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Department of Water Resources

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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 No. 75-13316

**MEMORANDUM IN SUPPORT OF
THOMPSON CREEK MINING
COMPANY'S OBJECTION TO
PROPOSED STIPULATION**

Thompson Creek Mining Company ("Thompson Creek"), by and through its counsel of record, RINGERT CLARK, CHARTERED, files this Memorandum in support of its objection to the proposed settlement agreement between the United States and remaining objectors in Consolidated Subcase 75-13316 (Wild and Scenic Rivers Claims). The proposed settlement contains provisions that call for the management and/or distribution of waters by methods that are contrary to Idaho law; create a judicial review mechanism not in accordance with Idaho law; and potentially subject Thompson Creek's prior settlement and water right decrees to reexamination and alteration.

COPY

MEMORANDUM IN SUPPORT OF THOMPSON CREEK MINING COMPANY'S OBJECTION TO
PROPOSED STIPULATION - 1

I. BACKGROUND

The United States claimed federal reserved water rights for the Middle Fork of the Salmon River, the Middle Fork of the Clearwater River (including its tributaries, the Lochsa and Selway Rivers), the Rapid River, and the main stem of the Salmon River pursuant to the Wild and Scenic Rivers Act of 1968.¹ Those claims were consolidated as subcase 75-13316 under SRBA case number 39576.

On January 16, 1998, the United States filed its motion for partial summary judgment regarding its Wild and Scenic Rivers Act claims. That initial motion was opposed by the State of Idaho, Thompson Creek Mining Company, and Potlatch Corporation. This opposition was supported by a number of other interested parties.

On July 24, 1998, District Judge Daniel C. Hurlbutt, Jr., then the presiding Judge of the Snake River Basin Adjudication ("SRBA"), issued his Memorandum Decision both granting, in part, and denying, in part, the United States' motion for summary judgment (Exhibit A). Judge Hurlbutt agreed with the United States that the Wild and Scenic Rivers Act expressly reserves water for rivers designated under the Act; however, Judge Hurlbutt disagreed with the United States' interpretation that the Act required all unappropriated flows of designated rivers be reserved. Instead, Judge Hurlbutt determined that the Act reserved only those amounts of water necessary to fulfill the purposes of the Act, and no more. Those necessary amounts had yet to be determined.

Shortly before Judge Hurlbutt issued his decision, the United States and Thompson Creek entered into a stipulation regarding their respective water rights on May 29, 1998 (Exhibit B). That stipulation provided that Thompson Creek would withdraw its opposition to the United States'

¹ 16 U.S.C. § 1271-1287.

Wild and Scenic Rivers claims provided that the United States subordinated those claims to certain numbered Thompson Creek claims. The United States further agreed that it would not object to those Thompson Creek claims in further proceedings of the SRBA. Essentially, the stipulation provided that the existence of the United States' Wild and Scenic Rivers claims and/or water rights would not preclude the SRBA Court from approving and decreeing Thompson Creek's claims for any reason including, but not limited to, "the basis that water is not legally available for appropriation." Judge Hurlbutt's June 16, 1998, Order Approving the Stipulation And Dismissing Objections (Exhibit C) specifically required the subordination terms of the stipulation to be incorporated into any partial decrees for Wild and Scenic River Act based water right claims and any final decree adjudicating Thompson Creek's claims in the matter.

Partial decrees in favor of Thompson Creek (Exhibit E) were entered on the following dates on each of the following Thompson Creek claims:

- | | | |
|----|-------------------|------------------|
| 1. | February 10, 2000 | Claim # 72-07220 |
| 2. | August 8, 2001 | Claim # 72-07193 |
| 3. | August 8, 2001 | Claim # 72-07257 |
| 4. | August 8, 2001 | Claim # 72-07414 |
| 5. | November 13, 2001 | Claim # 72-07219 |

Each partial decree was certified as a final judgment under I.R.C.P. 54(b) and no appeals were filed as to those partial decrees.

On October 27, 2000, the Idaho Supreme Court affirmed Judge Hurlbutt's July 24, 1998, decision regarding the United States' Wild and Scenic Rivers claims after the Potlatch Corporation and the Hecla Mining Company appealed that decision (Exhibit D). Specifically, the Idaho Supreme Court held that the Wild and Scenic Rivers Act only intended to reserve enough water

to fulfill its purposes; and that the United States' claims were limited to those amounts of water necessary to fulfill the purposes of the Act, rather than all unappropriated waters.²

Recently, on August 20, 2004, the United States and remaining objectors in this matter filed a Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees. Thompson Creek objects to this proposed stipulation and joint motion for the reasons stated below.

