

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

2005 MAY 26 PM 3 31

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	)	ORDER ON MOTION TO
	)	ENFORCE SETTLEMENT
	)	
Case No. 39576	)	SUBCASE NOS.: 29-11775, 29-13406,
	)	AND 29-13407
_____	)	

I. SUMMARY

This *Order* enforces a settlement agreement entitled *Portneuf River Settlement Agreement Basin 29:Portneuf River* entered into on March 23, 2005. (A copy of the *Portneuf River Settlement Agreement* is attached hereto as Exhibit A. The *Proposed Partial Decrees* for each individual water right are not included in Exhibit A.)

II. PROCEDURAL BACKGROUND

Initial Hearings were held on the contested water claims in Basin 29 on April 21, 2004. There were more than thirty parties involved in the Initial Hearing held for these subcases. Objections were filed by some parties relating to an early season of use and late season of use. Brett Casperson was present at the Initial Hearing. Nathan Casperson did not attend the Initial Hearing. A representative of the Carrol and Ione Willmore Estate, executor Jim Willmore, attended the Initial Hearing. At the Initial Hearing, the court set a Mandatory Settlement Conference for November 2004. Following the Initial Hearing the court sent a written *Order Setting Mandatory Settlement Conference* (hereafter "*Order on Mandatory Settlement.*") dated August 26, 2004. The *Order on Mandatory Settlement* stated that:

Each party and IDWR is required to be present with the individual having full settlement authority on every aspect of the contested subcase. Partnerships, corporations, limited partnerships, unincorporated associations and all governmental entities must have a responsible officer or partner with settlement authority in attendance, in addition to their attorney of record, unless written authority to settle has been given to the attorney and is presented to the Settlement Moderator.

In addition, the *Order on Mandatory Settlement* stated in bold type, “**Failure to attend or attendance without settlement authority may result in sanctions by the court.**”

The Mandatory Settlement Conference was held on November 10, 2004, and was presided over by District Judge Barry Wood. Brett and Nathan Casperson and the Carrol and Ione Willmore Estate failed to attend the Mandatory Settlement Conference. At the conclusion of the settlement conference, an agreement was reached by all parties in attendance. After the Mandatory Settlement Conference, the parties held several meetings to draft the final details of the settlement agreement.

The settlement agreement is called *Portneuf River Settlement Agreement: Basin 29: Portneuf River* (hereafter “*Portneuf Settlement Agreement*”) and was filed April 22, 2005. All parties signed the *Portneuf Settlement Agreement* except the Caspersons and the Willmore Estate.

On April 25, 2005, Portneuf Marsh Valley Canal Company, Marsh Valley Development, Inc., McCammon Ditch Company, Portneuf Irrigating Company, and Lava Irrigation Company filed a *Motion to Enforce Settlement Agreement*. The *Motion* asks the court to bind the Caspersons and the Willmore Estate to the terms of the *Portneuf Settlement Agreement*. A hearing on the *Motion* was held May 18, 2005.

III. ANALYSIS

A. The Settlement Agreement

The *Portneuf Settlement Agreement* does not make changes to the elements of the water rights as they were recommended in the *Director's Reports*. The *Portneuf Settlement Agreement* provides detailed provisions for the administration of a large number of water rights tributary to the Portneuf River. In particular, the agreement specifies how water will be administered during the early season from April 1 to April 14 and how water will be administered during the late season from September 16 through October 31. In addition, the agreement also provides for delivery and administration during the regular season and establishes a minimum flow at the Topaz Gauge to assist in delivery and administration of water. These administrative provisions are intended to replicate the historical use and diversion of water.

B. Argument of the Parties

The movants argue that the Caspersons and the Willmore Estate should be subject to the same administrative provisions as the parties who signed the *Portneuf Settlement Agreement*. The movants assert that the Caspersons and the Willmore Estate failed to attend the court-ordered mandatory settlement conference. Therefore, movants ask that the non-attending parties be bound to the agreement. In addition, the movants argue that binding the Caspersons and the Willmore Estate to the administrative provisions will not impose any disadvantages to these parties, but will provide certain benefits. If they are bound to the *Portneuf Settlement Agreement*, the Caspersons and the Willmore Estate will avoid the necessity of proving the elements of their water rights at trial. In addition, they will have the advantage of official recognition of their early and late season water usage.

