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Department of Water Resources

May 25, 2005

Brett Casperson
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Lava Hot Springs, Idaho 83246
208-776-5428

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

In Re SRBA	)	Subcase No. 29-13406
	)	Subcase No. 29-13407
	)	
RE: Case No. 39576	)	ARGUMENT AGAINST MOTION TO ENFORCE SETTLEMENT AGREEMENT

1. I appreciate the opportunity to present my argument further in the case referenced. I felt pushed aside in the court on the 18th, I do better if I have time to pull all my thoughts together. Because I work two jobs I was unable to attend the meeting in Twin Falls on November 10, 2004. I have always tried to do my part in society and the community by volunteering the little time I have left out side work to helping the youth in community sports. I have always tried to be fair with people and ask the court for the same consideration.

2. The agreement that the motion pertains to is a one sided agreement in favor of the lower users. It restricts the historical water use of the upper users and preserves the historical use of the lower users. It also carefully camouflages the fact that anyone who signs this agreement agrees to allow the lower users to curtail and take the upper users water and not only take their agricultural water but take it and run it through the lower users power plant. This is Contrary to the impression I got from Mr. Budge's testimony that this agreement does not allow water to be run through the power plant while upper users are being curtailed. He referenced Article 4 "Allocation Within Each Division" of the settlement agreement, which masterfully camouflages the fact that the water can be run through the power plant while the upper users are under curtailment. This paragraph

states that the lower users will use the water "in the manner in which they agree" and that "no water right holder... above Topaz can make a call on any water right holder...below the Topaz gauge." This clearly allows water to be curtailed and used in the power plant while upper users are curtailed. The objective of the lower users is to take more control of the upper user's late water, which the upper users have relied on for a century, and secure it for use in the power plant. Ironically, the upper and lower division boundaries just happened to fall where all the canal companies in the lower division have ownership in the power plant.

3. The subordination statutes for the State of Idaho are set up to protect individuals, like me, from this very attempt. The water rights for the Marsh Valley Development power plant also have the subordination requirements.

4. The Idaho Department of Water Resources (IDWR) representatives have been very up front with the fact that this agreement will allow the lower users to curtail water from upper users and still run it through the power plant. Mr. Norm Avery contacted Ms. McHugh again on May 19, by phone and reconfirmed the department's position on this matter. I have been consulting Mr. Avery because of his experience in contract administration; he is also very familiar with the basin 29 issues. The department's position is clear that this agreement provides an avenue where the curtailed water from the upper users can be taken and run through the lower user's power plant. My position is clear, I do not feel I have to become part of any agreement that subjects me to giving up my irrigation water, which has been used for decades, to be used in a power plant, I have that protection under Idaho State Law.

5. As you look at this agreement with the upper and lower divisions, there is a common thread; the lower user canals all have an ownership interest in Marsh Valley Development power plant. The lower users have never used much late season water and now they are, for some reason, trying to stake claim to the upper user's late water, which the upper users have used for a century to keep their crops alive. The very attempt by the

power company to try and get agriculture water violates the subordination requirements by which the water rights of the Marsh Valley Development were grant.

6. Now the second issue. Many of the water users above the gauge are not subject to this agreement and will not be apart of the curtailment requirement when the flow of water at the Topaz gauge drops below the minimum amount. Therefore, these users can turn on and use the water putting the upper users into a curtailment situation. Under this situation they will have protection by the state hydro subordination statues in which they will not be required to shut down their water while those in the agreement will be curtailed and the water will still be flowing through the power plant. Thus there will be users with senior water rights shut down while other users with junior rights will still be drawing water. Therefore they can cause the curtailment and we will suffer the consequences even though we have the senior water rights. Mr. Tuthill has pointed this out in several correspondences. I have attached an e-mail (Attachment A) sent by him on February 16, 2005 at 5:43 A.M. explaining the situation and expressing his concerns. If someone is trying to resolve this problem by inserting the clause in this agreement that the upper users and lower users will each deal with the issue, this approach is totally unacceptable. It is impossible for the upper users to regulate the water since they have no authority to do so, especially when it comes to those who are not signatory to the agreement that is presented. Shifting the problem is not the answer. The court needs to insist that Dave Tuthill's concerns are addressed.