II. ARGUMENT

A. The Proposed Stipulation Cannot Create Mechanisms Capable Of Revisiting And Potentially Modifying The Subordination Terms Of Thompson Creek's 1998 Stipulation, Confirmed By Judge Hurlbutt's June 16, 1998 Order

Judge Hurlbutt's June 16, 1998 Order Approving Stipulation And Dismissing Objections, and the five partial decrees entered in favor of Thompson Creek based on the stipulation, represent the final adjudication of the dispute between Thompson Creek and the United States in this matter. The current stipulation recently submitted by the United States cannot create the potential for modifying the subordination terms that Thompson Creek bargained for and received in the June 16, 1998 Order. Such a collateral attack upon Thompson Creek's 1998 settlement is barred by the doctrine of *res judicata*.

Res Judicata, also known as claim preclusion, bars subsequent action between the same parties upon the same claim after a final judgment has been rendered on the merits by a court of competent jurisdiction. *Hindmarsh v. Mock*, 138 Idaho 92, 94 (2002), citing *Aldape v. Akins*, 105 Idaho 254 (Ct. App. 1983). Under the doctrine of *res judicata* "a final judgment rendered in an action resolves all claims arising out of the same transaction or series of transactions out of which the cause of action arose." *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150 (1990).

² *Potlatch v. United States*, 134 Idaho 912 (2000).

The doctrine of *res judicata* serves three fundamental purposes:

First, it '[preserves] the acceptability of judicial dispute resolution against the *corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results.*' Second, it serves the public interest in protecting the courts against the burdens of repetitious litigation; and third, *it advances the private interest in repose from the harassment of repetitive claims.*

Hindmarsh at 94 (emphasis added).

Res Judicata applies in this instance because Judge Hurlbutt's June 16, 1998, Order, and the five partial judgments decreed to Thompson Creek, were the final disposition and subordination of the United States' claims, *vis-à-vis* Thompson Creek. Judge Hurlbutt explicitly ordered that those subordination terms be incorporated into any partial decrees entered on Thompson Creek's claims and the United States' Wild and Scenic River Act claims, Exhibit D at 1-2.³ In return, Thompson Creek withdrew its objections to the government's Wild and Scenic River Act claims. No party to this subcase objected to the substantive provisions of the United States/ Thompson Creek

³ Judge Hurlbutt's Order specifically states:

The terms of subordination set forth in the Stipulation shall be incorporated. . . in the final decree entered in this matter. . . and based upon the subordination of the United States' claims as set forth in the stipulation, the existence of the United States' claims or water rights shall not preclude the Court from approving and decreeing those Thompson Creek claims or water rights for any reason, including but not limited to the basis that water is not legally available for appropriation."

Id.

stipulation.⁴ No appeals were taken from the subsequent partial decrees for Thompson Creek's water rights, which were certified as final under Rule 54(b) (Exhibit E). Those decrees are now final and are *res judicata*.

However, the proposed stipulation before this Court, submitted by the federal government and the same remaining objectors present in 1998, purports to incorporate the United States/Thompson Creek 1998 stipulation by reference and requests "continuing jurisdiction" of the SRBA Court for the purpose of resolving disputes regarding the implementation and enforcement of the proposed stipulation, "including, but not limited to, administration of the subordination provisions of the partial decrees." *See Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees* at Section 5—Continuing Jurisdiction. That language is at best ambiguous and could be construed to allow the parties to the stipulation, including the United States, to revisit and potentially modify the subordination of the United States' Wild and Scenic River Act claims to those of Thompson Creek, as adjudicated in 1998. Thompson Creek objects to the proposed stipulation because it is inconsistent with Judge Hurlbutt's 1998 Order (Exhibit D).