The Caspersons did not provide any evidence or briefing regarding the *Motion*. Nathan Casperson did not attend the hearing. Brett Casperson attended the hearing on May 18, 2005. Mr. Casperson conceded that he had not attended the Mandatory Settlement Conference. Mr. Casperson did not provide any argument as to why the court should not bind him to the Settlement Agreement.

The Carroll & Ione Willmore Estate did not provide any evidence or briefing regarding the *Motion*. Mr. Kenneth Knowles attended the hearing. Apparently Mr. Knowles is not the personal representative or executor of the estate, and no official connection with the estate was stated on the record. Neither Mr. Knowles nor anyone else on behalf of the Willmore Estate opposed the *Motion*.

C. Enforcement of Settlement Agreements

Mandatory Settlement Conferences have long been an important process in the SRBA. Many water claims have been resolved through mandatory settlement conferences. Participation in a mandatory settlement conference is required where the court orders such participation. Participation is mandatory, but settlement is not mandatory if the parties participate in good faith. In such situations, the parties retain their ability to go to trial and to have their day in court. Participating parties may go forward to prove their case if they disagree with the *Director's Report* or with the proposals that are made in the settlement conference. However, parties who ignore court orders for mandatory settlement conferences may be bound by the agreement reached by the other parties.

The SRBA District Court has recently considered the question of whether to enforce a settlement agreement on parties who failed to attend a mandatory settlement conference. In the *Order on Order to Show Cause Hearing Enforcing Settlement Agreement; and Order Staying Discovery and Trial Schedule on Basin-Wide Issue 5-34*, (Subcase No. 91-00005-34) (March 15, 2001) the

SRBA District Court considered a similar set of facts. That case involved a large number of water right claimants in Basin 34 with objections to administrative provisions proposed by IDWR. In the process of resolving the objections of the parties, the court ordered a mandatory settlement conference.

One of the parties in the Basin 34 subcase failed to attend the settlement conference ordered by the court. She also failed to notify the court of her inability to attend. The SRBA court held that the non-attending party was bound to the settlement agreement reached at the mandatory settlement conference. In making its decision, the court considered the following factors:

- 1) The court had issued an order setting a mandatory settlement conference.
- 2) A party failed to attend the settlement conference.
- 3) The non-attending party had received notice of the order setting the mandatory settlement conference.
- 4) The non-attending party had failed to notify the court or the settlement moderator of her inability to attend the settlement conference.
- 5) The non-attending party failed to request a rescheduling of the mandatory settlement conference or to have someone appear on her behalf.
- 6) The attending parties reached an agreement.

Order on Order to Show Cause at 16.

The Court found that the large number of parties involved in the mandatory settlement conference resulted in substantial effort and resources being devoted to settlement discussions.

Therefore, in order to make the settlement process effective, and in fairness to those who attend and participate in good faith, participation at the settlement conferences needs to be mandatory and the parties attending must have authority to settle. The process is rendered meaningless if interested parties do not attend negotiations but still retain the ability to veto any agreement reached. Accordingly, any party who did not attend the settlement conferences is bound by the terms of the agreement ultimately reached."

Id. at 16 (emphasis added)

The facts in the instant case are very similar.

- 1) The Court issued an order setting a mandatory settlement conference. The Order included a warning in **bold** type that sanctions may apply to parties who failed to attend.
- 2) The Caspersons and the Willmore Estate were sent notice of the mandatory settlement conference.
- 3) The Caspersons and the Willmore Estate failed to attend the mandatory settlement conference.
- 4) The Caspersons and the Willmore Estate failed to notify the court of their inability to attend the settlement conference for any reason.
- 5) The Caspersons and the Willmore Estate failed to request a rescheduling of the mandatory settlement conference.
- 6) The attending parties reached an agreement after extensive work by the parties, counsel, IDWR and Judge Wood.

IV. CONCLUSION

In applying these facts to the holding in *Order on Order to Show Cause*, this Special Master holds that the *Portneuf River Settlement Agreement* is binding on the non-attending parties, the Caspersons and the Willmore Estate. To hold otherwise would put the mandatory settlement conference process, so vital to SRBA, at risk. If parties were permitted to skip court ordered settlement conferences without facing sanctions, there would be little incentive for *any* parties to go to the effort and expense of reaching an agreement. It is unjust to allow non-attending parties to veto the very settlement in which they failed to participate.

