (3) whether the terms of the agreement are contrary to law or public policy (*Big Lost Irr. Dist. v. Zollinger*, 83 Idaho 401, 406-07, 363 P.2d 706708-09 (1961)).

Scheduling Order at 2-5.

Accordingly, the Court applied this standard of review in denying the objections raised by DeVeny and approving the Consent Decree following the January 9, 2007, hearing.

III.

ORDER

Based on the foregoing, THE FOLLOWING ARE HEREBY ORDERED:

1. IT IS HEREBY ORDERED for the reasons set forth at length on the record and summarized above, that the objections raised by DeVeny, through counsel, are DISMISSED.
2. IT IS FURTHER HEREBY ORDERED that the *Joint Motion for Approval and Entry of Consent Decree Approving Entry of Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resource Board* is GRANTED and the *Consent Decree* shall be executed contemporaneously herewith.

3. IT IS FURTHER HEREBY ORDERED that all water right claims subject to entry of partial decree shall be **decreed** as set forth in the individual *Partial Decrees* included in Attachments 4-6 to the *Consent Decree*.

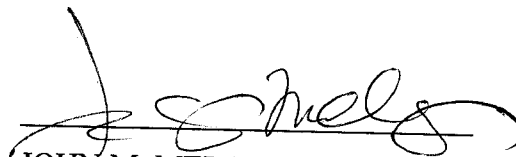
4. IT IS FURTHER HEREBY ORDERED that the water right claims subject to dismissal as identified in Attachment 3 to the *Consent Decree* are hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final unified decree entered in SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

IV.

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: January 30, 2007



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the NEZ PERCE CONSENT DECREE AND ORDER APPROVING NEZ PERCE CONSENT DECREE was mailed on January 31, 2007, with sufficient first-class postage to the following:

ALBERT P. BARKER
JOHN K. SIMPSON
BARKER ROSHOLT & SIMPSON LLP
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139

TRAVIS L THOMPSON
BARKER, ROSHOLT & SIMPSON LLP
113 MAIN AVE W, STE 303
TWIN FALLS, ID 83301-6167

JOSEPHINE P. BEEMAN
BEEMAN & ASSOCIATES, P.C.
409 WEST JEFFERSON STREET
BOISE, ID 83702

WILLIS D & BETTY G DEVENY
BOX 1160
RIGGINS, ID 83549

JAMES W GIVENS
BOX 875
LEWISTON, ID 83501

UNITED STATES DEPT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCE
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

W. KENT FLETCHER
FLETCHER LAW OFFICE
PO BOX 248
BURLEY, ID 83318

JEFFREY C. FEREDAY
MICHAEL C. CREAMER
GIVENS PURSLEY LLP
601 W BANNOCK ST
PO BOX 2720
BOISE, ID 83701-2720

MARK L JACKSON
HC 11 BOX 32
KAMIAH, ID 83536

CLAUDE SIMMONS
HC 11 BOX 59B7
KAMIAH, ID 83536

DAVID W. & MELODIE L. BAKER
HC 68 BOX 304
CLAYTON, ID 83227

JERRY HOAGLAND
HC 79 BOX 44
MELBA, ID 83641

JAMES C. TUCKER
IDAHO POWER CO
PO BOX 70
BOISE, ID 83707

NORMAN M. SEMANKO
IDAHO WATER USERS ASSOCIATION
1010 W JEFFERSON ST, STE 101
BOISE, ID 83702

TERRY T. UHLING
JR SIMPLOT COMPANY
999 MAIN ST, 13TH FL
PO BOX 27
BOISE, ID 83707

ROGER D LING
LING, ROBINSON & WALKER
615 H ST
PO BOX 396
RUPERT, ID 83350-0396

CHARLES F MC DEVITT
MC DEVITT & MILLER
420 W BANNOCK ST
PO BOX 2564
BOISE, ID 83701

MICHAEL MIRANDE
MILLER BATEMAN LLP
1426 ALASKAN WAY, STE 301
SEATTLE, WA 98101

(Certificate of mailing continued)

ANGELA SCHAER KAUFMANN
SCOTT L. CAMPBELL
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS
101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE
950 W BANNOCK STE 520
BOISE, ID 83702

DON B. MILLER
STEVEN C. MOORE
NATIVE AMERICAN RIGHTS FUND
1506 BROADWAY
BOULDER, CO 80302

JOHN R. KORMANIK
NATURAL RESOURCES
STATE OF IDAHO AG'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

K. HEIDI GUDGELL
NEZ PERCE TRIBAL EXEC COMM
100 AGENCY ROAD
PO BOX 305
LAPWAI, ID 83540

CHIEF, NATURAL RESOURCES DIV.
OFFICE OF THE ATTORNEY GENERAL
STATE OF IDAHO
PO BOX 44449
BOISE, ID 83711-4449

DAVID HENSLEY
OFFICE OF THE GOVERNOR
PO BOX 83720
BOISE, ID 83720-0034

JOHN E. BURNS
PO BOX 264
CARMEN, ID 83462

DIRECTOR OF IDWR
IDWR DOCUMENT DEPOSITORY
PO BOX 83720
BOISE, ID 83720-0098

JERRY R. RIGBY
RAY W. RIGBY
RIGBY, THATCHER, ANDRUS, RIGBY
KAM & MOELLER, CHTD
25 N 2ND E
PO BOX 250
REXBURG, ID 83440-0250

CHARLES L. HONSINGER
DANIEL V. STEENSON
RINGERT, CLARK CHTD.
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773

WILLIAM F. BACON
SHOSHONE-BANNOCK TRIBES
PO BOX 306
FORT HALL, ID 83203

BRANDELLE WHITWORTH
SHOSHONE-BANNOCK TRIBES
TRIBAL COUNSEL OFFICE
PO BOX 306
FORT HALL, ID 83203

NEZ PERCE TRIBE
USA, TRUSTEE
911 N.E. 11TH AVENUE
PORTLAND, OR 97232

CLAYTON M. BADLEY
1220 EAST 10TH NORTH
MOUNTAIN HOME, ID 83647

STEVEN W. STRACK
210 STATEHOUSE
PO BOX 83720
BOISE, ID 83720-0010

NEZ PERCE CONSENT DECREE

Page 2
1/31/07

(Certificate of mailing continued)

MARDELL J EDWARDS
239 GRANGEVILLE SALMON RD
GRANGEVILLE, ID 83530

LOST VALLEY RESERVOIR CO
2671 WEST FORK RD
FRUITVALE, ID 83620

LITTLE WEISER IRRIGATION DIST
3453 HIGHWAY 95
CAMBRIDGE, ID 83610

JOHN MARK NUTTMAN
411 E CONQUIST RD
ALLYN, WA 98524

DANA L. HOFSTETTER
608 WEST FRANKLIN STREET
BOISE, ID 83702