The United States cannot settle with one objector, who then withdraws its objections against the United States' claims, and then turn around years later and settle with the remaining parties in a manner that could revisit and modify the terms of the prior settlement. Similarly, the remaining parties, finally settling now with the United States, cannot settle in a manner that could revisit and modify the terms of the prior settlement when they were fully aware of the prior

⁴ While the State of Idaho did not object to the substantive subordination terms of the United States/Thompson Creek stipulation, the State of Idaho did object to the portion of the stipulation invoking Idaho Rule of Evidence 408, stating that proposed stipulation overreached the scope of the rule as it pertained to the subsequent admissibility of the stipulation and/or the negotiations leading up to the stipulation's execution between Thompson Creek and the United States. Judge Hurlbutt denied the objection, and no appeal was taken.

settlement, and neither objected nor appealed from the Order confirming the prior settlement and the partial judgments entered based on that Order. Such a result, if allowed, would foster the “*corrosive disrespect*” that the doctrine of *res judicata* is meant to prevent. *See Hindmarsh, supra*.

B. The Proposed Stipulation Should Be Rejected By This Court Because It Contains Provisions That Are Inconsistent With State Law

Water development, management, and distribution within the State of Idaho are administered by the Idaho Department of Water Resources (“IDWR”). As an administrative agency, a creation of statute, IDWR is limited to the power and authority granted to it by the Legislature. IDWR may not exercise its rule-making powers to modify, alter, or enlarge the legislative acts it administers. *See, e.g., Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 212 (2000); *Welch v. Del Monte Corp.*, 128 Idaho 513, 514 (1996); and *Roberts v. Transp. Dep’t*, 121 Idaho 727, 732 (Ct. App. 1991). Further, in its capacity as an administrative tribunal, IDWR exercises limited jurisdiction, and nothing is presumed in favor of its jurisdiction. *Welch, supra*. To hold otherwise would impermissibly allow an administrative agency to expand its own powers and effectively amend statutes without legislative action; a violation of the Constitutional separation of powers. Article II, Section 1, Idaho Constitution; *see also Kelso & Irwin, P.A. v. State Insurance Fund*, 134 Idaho 130, 137 (2000). Thus, IDWR may only conduct its functions in accordance with the means provided to it by the Legislature in the Idaho Code.

1. Section 2(b), “Creation Of Water Districts,” Of The Proposed Stipulation Combines Existing Water Districts In A Manner Contrary To Idaho Law

The proposed stipulation calls for the creation of a water district (combining administrative basins 71-75) to be known as the Upper Salmon Water District (“USWD”).⁵ While it

⁵ *See* sections 2(b) and 2(g) of the proposed settlement.

is true that the Director of the Department of Water Resources is empowered by statute to create and combine water districts in order to facilitate the administration of water resources in the state, the creation of the USWD, leaving intact the structure and operations of those districts combined to create it as underling subdistricts, is not contemplated, nor authorized by Idaho law.

Idaho Code Section 42-604—Creation of water districts—provides in pertinent part:

The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is required in order to properly administer uses of the water resource. . . . Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.

Nothing in Idaho Code Section 42-604 contemplates the partial combination of several water districts. Nevertheless, the proposed stipulation calls for the creation of the USWD, a combination of already established water districts in basins 71-75, even though the combined districts will not lose their individual structure and administrative characteristics, but will instead remain operationally intact as subdistricts within the USWD. In other words, the preexisting and subsequently combined water districts will not be merged out of existence upon the creation of the USWD. Essentially, the USWD would be an overarching administrative entity, rather than a new water district that completely subsumes and fully assumes the powers and operations of the predecessor districts. Idaho law simply does not provide for such hybrid structures.

Under Idaho Code Section 42-604, the director may combine preexisting water districts; however, those combined districts then lose their individual structure and cease to exist. To the extent that the proposed stipulation seeks to create the USWD differently from the structure prescribed by Idaho Code Section 42-604, it violates Idaho statutory law.

2. Section 2(c), “Administration Of New Water Rights,” Of The Proposed

Stipulation Sets Water Measurement And/Or Monitoring Requirements Beyond The Scope Of Those Contemplated By Idaho Law

Section 2(c) of the proposed stipulation requires the constant monitoring of water diversions coupled with quarterly reports regarding those diversions to be submitted by the water user to either the director of the Department of Water Resources, or to the USWD watermaster. This constant monitoring and quarterly reporting imposes burdens on water users not authorized by Idaho law.

Idaho Code Section 42-701(5), in pertinent part, provides:

All appropriators of the public water of the state of Idaho who are given thirty (30) days' written notice by the director prior to the beginning of the irrigation season but no later than March 15 of any year, shall measure their water diversions and report said diversions annually thereafter. . . . Subsections (5) and (6) of this section shall not apply to: (a) any appropriator or water user with respect to a water right included in an active water district created pursuant to chapter 6, title 42, Idaho Code. . . .

The proposed stipulation calls for quarterly, even daily reporting under certain circumstances, when Idaho Code contemplates only annual reporting.⁶ Further, under existing law individual water users who are part of an active water district have no individual reporting requirement as they are excepted out of that requirement. Idaho Code § 42-701(5)(a). Therefore, the proposed stipulation impermissibly burdens water users in ways not permitted by Idaho law.

3. Section 2(e), "Administration Of Existing Water Rights," Of The Proposed Stipulation Calls For Excess Department Of Water Resources Involvement In The Staffing Of The Various "Subdistrict" Water Districts

Assuming that the proposed stipulation's creation of the USWD, leaving intact the structure of the underling administrative "subdistricts" within it, is appropriate—which it is not (*see*

⁶ The improper reporting requirement also appears in Section 2(e) of the proposed stipulation.

section B1, *supra*)—Idaho law permits only the water users of a water district to elect a watermaster and to permit the employment of assistants as needed to administer the affairs of the district. However, as the proposed stipulation now reads, the Department of Water Resources is to “evaluate the staffing requirement for operation of the [USWD] water district” and to “identify needs for subdistricts and deputy watermasters as required.” Proposed Stipulation at Section 2(e).

However, Idaho Code Section 42-605(3), provides that it is the water users who are entitled to make those decisions:

At the meeting of the water users of a district there shall be elected a watermaster for such water district, who may be authorized to employ such other regular assistants as the water users shall deem necessary. . . .

Department of Water Resources involvement in the staffing needs of a water district to the extent provided by the proposed stipulation is in direct contravention of Idaho law.

4. Section 2(g), “Coordination,” Of The Proposed Stipulation Creates A Water Management And/Or Distribution Scheme Contrary To And Unsupported By Idaho Law

The proposed stipulation between the United States and the remaining objectors calls for the “coordination” of water management activities in the USWD. Thompson Creek objects to the portions of the proposed stipulation which call for novel water management coordination among IDWR, the watermaster, water users, and the federal government. Nothing in the Idaho Code sections governing IDWR or the Idaho Administrative Procedure Act (“IDAPA”) sanctions the creation or implementation of such an ad hoc management committee.⁷

⁷ While the director may adopt such rules and regulations necessary for the distribution of water, promulgation of any such rules and regulations *must be in accordance* with the procedures set forth in IDAPA (Idaho Code Title 67, Chapter 52):

The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water . . . as shall

The proposed stipulation states that this ad hoc management committee shall convene periodic coordination meetings, and that the purposes of these meetings include:

(1) Agreeing upon management goals; (2) Identifying and prioritizing stream reaches or other locales needing improved management to focus the use and attention of available resources; (3) Identifying sources of funding for regulation, equipment, and facilities; (4) Identifying the need for creation of additional subdistricts with deputy watermasters; (5) Sharing data and other information and assessing progress in meeting management needs.

Proposed Stipulation at Section 2(g).

Further, the proposed stipulation provides that these meetings may be called as often as the parties deem necessary. *However*, Idaho law provides for establishment of an advisory committee which must be selected pursuant to procedures adopted by the water users of the district and that committee can only carry out those policies set forth by district water users at their annual meetings:

At such meeting the water users may choose an advisory committee to be composed of members selected as may be determined at the meeting, which committee shall serve as advisors to the director and the watermaster in matters pertaining to the distribution of water within the district. The advisory committee may be authorized to carry out policies as set forth in resolutions duly adopted by the water users at the annual meeting or at a special meeting.

Idaho Code § 42-605(6).⁸

be necessary to carry out the laws in accordance with the priorities of the rights of the water users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

Idaho Code § 42-603.

⁸ Water districts may hold annual meetings with water users who, in turn, may adopt resolutions to assure or improve the distribution of water within the district. *However*, any resolutions adopted by water users within a district must comport with state law:

At an annual meeting the water users [of a water district] may

Even though advisory committees, when properly formed and authorized, are permissible, the director of IDWR may only delegate duties imposed upon him by law to employees of the department who are selected and appointed by the director in accordance with the provisions of Idaho Code Title 67, Chapter 53:

(3) The director may delegate such duties as are imposed upon him by law to an employee of the department of water resources.