ACCORDINGLY, IT IS ORDERED that the Caspersons and the Willmore Estate are bound to the *Portneuf Settlement Agreement*.

Dated May 26, 2005.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ENFORCE SETTLEMENT was mailed on May 26, 2005, with sufficient first-class postage to the following:

Director of IDWR
P O Box 83720
Boise, Idaho 83711-0098

United State Department of Justice
550 West Fort Street, MSC 033
Boise, Idaho 83724

Craig W Parrish
P O Box 4321
Pocatello, Idaho 83205

James A Spinner
P O box 6009
Pocatello, Idaho 83205

Jerry R Rigby
P O Box 250
Rexburg, Idaho 83440-0250

Randall C Budge
201 E Center, STE A2
P O Box 1391
Pocatello, Idaho 83204-1391

Randolph Calvin Stone
P O Box 910
Burley, Idaho 83318

Ronald J Jarman
P O Box 2696
Pocatello, Idaho 83206-2696

Indian Falls Property Assn
C/O Earl Mapes
1061 Sagewood Place
Pocatello, Idaho 83201

Dempsey Irrigation Company
C/O Earl Smith
P O Box 235
Lava Hot Springs, Idaho 83246

Topaz Irrigation Co.
C/O Gene Fagnant
P O Box 293
Lava Hot Springs, Idaho 83246

Carrol & Ione Willmore Estate
C/O Jim Willmore
519 Park St
St Anthony, Idaho 83445

Fish Creek Irrigating Co
C/O Wallace Whitehead
P O Box 152
Lava Hot Springs, Idaho 83246

Fagnant & Olson Ranch LLC
Frances Gene Fagnant
P O Box 293
Lava Hot Springs, Idaho 83246

Indian Falls Water Users Assoc
Phil Hudgens President
P O Box 134
Lava Hot Springs, Idaho 83246

Lava Irrigation Co Inc
P O Box 182
Lava Hot Springs, Idaho 83246

Portneuf Irrigating Co
P O Box 194
Arimo, Idaho 83214

Jeffrey F Harris
PO Box 252
McCammon, Idaho 83250

Ronnie D & Sherril Tillotson
P O Box 261
Lava Hot Springs, Idaho 83246

Russell & Natalie Gunter
P O Box 433
McCammon, Idaho 83250

Lynden & Candice Symons
P O Box 604
Lava Hot Springs, Idaho 83246

Roben Hull
2142 Arbon Valley Hwy
Pocatello, Idaho 83204

Carl L & Nola Rae Phillips
2884 W 1400 S
Aberdeen, Idaho 83210

Barbara W Kevan
3462 N 2500 E
Twin Falls, Idaho 83301

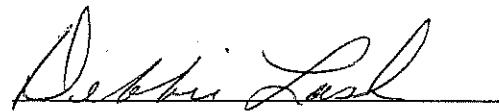
Larry & Lana Naef
5812 E Old Oregon Trail Road
Lava Hot Springs, Idaho 83246

Jim Andrus, Kenneth D Andrus
Colleen L Andrus
6948 E Old Oregon Trail Road
Lava Hot Springs, Idaho 83246

Lynn W & Margie H Stewart
8574 Bob Smith Road
Lava Hot Springs, Idaho 83246

Nathan Casperson
8789 E Maughan Road
Lava Hot Springs, Idaho 83246

Brett Casperson
8893 E Maughan Road
Lava Hot Spring, Idaho 83246

A handwritten signature in cursive script, appearing to read "Debbie Lash", written over a horizontal line.

Deputy Clerk

EXHIBIT A

PORTNEUF RIVER SETTLEMENT AGREEMENT
BASIN 29: PORTNEUF RIVER

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
APR 22 2005
By _____ Clerk Deputy Clerk

THIS PORTNEUF RIVER SETTLEMENT AGREEMENT (the "Agreement") is made and entered into this 23rd day of March, 2005, PORTNEUF-MARSH VALLEY CANAL COMPANY, McCAMMON DITCH COMPANY, PORTNEUF IRRIGATING COMPANY, LAVA IRRIGATION COMPANY, DEMPSEY IRRIGATING COMPANY, TOPAZ IRRIGATION COMPANY, INDIAN FALLS PROPERTY ASSOCIATION/INDIAN FALLS WATER USERS ASSOCIATION, FISH CREEK IRRIGATING COMPANY (referred to collectively as the "Canal Companies"), and the individual parties whose names are set forth upon the signature page. The foregoing are sometimes referred to herein individually as a "Party" or collectively as the "Parties".