7. The late water is critical to the upper users because the lower users take most of the water in the summer season, leaving many of the upper users dry for much of the summer. The lower users have never used much of the water in the late season because they have had water all summer. Many of the upper users grow crops which the application of late water to these crops, after they have been dry for several months, is critical to the revitalization of the plants before winter sets in. This eliminates much of the winter kill and will produce a healthy plant in the spring. The upper users have relied on this water for a century and the lower users have never made one complaint until the power company came into play and now they want water that has had an agriculture

beneficial and historical use and take it for the power plant. The people who sign this agreement may loose the water and then watch it run through the power plant.

8. Mr. Ken Andrus stated in the count on Wed May 18, 2005 that he would feel more comfortable with the motion to force agreement of Casperson and Willmore if he thought that we had understood more clear what some parties felt the meeting in Twin Falls was to accomplish. Norm Avery later asked Ken what his interpretation of the Twin Falls meeting was and he said he did not understand it to be an all inclusive binding meeting. Obviously he did not interpret this meeting as some parties are portraying it today, nor do

I. A close look at the setup on this meeting gives rise to some real concerns and I don't think it can be used to beat parties up to make them sign this agreement. I was never told that an arbitrator had been selected for this meeting. There was no agenda sent out outlining what was going on in this meeting. In an arbitration process there should have been arbitration rules established. The parties should have been told that this was to be a binding arbitration meeting if that really was to be the case. There was no binding arbitration agreement established. Matter of fact the letter from District Judge Barry Wood on October 21, 2004, (Attachment B) to Council and Parties, clearly states, in the first sentence, "As you know, mediation is a non-binding, confidential process..."

9. This was a non-binding arbitration meeting, to facilitate open discussion and come up with solutions. After seven long hours of discussion to have Randy Budge (the opposing council) stand up and state his interpretation of the meeting and then have all parties stand and bind themselves, in a non-binding meeting, seems out of line. Now that parties are being pressured to sign the agreement based on this meeting which was to be an open non-binding conference seems even more out of line. I find it hard to believe that the court would grant a motion to enforce an agreement, which motion is based largely on the results of the Twin Falls meeting, with no record of what was discussed or agreed to in that meeting. The court stated on the 18th that those minutes and statements have not been submitted.

10. The Marsh Valley Development was granted water rights on the river with the condition that they stay subordinate to the agricultural water users. Now they have got their foot in the door, they are objecting to the agricultural user's rights in an attempt to get control of more water. An agreement like this one only opens the door for more aggressive attempts to secure more agricultural water for their power plant. Their very objection violates the conditions by which they got their right to water on the river. Marsh Valley Development must honor their subordination to the agricultural users.

11. I also have concerns of being locked in to the 17.4 CFS flow figure. There is no guarantee that this is an accurate number and as the water levels change the upper users will be locked in to this number. This number is from past data and which may not be a true reflection of the future. Too many things can affect the water flow that I have no control over. All this minimum flow number does is secure a steady flow to the lower users power plant.

12. Idaho Law requires all hydro plant usage of water to be subordinate to agricultural use. The water right for the Marsh Valley power plant also has a subordinate clause to the agricultural water. I see no reason or basis to force me or anyone else to sign an agreement that requires us to give up irrigation water that is protected by state law. Secondly I have no authority nor ability to regulate water as is called for by this agreement for all the so called upper users. Many of the upper users are not signatory to this agreement and according to Dave Tuthill's e-mail 39 cubic feet per second belongs to non-signatory holders of water right while others are. The concerns in Mr. Tuthill's e-mail on February 16, 2005 (referenced in 7) needs to be addressed and a resolution developed rather than making the issue, brought forth by Mr. Tuthill, a problem for the upper users. I do not want to become part of the problems described by Mr. Tuthill's e-mail. I especially do not want to be placed in a situation where I am giving up my water to a junior right and see the water that is curtailed from me go through the power plant. The parties need to stop the coercive process and find a solution that solves the remaining challenges. I am asking you to request the parties find the solutions to the remaining

problems and honor my rights as an individual which are granted under the water subordination laws of the State of Idaho.

Respectfully,

A handwritten signature in cursive script that reads "Brett Casperson". The signature is written in dark ink and is positioned above the printed name.

Brett Casperson

McHugh, Candice

From: Tuthill, Dave
Sent: Wednesday, February 16, 2005 5:43 AM
To: 'spinjim@cableone.net'; 'smithrk@pmt.org'; 'cebrock@mindspring.com'; 'rcb@racinelaw.net'; Rigby, Jerry (IWRB Member); 'crobinson@theensigngroup.com'; 'rcstone@pmt.org'
Cc: McHugh, Candice; 'ernest.carlsen@idwr.idaho.gov'; Williams, Ray; Tuthill, Dave; Luke, Tim
Subject: Portneuf Late Season Irrigation



RE Portneuf Late
Season Irriga...

