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**NOV 19 2002**

**Department of Water Resources**

Roseberry Irrigation District

Dana L. Hofstetter, ISB # 3867  
HOFSTETTER LAW OFFICE, LLC  
608 West Franklin Street  
Boise, ID 83702  
(208) 424-7800  
(208) 424-8774 (Facsimile)

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR TWIN FALLS COUNTY**

In Re SRBA

Case No. 39576

)  
)  
)  
) Subcase Nos. 65-02585, 65-03114, 65-03115,  
) 65-03116, 65-22587, 65-22588, 65-22589 and  
) 65-22590  
)  
)

**STIPULATION AND AGREEMENT**

## STIPULATION AND AGREEMENT

This stipulation and agreement is entered into by the Roseberry Irrigation District, Black Canyon Irrigation District, and the United States, on behalf of the Department of Interior, Bureau of Reclamation, with regard to water rights claimed by Roseberry Irrigation District in the Snake River Basin Adjudication, Basin 65. Specifically, this agreement involves Water Right No. 65-03115, objected to by both Black Canyon Irrigation District and the Bureau of Reclamation, and Water Right Nos. 65-02585, 65-03114, 65-03116, 65-22587, 65-22588, 65-22589, and 65-22590, objected to by only the Bureau of Reclamation.

To resolve the dispute over the referenced water rights, claimant Roseberry Irrigation District and their successors or assigns, objector Black Canyon Irrigation District and their successors or assigns, and objector the United States stipulate and agree as follows:

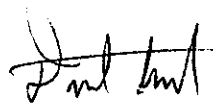
1. Black Canyon Irrigation District will withdraw its objections to Water Right No. 65-03115, as to the priority date of the water right and place of use.
2. The United States will withdraw its objection to Water Right No. 65-03115, as to the priority date of the water right.
3. Roseberry Irrigation District will sign SRBA Form SF-5 for Water Right Nos. 65-02585, 65-03114, 65-03115, 65-03116, 65-22587, 65-22588, 65-22589, and 65-22590, concerning General Provision 3 - Separate Streams Administration, thus agreeing to the terms of the separate streams settlement.
4. Each party to this agreement will bear its own costs and attorney's fees in connection with this matter.

These terms serving to resolve all outstanding issues between Roseberry Irrigation District as claimant and Black Canyon Irrigation District and the Bureau of Reclamation as objectors, this stipulation is entered into and executed voluntarily by all parties in good faith and without any fraud, misunderstanding, overreaching, misrepresentation, duress or undue influence whatsoever.

**UNITED STATES OF AMERICA**

on behalf of the Bureau of Reclamation

Dated: 10/24/02

By: 

David W. Gehlert  
Trial Attorney, General Litigation Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
999 18<sup>th</sup> Street, Suite 945, North Tower  
Denver, CO 80202  
(303) 312-7352

**BLACK CANYON IRRIGATION DISTRICT**

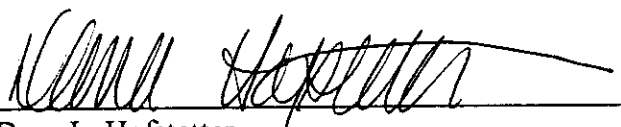
Dated: 11/14/02

By: 

Charles F. McDevitt  
McDevitt & Miller, LLP  
P.O. Box 2564  
Boise, ID 83701-2564

**ROSEBERRY IRRIGATION DISTRICT**

Dated: 11/18/02

By: 

Dana L. Hofstetter  
608 W. Franklin Street  
Boise, ID 83702

# HOFSTETTER LAW OFFICE

608 West Franklin Street  
Boise, Idaho 83702

Dana@IdahoWaterLaw.com

Dana L. Hofstetter  
Attorney at Law

Telephone: (208) 424-7800  
Facsimile: (208) 424-8774

September 12, 2002

*Via Facsimile: 303-312-7379*

David W. Gehlert  
United States Department of Justice  
999 18<sup>th</sup> Street, Suite 945  
Denver, Colorado 80202

Re: Snake River Basin Adjudication – Separate Streams Settlement Proposals

Dear David:

This letter will summarize the questions regarding the proposed Snake River Basin Adjudication (“SRBA”) Separate Streams settlement proposals, which I raised during our telephone conversation yesterday. Understanding the Department of Justice and Bureau of Reclamation’s positions on these matters would be helpful as I advise my clients with regard to the proposed settlements.

1. It is my understanding that the proposed settlement language referring to “appropriations of water after October 18, 1977” is intended to describe water rights with priority dates subsequent to October 18, 1977. As you know, in many instances, a water right priority may not correspond with the date that the water was first put to beneficial use. Accordingly, I would request confirmation that the phrase “appropriations of water after October 18, 1977” is intended to refer to water rights having priority dates after October 18, 1977.

2. I also would request clarification as to the Bureau of Reclamation and Department of Justice’s position as to the need for the second proposed settlement provision concerning demonstrations of injury in transfer proceedings. To the extent that

Exhibit A  
STIPULATION AND AGREEMENT  
Subcase Nos. 65-02585, 65-03114,  
65-03115, 65-03116, 65-22587,  
65-22588, 65-22589 & 65-22590

I.C. § 42-222 does not limit the kind of water right holders that may claim injury, I ask for an explanation as to the reason why the Department of Justice and Bureau of Reclamation perceive the need for this language in the settlement.

3. The proposed language regarding demonstrations of injury in transfer proceedings addresses only those instances where the holders of the water rights subject to Separate Streams protection apply for the transfer. The reverse situation, concerning a potential claim of injury by a holder of a Separate Streams water right to a proposed transfer by a water right holder who is not subject to Separate Streams protection, is not addressed. Such a situation could occur if, for example, a water right holder applies to transfer a Payette River water right to a new point of diversion on the Snake River. This transfer could result in Separate Streams water rights potentially becoming subject to a call by the water right transferred to the Snake River. Since this situation is not explicitly addressed in the proposed settlement language, I seek confirmation as to whether the Department of Justice and the Bureau of Reclamation intend by the settlement proposal to limit the ability of Separate Streams water right holders to claim injury as a result of transfers of water rights that are not included within the Separate Streams protection. In other words, I seek clarification that the Department of Justice and Bureau of Reclamation do not intend for the Separate Streams settlement to undermine the ability of Separate Streams water right holders to participate fully in any transfer proceeding, including ones initiated by holders of non-Separate Streams water rights.

4. Additionally, I seek confirmation that the settlement language regarding transfer proceedings is not intended to be interpreted to mean that Separate Streams protection would be lost as a result of a transfer application. It is my understanding that the proposed settlement is not intended to affect continued Separate Streams protection for the covered water rights after a I.C. § 42-222-type transfer. Please confirm that this is also the Department of Justice and Bureau of Reclamation's interpretation of the settlement proposal.

The Department of Justice and Bureau of Reclamation have indicated that they would not make any changes to the settlement language. They are seeking general acceptance of the standardized settlement language as proposed. Accordingly, it is my understanding that the Department of Justice and Bureau of Reclamation will not accept suggestions for clarifications to be made in the Standard Form 5 documents themselves. Therefore, I am requesting that these clarifications be provided by letter so that this information is available, if necessary, for interpretation of the settlement language in the future.

David W. Gehlert  
September 12, 2002  
Page 3

Thank you for your attention to these questions. You have requested responses to the settlement proposals by September 16, 2002. Please advise me as to whether the Department of Justice and Bureau of Reclamation can provide any extension to this deadline pending clarification of these matters.

Sincerely,

HOFSTETTER LAW OFFICE, LLC

A handwritten signature in black ink, appearing to read "Dana Hofstetter", with a long horizontal flourish extending to the right.

Dana L. Hofstetter

cc: Kathleen M. Carr *via facsimile*  
Susan E. Hamlin *via facsimile*  
E/4004.1/5354



U.S. Department of Justice

Environment and Natural Resources Division

KJH:DWG  
90-6-2-63C

David W. Gehlert  
General Litigation Section  
999 18<sup>th</sup> Street, Suite 945  
Denver, Colorado 80202

Telephone: (303) 312-7352  
Facsimile: (303) 312-7331  
E-mail: David.Gehlert@usdoj.gov

October 1, 2002

Dana Hofstetter  
Hofstetter Law Office  
608 West Franklin Street  
Boise, ID 83702

Re: SRBA - Separate Streams Settlement

Dear Dana:

This letter is in response to your letter of September 12, 2002 requesting that the United States provide further information regarding its proposed settlement of the "separate streams" issue. Your letter posed five questions which are answered below.

First, you wanted confirmation that the settlement language "appropriations of water after October 18, 1977" is intended to describe water rights with a priority date subsequent to October 18, 1977. That is the case; the language is intended to address only involve those water rights whose priority dates are subsequent to the October 18, 1977.

Your second question was why we felt a need for the second proposed settlement provision. Our concern is that because water rights on the separate streams will be *decreed* for separate administration we cannot be sure that a future court will apply Idaho Code § 42-222 to water rights that are physically injured, but arguably not legally injured. Therefore, we sought language to clarify that we are correct in our assumption that Reclamation will be able to participate in a future administrative transfer proceeding.