RECITALS:

A. The water rights in the Portneuf River and its tributaries (Basin 29) are being adjudicated in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, Case No. 39576 in the Matter of the Snake River Basin Adjudication ("SRBA").

B. The parties have submitted water right claims in the Portneuf River Basin 29 in the pending SRBA, IDWR has submitted Water Right Recommendations in the Basin 29 Director's Report filed with the SRBA District Court in July 2003 with respect to each of said claims and certain parties have filed objections thereto.

C. The parties desire to enter into this Agreement for the purpose of fully compromising and settling all of their pending claims and objections in Portneuf River Basin 29.

AGREEMENT:

NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED among the parties as follows:

1. Extended Irrigation Season.

All extended irrigation season water right claims submitted by the parties as recommended by IDWR are approved with a period of use commencing April 1 and ending April 14 (the "early season") and September 16 and ending October 31 (the "late season") each year, and shall be partially decreed by the Court accordingly. After October 31 each year, all headgates will be closed and no water may be diverted, excepting only the diversion of quantities as may be necessary to supply stock water rights that are partially decreed.

2. Administration by Division.

For the purpose of administering and delivering all water rights in Portneuf River Basin 29, the Portneuf River will be divided at the Topaz Gauge and administered in two separate reaches. The reach above the Topaz Gauge will be known as the "Upper Division", and the reach below the Topaz Gauge will be known as the "Lower Division".

3. Minimum Stream Flow at Topaz Gauge.

A minimum stream flow will be established in the manner described below and maintained at the Topaz Gauge each year for purposes of administering and delivering water during the late irrigation season. Above the minimum flow level at the Topaz Gauge, late season water rights in the Upper Division may be diverted and delivered as decreed without restriction. Below the minimum flow level at Topaz, water rights in the Upper Division will be subject to administration and curtailment by the water master as necessary to maintain the established minimum flow at Topaz during the late irrigation season.

The minimum stream flow level at Topaz will be established annually in the following manner. First, the average flow at the Topaz Gauge will be determined as of the end of the normal irrigation season, September 15, by averaging the 15th and preceding four days of flows, i.e., September 11-15, to establish the base flow each year. The base flow calculation will be "net" of Chesterfield Reservoir storage as further described in 3(g) below. The base flow will be reduced by the historic depletion in flow at the Topaz Gauge station, 17.4 cfs, during the late

irrigation season from September 20 through October 31. Each year this 17.4 cfs depletion amount will be subtracted from the average 9/11-9/15 base flow at Topaz Gauge to establish the minimum flow at Topaz to be used for purposes of administration by the Watermaster during the late season of use, provided that regulation shall be conducted on a five-year running average as described below.

The five-year running average regulation will be conducted as follows:

(a) On September 15, determine the average of Topaz Gauge flows from September 11 through September 15. If flows at Topaz Gauge are affected by local rainfall or Lava hydro plant impact events during this period, the Watermaster should remove such effects from the calculations in consultation with IDWR.

(b) Allow the late-season irrigation flows to equilibrate from September 16 through September 19.

(c) If on September 20 the drop in flow at the Topaz Gauge (as compared with the September 11-15 average) exceeds 17.4 cfs, then compute the average drops for the four previous years using the same method outlined above.

(d) If the average drop on this date for the previous four years equals or exceeds 17.4 cfs, then regulate irrigation diversions of upstream signatories, to reduce the flow reduction to not exceed 17.4 cfs at the Topaz Gauge.

(e) If the average drop on this date for the previous four years is less than 17.4 cfs, the Upper Division rightholders may divert water in accordance with their respective decreed rights.

(f) Repeat steps (c) and (d) for each day until late season irrigation is discontinued, no later than October 31.