(4) . . . All employees of the department, except the director, shall be selected and appointed by the director in conformance with the provisions of chapter 53, Title 67, Idaho Code [State Government and State Affairs—Personnel System].

Idaho Code § 42-1701 (3) and (4).

There is no question that the proposed stipulation's coordination/management committee is not contemplated or authorized by Idaho law. First, Idaho Code mandates that it is the *director's* responsibility to direct and control the distribution of water within a water district. Second, the director cannot delegate any of his duties (*i.e.*, water management responsibilities) to anyone other than IDWR employees, and even then, IDWR employees must be properly selected and appointed. Third, water district advisory committees must be selected in accordance with the procedures set by the water users of the district, not those set forth in the ad hoc coordination/management committee set out in the proposed stipulation.

Essentially, the proposed stipulation, if approved, would permit the creation of an extraordinary committee effectively bypassing the legal and procedural requirements in the Idaho Code and the public notice and comment provisions/protections of IDAPA. The proposed stipulation

adopt resolutions to assure or improve the distribution of the waters of the district within state law. . .

Idaho Code § 42-605(2).

as it now stands would allow the director to delegate authority to non-IDWR employees and would allow the creation of advisory committees contrary to Idaho law. The proposed stipulation, if approved and ordered by this Court, would impermissibly allow IDWR to expand its powers and effectively amend statutes without legislative action, in violation of Article II, Section 1, of the Idaho Constitution. Neither the United States, IDWR, nor the remaining objectors, can, by agreeing among themselves, do that. This Court should not provide its imprimatur of validity to such invalid actions by issuing an order approving and implementing the proposed stipulation.

Thompson Creek's concern stems from the fact that while it is not a party to this proposed stipulation, its 1998 stipulation is referenced, and if the USWD is created, as an area water user, Thompson Creek, would be included in that district. Thompson Creek entered its settlement with the United States based upon the administration and management of water resources as promulgated by Idaho Code and legally adopted rules under IDAPA, not based upon the creation of some future unfathomable composite management committee by the remaining parties which effectively creates an additional level of governance over water users not authorized by Idaho law.

5. The Federal Government Will Be A Managing Member Of The Ad Hoc USWD Management Committee Without Having To Share The Burden Of The District's Costs

Water districts are authorized to recoup their annual costs of operation (*e.g.*, compensation of watermasters and any assistants, water delivery, and costs to the advisory committee in implementing resolutions adopted by the water users of the district) through assessments against the individual water users of the district. Idaho Code §§ 42-610-42-613.⁹

⁹ Idaho law permits four alternative methods for the collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments; (2) the county auditor and treasurer may collect the assessments, and the water district treasurer may hold and disburse the water district funds; (3) the watermaster may collect the assessments, and the county treasurer may hold and disburse the assessments; and (4) the watermaster may collect the funds, and

While the Federal Government in this matter would be a water user, it will not be subject to district assessments because its use will be non-consumptive pursuant to Idaho Code Section 42-605A(2):

Instream flow water rights held in the name of governmental entities or agencies for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality shall be exempt from the payment of assessments. . . .

Allowing the federal government managing member status, without cost assessment accountability, clearly contravenes Idaho Code Section 42-605A(2), which provides that the rights of those exempt, non-consumptive water users “*shall not be voted.*” *Id.* (emphasis added). The proposed stipulation would provide the federal government with the benefits of representation without obliging it to pay its fair share of the costs as any other similarly situated managing water user would have to do. Thus, the water user unquestionably possessing the greatest financial resources of any water user that is a party to this proposed stipulation is granted “free ride” management status by the stipulation. Such a scheme is not only egregiously unfair, but it also clearly violates Idaho law.

6. Section 4 Of The Proposed Stipulation Impermissibly Creates An Administrative Review And/Or Judicial Review Process Not Contemplated By Idaho Law

Section 4 of the proposed stipulation provides the parties to the stipulation with a means of judicial review in the SRBA Court, or any successor court, of IDWR water right administration, contrary to current IDWR procedure. The proposed stipulation further states that the review is to be *de novo* and that disputed factual issues are to be decided based upon a preponderance of the evidence. The proposed stipulation requires that judicial review be brought within six months of the challenged action or within six months of the notification of the challenged

the water district treasurer may hold and disburse the assessments. OAG 91-7.

action, whichever is later.

Again, for many of the same reasons cited above, this alternative avenue for judicial review of IDWR's administration of those water rights pertinent to the proposed stipulation is contrary to Idaho law. First and foremost, this judicial review scheme impermissibly bypasses IDWR's own procedures, set forth in Idaho Code 42-1701A, requiring observance of the procedures of Idaho Code Title 67, Chapter 52, and IDAPA 37.01.01:

All hearings required by law to be held before the director of the department of water resources shall be conducted in accordance with the provisions of chapter 52, title 67, Idaho Code, and rules of procedure promulgated by the director.

Idaho Code § 42-1701A(1).

As an administrative agency, challenges and/or contested cases are to be heard by the agency prior to judicial review. Judicial review can only be sought by aggrieved parties after IDWR issues its final order on the matter: Idaho Code Section 42-1701A(4) and IDAPA 37.01.01740.02(c):

Any person who is aggrieved by a *final decision* or order of the director is entitled to judicial review.

Idaho Code § 42-1701A(4) (emphasis added); IDAPA 37.01.01740.02(c).¹⁰

Further, when judicial review is sought, said review is ordinarily limited to review only of the agency record on appeal. Idaho Code §§ 67-5276-5277; *see also Roberts v. Wyman*, 135 Idaho 690, 694-95 (Ct. App. 2000). The reviewing court must uphold the agency decision unless the court finds that the agency's decision was in violation of constitutional or statutory provisions; in

¹⁰ *See also Hayden Pines Water Co. v. Pub. Utilities Comm'n*, 111 Idaho 331, 334, n.1 (1986), citing Idaho Code Section 67-5215(a) ("A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case of an agency other than the industrial commission or the public utilities commission is entitled to judicial review under this act.")

excess of an agency's statutory authority; made upon unlawful procedure; not supported by substantial evidence in the record; or was arbitrary, capricious or an abuse of discretion. Such review is not *de novo*, as the stipulation provides. Idaho Code § 67-5279(3); *see also Roberts*, 135 Idaho at 695.

Furthermore, the expedited judicial review procedure set out in the stipulation seemingly only applies to those who are parties to the stipulation and not to other potentially interested water users such as Thompson Creek who, while not a party to the stipulation, is an area water user with SRBA decreed water rights, legally protectable interests, affected by this proposed stipulation. IDAPA's requirements and current IDWR procedure establish uniformity and fairness for all water users. The parties to this proposed stipulation cannot unilaterally change the rules of procedure to suit their needs without employing the proper legal means for doing so – namely legislative action changing existing statutes and the promulgation of revised rules through the public notice and comment process. *Serv. Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 758-59 (1984) ("Subsection (g) of § 67-5203 provides that '[n]o rule hereafter adopted is valid unless adopted in substantial compliance with this section'. . . . In order for such a rule to be effective it must be adopted in substantial compliance with [Idaho Code § 67-5203]"); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979) ("In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites. . . . For agency discretion is limited not only by substantive, statutory grants of authority, but also by the procedural requirements which 'assure fairness and mature consideration of rules of general application.'").

III. CONCLUSION

This Court should not approve this proposed stipulation. It creates mechanisms by which Thompson Creek's 1998 stipulation can be revisited and modified, and its provisions contravene Idaho law. Approval of the proposed stipulation would impermissibly allow (1) the federal government to settle with one objector, effectively tying that objector's hands, and then undermine the terms of that settlement through subsequent settlement with the remaining objectors; and (2) allow an administrative agency to expand its powers and effectively amend statutes without legislative action. Moreover, the unique and statutorily unsupported water management procedures remove existing procedural due process protections which Thompson Creek and other affected water users could utilize to protect their water rights. At the same time, the proposed stipulation cuts out all water users but the parties to the proposed stipulation from participation in the proposed invalid direct judicial review of water distribution/management decisions of the director of Idaho Department of Water Resources. For these reasons, and those previously discussed, the Court should summarily reject the proposed stipulation.

DATED this 13th day of October, 2004.

RINGERT CLARK CHARTERED



Daniel V. Steenson
Attorneys for Thompson Creek Mining
Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October, 2004, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF THOMPSON CREEK MINING COMPANY'S OBJECTION TO PROPOSED STIPULATION** to be served by the method indicated below, and addressed to the following:

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