Your third question was whether the United States believes that a separate stream water right holder could invoke the second proposed settlement provision for standing in a transfer request of a downstream water right holder. We do not believe there would be a circumstance where a separate streams holder would be injured by a downstream transfer given that the separate stream water rights are filled *prior* to filling any downstream water rights (or transfers), thereby making it unnecessary for a separate streams water right holder to make such an argument. However, assuming *arguendo* that there may be an instance where the separate administration for a water right had been terminated for whatever reason, and a downstream right could call out a separate stream right, then we believe that the two rights would have all the same

Exhibit B  
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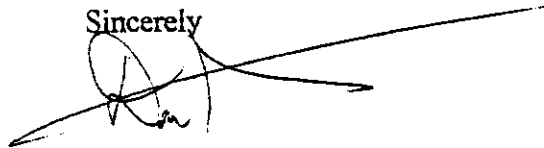
legal rights and defenses under Idaho law as if the separate stream administration had never existed. Additionally, we believe because the language was not drafted to protect the separate streams' water rights, as a matter of contract construction it could not be used in such a circumstance.

Fourth, you request confirmation that the separate streams administration would not be lost after a I.C. § 42-222 transfer had occurred. We do not intend for that to happen, but we cannot make any guarantees in this regard as it would ultimately be a matter for a court to determine.

Finally, you want us to verify that we will not accept changes or clarifications to the proposed settlement through the Standard Form 5. That is correct; we believe both that in fairness to all those individuals who have signed and to assure no future disagreements on "added language" we need to have the same language for all separate streams water right holders.

I trust this responds to your questions and concerns. If you have any further questions, please do not hesitate to contact me.

Sincerely

A handwritten signature in black ink, appearing to be 'D. Gehlert', with a long horizontal line extending to the right.

David W. Gehlert

cc: Susan Hamlin Nygaard  
Kathleen Marion Carr

bc: E. Gail McGarry  
Dala Walton

# HOFSTETTER LAW OFFICE

608 West Franklin Street  
Boise, Idaho 83702

Dana@IdahoWaterLaw.com

Dana L. Hofstetter  
Attorney at Law

Telephone: (208) 424-7800  
Facsimile: (208) 424-8774

October 8, 2002

*Via Facsimile: 303-312-7379*

David W. Gehlert  
United States Department of Justice  
999 18<sup>th</sup> Street, Suite 945  
Denver, Colorado 80202

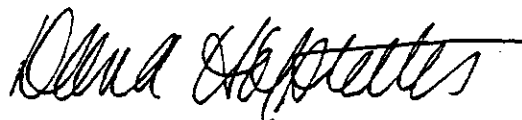
Re: Snake River Basin Adjudication -- Separate Streams Settlement

Dear David:

As we discussed on the telephone earlier today, I appreciated receiving your October 1, 2002 letter providing clarifications regarding the separate streams settlement language. During our conversation, you further clarified with respect to my third question that the settlement language is not intended to address separate streams water rights except in respects specifically described in the settlement language. Since the settlement language does not explicitly address the ability of separate streams water right holders to claim injury in Idaho Code § 42-222 type proceedings involving changes to non-separate streams water rights, I conclude that the settlement is not intended to affect the ability of separate streams water right holders to claim injury in such proceedings. I further appreciate your indication that the settlement can remain available, at least for an additional week, and possibly longer. This will enable me to discuss the clarifications with my clients. Please inform me immediately if any of my understandings are incorrect any regard. Thank you very much for your assistance.

Sincerely,

HOFSTETTER LAW OFFICE, LLC



Dana L. Hofstetter

cc: Kathleen Carr *via facsimile*  
Susan Hamlin *via facsimile*  
E:/4004.1/ 5365

Exhibit C  
STIPULATION AND AGREEMENT  
Subcase Nos. 65-02585, 65-03114,  
65-03115, 65-03116, 65-22587,  
65-22588, 65-22589 & 65-22590

## CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2002, I caused to be served copies of the foregoing **STIPULATION AND AGREEMENT** postage pre-paid by the methods indicated below:

U.S. Department of Justice  
Environmental & Natural Resources Division  
550 West Fort Street, MSC 033  
Boise, ID 83724

\* U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Idaho Department of Water Resources  
Document Depository  
P. O. Box 83720  
Boise, Idaho 83720-0098  
\* U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Chief, Natural Resources Division  
Office of the Attorney General  
State of Idaho  
P. O. Box 44449  
Boise, ID 83711-4449  
\* U.S. Mail ☐ Fed Ex ☐ Hand ☐ Fax

Charles F. McDevitt  
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Boise, Idaho 83701-2564  
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Joe Eld  
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McCall, Idaho 83638  
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Kathleen M. Carr  
Field Solicitor's Office  
U.S. Department of the Interior  
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Dana L. Hofstetter