(g) The minimum flow calculation will be "net" of Chesterfield Reservoir storage. Stated another way, the releases of storage water from Chesterfield Reservoir will be subtracted from the flows at the Topaz Gauge, including consideration of time of travel and assuming negligible shrink.

4. Allocation Within Each Division.

Water available during the normal irrigation season from April 15 through September 15 shall be allocated and delivered to the parties in accordance with their water rights as partially decreed.

Water available in the Upper Division during the extended irrigation season will be allocated to those Parties holding extended season irrigation rights in the Upper Division in the manner in which they agree. Water available in the Lower Division for allocation during the extended irrigation season will be allocated among the Parties holding extended season irrigation rights in the Lower Division in the manner in which they agree. During the extended season, no water right holder in the Portneuf River and tributaries above Topaz can make a call on any water right holder in the Portneuf River and tributaries below the Topaz Gauge; and, no water right holder in the Portneuf River and tributaries below the Topaz Gauge can make a call on any water right holder in the Portneuf River and tributaries above the Topaz Gauge. This allocation agreement shall apply only to the parties to this Agreement with regard to the water rights covered by this Agreement.

5. East and West Bob Tributaries.

Those Parties with water rights in East Bob Creek and West Bob Creek which are tributary to the Portneuf River immediately below the Topaz Gauge will have their late irrigation season water rights administered and delivered as if they were in the Upper Division. Accordingly, these Parties' late season rights may be subject to curtailment at the same times and in the same percentages as water right holders in the Upper Division may be curtailed during the extended irrigation season, subject to the following limitations:

5.1 If the amount of water contributed to the Portneuf River by West Bob Creek after curtailment is less than 0.50 cfs, measured above the springs located in NENE Section 22, T09S R37EB.M., it shall be deemed a futile call and not subject to any curtailment.

5.2 Water right no. 29-11681 diverted from East Bob Smith Creek shall be allowed to divert 2 cfs or its pro-rated share of irrigation water rights diverted in the lower reach, whichever is greater.

6. Diversion Structure Modification.

Water right holders in the Upper Division may repair, maintain or replace diversion structures as needed; provided, however, that no modification or replacement may occur which increases the diversion capacity beyond the presently existing capacity of such structure.

7. Withdrawal of Objections.

All objections of all parties to all water right claims in Basin 29, including in-season and extended-season claims and objections, are withdrawn.

8. Partial Decrees.

All of the Parties' water rights, including extended season water rights, shall be partially decreed by the Court as reflected in the attached water right descriptions which are attached hereto and incorporated by this reference.

9. Capacity to Execute Agreement.

The Parties warrant and represent that the person executing this Agreement is empowered to do so on behalf of each company or entity and thereby binds such entity by signing this Agreement.

10. Waivers.

The failure to object to any breach of any term or condition in this Agreement shall not constitute a waiver and no failure to object shall be deemed a waiver of any prior to subsequent breach.

11. Entirety of Agreement.

This Agreement represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations and oral agreements. No promise or inducement has been offered or made except as herein set forth, and this Agreement is executed without reliance on any statement or representation by any other Party or their agent.

12. Modification.

This Agreement may amended or modified only by a written agreement signed by each of the Parties to this Agreement.

13. Execution of Agreement in Parts.

Due to time constraints and practicalities, the Parties acknowledge it is not possible to have all parties sign the same copy of this Agreement at the same time. Therefore, the Parties agree that this Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

14. Signatures.

In witness whereof, the Parties to this Agreement through their duly-authorized representatives have executed this Agreement and certify that they have read, understood and agree to the terms and conditions of this Agreement as set forth herein.

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year first above written.

PORTNEUF-MARSH VALLEY CANAL CO.

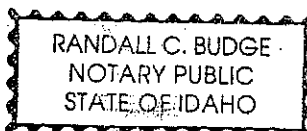
STATE OF IDAHO)
) ss.
County of Bannock)

On this 21st day of April, in the year of 2005, before me Randall C. Budge, personally appeared Ellis Gilbert known or identified to me to be the president, or vice-president, or secretary or assistant secretary, of the corporation that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

DATED this 21st day of April, 2005.



SUBSCRIBED AND SWORN before me this 21 day of April, 2005.



Randall C. Budge
NOTARY PUBLIC FOR IDAHO
Residing at: Pocatello, ID.
My commission expires: 10/11/2006