Attachment A =

The meeting yesterday afternoon seemed to go as well as possible given the details that still require resolution in this matter. I think that a win-win solution for the parties is being approached.

The purpose of this email is to re-identify an aspect that appears to be yet-unresolved. On December 23, 2004, I sent an email on this matter to representative parties (the same emailing list that I am using today). I am attaching a copy of the email, including its attachments. This email identifies 39 cfs of late-season irrigation water rights with priority dates that are post Aug 7, 1932. To my knowledge SRBA objections were not filed for these water rights and many have been issued partial decrees. As depicted in the enclosed map, most or all of the points of diversion for these water rights are located upstream from Topaz gage.

My concern relates to delivery during the late season. When the drop at Topaz gage is low, causing periods of no regulation, all of the rights upstream from Topaz gage can be diverted. When conditions at Topaz gage are such that the Watermaster must begin to regulate irrigation diversions upstream from the gage, signatories of the presently proposed agreement will be proportionately curtailed without respect to deliveries below Topaz gage, per the agreement.

This is the problem: water rights that are not part of the proposed agreement will be delivered per the general water distribution practices and rules of the Department. If all of the water diverted downstream is used for irrigation, and insufficient supplies are available to meet irrigation demands and uses, then junior priorities are totally curtailed. However, if some water is being used for hydropower purposes, the situation changes. As you are aware, the hydropower right is subordinated to irrigation uses. The use of water for hydropower is an immediate signal to IDWR that the downstream canals are not using their supplies for irrigation, and those irrigation rights upstream that are not parties to the agreement can turn on.

A comment was made yesterday that the upstream irrigation users can place a "call" on the junior irrigation rights. This is true, except when water is being used for hydropower. In that case the situation changes and the call cannot be exercised on non-signatories. IDWR has a responsibility to look beyond the headgate diversion in many situations --this is one where we must do so to protect the rights of junior irrigation appropriators.

One possible solution to this situation, in the spirit of the proposed agreement, is to bring the junior late season irrigation water rights into this or another associated agreement. Perhaps these water rights would have an incentive to agree to operate as part of the "upper division" envisioned in the agreement. One incentive might be to share in some way in a pro-rated curtailment when regulation occurs, rather than to be totally curtailed.

Please feel free to contact other IDWR staff or myself in discussing these concepts. We are supportive in your efforts to complete this agreement so it will provide a lasting solution.

Regards, Dave

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
STATE OF IDAHO

Attachment B



RODERICK BARRY WOOD
DISTRICT JUDGE
(208) 934-4861

RESIDENT CHAMBERS
GOODING COUNTY COURTHOUSE
624 MAIN STREET
BOX 27
GOODING, ID 83330
FAX (208) 934-4408

OTHER CHAMBERS

JEROME COUNTY COURTHOUSE
300 N. LINCOLN
JEROME, ID 83338
(208) 324-8811
FAX (208) 324-2713

LINCOLN COUNTY COURTHOUSE
111 WEST "B"
DRAWER A
SHOSHONE, ID 83352
(208) 896-2173
FAX (208) 896-2458

October 21, 2004

RE: Mediation with Objector, Marsh Valley Development, Inc.

Dear Counsel and Parties:

Thank you for selecting me to mediate this dispute. As you know, mediation is a non-binding, confidential process that affords all parties the best opportunity to air grievances in a protected environment and to reach agreement in areas thought to be irreconcilable. I can personally attest to its success in cases ranging from a simple tort claim, to a complicated multi-party business controversy, to various kinds and sizes of water disputes. Mediation's non-binding and confidential nature makes it a productive process. Pursuant to SRBA notices this case is scheduled for:

DATE: November 10, 2004

TIME: 10:00 am – 5:00 pm

LOCATION: Theron W. Ward Judicial Building (Courtroom 1)
Twin Falls County Courthouse
427 Shoshone Street
Twin Falls, Idaho

Please be sure that each party, or, as a less desirable option, a party representative with full settlement authority is present. Please fax me confirmation of the same ASAP. We cannot proceed meaningfully without actual decision makers present.

In advance, I request that you send me a copy of the operative documents and furnish me ASAP a **confidential position paper** to help prepare for the mediation. This summary analysis should cover the following: