

July 25, 2005

Brett Casperson
8893 E. Maughan Road
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. ~~29-13407~~ <i>BC</i>
	)	Subcase No. 29-13407
	)	
RE: Case No. 39576	)	

MOTION FOR PERMISSIVE REVIEW

The decision that was handed down and dated July 12, 2005 clearly did not take into consideration the heart of my argument. The heart of my argument is the FACT THAT THE SETTLEMENT AGREEMENT CONTAINS LANGUAGE IN ARTICLE 4 THAT ALLOWS THE LOWER USERS TO CURTAIL AGRICULTURAL WATER FROM THE UPPER USERS (INCLUDING ME) AND USE THAT WATER FOR HYDRO POWER GENERATION RATHER THAN FOR IRRIGATION. The court must carefully review Candice McHugh's testimony in the June 22, 2005 hearing, when asked the question "does this agreement allow water to be curtailed by lower users and run through the power plant". Her testimony clearly states that this agreement does (I repeat) does allow water to be curtailed from the upper users and taken by the lower users for power generation. THIS IS AGAINST THE LAW. The state statues in 42-203 and other statues clearly protect agricultural users from this very attack. This agreement is not in accordance with the law. I can understand some individual's eagerness to enforce sanctions; however the court can not enforce sanctions that are outside the law. The court is being asked to bind me to an agreement that is not in accordance with the law. Before there is any further action IDWR and proponents of the agreement have an obligation to certify that the agreement, as it currently stands, is in full compliance with the law. I argue that it is not.

As provided in the Rules of Procedure of the Idaho Department of Water Resources Rule 613 (37.01.01) the proponents of the agreement bare the burden of proof of showing that

the agreement is in accordance with the law. Rule 614 directs the presiding officer to conduct an independent review to determine whether the settlement is in accordance with the law. State law requires the hydropower water rights to stay subordinate to agricultural water and this agreement violates those state laws.

Mr. Budge had told the court in the May 18, 2005 conference that the agreement **did not** contain language to allow water to be curtailed from upper users and used by the lower users for power generation. **He then told the court that it only says that "Water available in the Lower Division for allocation during 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."** He continued to quote article 4 **"no water right holder in the Portneuf River and tributaries above Topaz (upper users) can make a call on any water right holder in the Portneuf River and tributaries below the Topaz Gauge (Lower users, all who have financial interest in the power plant). Which in essence say's the lower users can use the water any way they wish including through the power plant. If water is curtailed, as is provided in this agreement, and run through the power plant it is a violation of the state law.**

Dave Tuthill and Candice McHugh have now made it clear, that the agreement does (I repeat) does allow for curtailment of water from upper users and will permit the lower users to take the curtailed water for power generation. IDWR and the court have an obligation to ensure the law is followed regardless of certain individual's desires to impose sanctions. Prior to the hearing on June 22, Ms. McHugh was asked if Mr. Tuthill would be to the June 22, conference to testify to this and she stated she would be the one to speak for the Department. She did make her statement and confirmed that the department's interpretation of the agreement allowed for curtailment of water by the lower users from the upper users. And that the lower users could run the curtailed agricultural water through the power plant instead of using it for irrigation. She added that article 4 was confusing to her and that she would call a meeting to get things cleared up.

Next argument, there was never, I repeat never, any discussion in the November 10, 2004 Twin Falls meeting about allowing curtailed water, from the upper users, to be run through the power plant instead of for irrigation. This language was carefully slid into the agreement sometime in February or March of 2005 at which point I have been addressing the matter. This clearly makes the agreement illegal. IDAPA 37 IDAHO DEPARTMENT OF WATER RESOURCES "Rules of Procedure of the Idaho Department of Water Resources" Rule 613 makes it clear that the proponents of settlement agreements carry the burden of showing that the settlement is in accordance with the law. This agreement is not in accordance with the law. Rule 614 lays out some criteria for settlement: First, "The presiding officer is not bound by settlement agreements that are not unanimously accepted by all parties or that have significant implications for persons not parties." The agreement is not unanimous and is significant to me. Second, The rule also states "The presiding officer will independently review any proposed settlement to determine whether the settlement is in accordance with the law." Therefore, I am respectfully requesting this review and legal determination take place prior to any further action. If the court is going to try and bind me to an agreement, the agreement **must be legal and within the state law.**

It should also be noted that the meeting in Twin Falls on November 10, did not resolve the objection to Portneuf Marsh Valley Canal Company transporting water shrink free on the upper 10 feet of storage water in the dam. This was added to the agreement in February or March by inserting clever language stating that all objections would be dropped. Candice McHugh notified the various legal councils of this fact several months ago and if I would have been able to finish my argument, in the June 22, 2005 hearing, I would have had her provide that testimony. As you can see two major items got added to the agreement months later. This issue was not openly resolved in the Twin Falls meeting and still is not resolved.

It is imperative the court look past some emotions to punish me for being unable to attend the November 10 conference and must look at the legality of the agreement to which the court is being asked to bind me to. It appalls me that the professional parties hear involved are pursuing an agreement that is against the law. IDWR has responsibility of

ensuring that agreements are in accordance with the law. **It is of great concern that the court did not address my argument of legality in its analysis of this case. Nor did the court address my argument about the fact that under a curtailment situation, this agreement will allow a significant number of junior water right holders to become senior right holders over the upper users.** This was clearly explained in Mr. Tuthill's e-mail on February 16, 2005 (attachment A of my argument), advising all parties about the problem. (More details are provided in my summary below in item 5) **The problem is still unresolved.** The state statues 42-203 clearly prohibit this. Perhaps if the court would have allowed me to finish my arguments this confusion would not have occurred. I find it hard to believe that we had a hearing to listen to my viewpoint and a great majority of the time was spent listening to other parties comments, only then to say the court didn't have time to hear the rest of my argument.

The court's analysis lists three main reasons for my argument; it states the first is because the agreement is unfair to the lower users. **My argument is just the opposite; it is unfair to the upper user's not the lower users.** The lower user have never used much late season water until they put in the power plant and now there is an argument for the late water so they can use it in the power plant. The court notes the second reason as to confusion infused by Judge Wood's letter on October 21, 2004. This is one of my arguments, Judge Wood was appointed to preside by the court and he becomes an agent for the court, his letter outlined the status of the November 10, 2004 meeting. The court did not lay out the process of the meeting, that was left to Judge Wood, the court set the meeting and then appointed Judge Wood take charge from that point on and he clearly states that the meeting is a place to air grievances in a protected environment. At that point he became the courts representative. He also made it clear that this was to be a **non-binding meeting.** Unfortunately, Judge Wood did not keep the meeting non-binding. At the end of the meeting he had all parties stand and bind themselves to Mr. Budge,s version of the meeting. Mr. Budge just happens to be the legal council for Marsh Valley Development (The Power Plant Operator who filed the objections in the first place and is causing all the problems and wants control of the water). Now this non-

binding meeting, which all parties got bound to, becomes a point of argument to bind me. It should also be noted that I was unable to attend and not that we chose not to attend.

Another major disagreement, the court states that it is using case precedence in setting this ruling referencing Issue 5-34 (subcase 91—0005-34) citing similar facts. I disagree, the case before the court is unprecedented in the State of Idaho, Never, has there been a case where water users have given up agricultural irrigation water to junior water right holders to be used for hydropower generation. There has never, been a case in Idaho where someone was forced to become part of an agreement which required that person to give up irrigation water to junior water rights for the generation of power, which is illegal and against the laws of the state of Idaho. There has never been a case where someone was forced to become part of an agreement that allowed junior water users to become senior water users (See Mr. Tuthill's e-mail my attachment A in the argument). There has never been a case where the court stated they didn't have time to listen to the individuals' arguments, especially when the court was respectfully asked to hear the remaining arguments, whether then or at a later date. **The court's analysis, pertaining to my argument, merely covers some of the peripheral issues and totally misses the heart of the argument. In summary my objections are as follows:**

1. The agreement is not in accordance with the law. My argument is based on the fact that the agreement contains careful language that permits water to be curtailed from upper users and run through the lower user's power plant. This is against the law. The agreement can not be against the law and still valid and binding. Second, the agreement does not have unanimous acceptance by all water users. There are users who own 39 cfs of water that are not in the agreement. (Mr. Tuthill's e-mail on Feb. 16 clearly explains this) Under this agreement these users, who have junior water rights, can actually take a senior water right position to those who are signatory to the agreement. Therefore the non signatory water users with junior rights will be able to water while those with senior water rights will be shut off. This type of arrangement is not permitted under the law. The agreement is not in accordance with the law.

2. As provided under Rule 613 I am requesting the proponents to bare the burden of proof that the agreement is legal. I am requesting the independent review for legality as required in this situation under rule 614.
3. The court can not make sanctions that are outside the scope of the law. The court is claiming its authority on the fact it can impose sanctions because of lack of attendance at a mandatory conference, if so the sanctions still have to be lawful. Forcing me to become part of an agreement that stripes me of protection that is granted to me under the state statues is unlawful. The court has no bases to binding me to an agreement that is not in accordance to the law.
4. The agreement requires me to give up irrigation water that can be taken by the lower users and ran through the power plant. This is a violation of my rights granted under the State of Idaho statues 42-203 and others. This violation of the statues makes the agreement unlawful and triggers a number of my arguments. Article 4 "Allocation Within Each Division" states that each division can use the water "in the manner in which they agree." It is critical to refer back and listen carefully to Candice McHugh's testimony in the hearing on June 22, where she states that this agreement will allow the lower users to curtail water from upper users and run it through their power plant. I have protection from this type attack under state law and should not have to attend any meeting to defend rights that are protected under the law. If Judge Woods letter would have stated that he was going to go as far as to allow the parties to explore approaches that were not in accordance with the law, red flags would have went up all over. Know I know this was not the intent of the meeting, the wording which allowed water to be curtailed from upper users and pilfered off for the power plant was slide in several months later. Never-the-less it is in the agreement and makes the agreement illegal.
5. This agreement, under a curtailment provision, forces many of the uppers users, who have senior water rights; including me, to surrender our water to those who have junior water rights. Many of the water users above the gauge are not subject to this agreement and will no t 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 the non-signatory users will have protection by the state hydro subordination statutes 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 water rights will still be drawing water. Therefore, they can cause the curtailment and the signatory users will suffer the consequences even though we have the senior water rights. This was carefully outline in Dave Tuthill's (IDWR) e-mail dated February 16, 2005 explaining the situation and expressing his concerns. A copy was attached to my argument as Attachment A. 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 is totally unacceptable. We as users have no authority to regulate water.

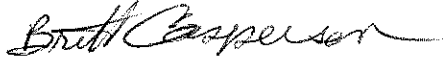
6. The meeting in Twin Falls was clearly a non-binding meeting. The court appointed Judge Wood to preside at the Twin Falls conference and he should have become the legal presiding authority for the court in that meeting. What he says should be upheld by the court and if the court is now saying that he was not the legal authority to speak and conduct the meeting for the court, then all the proceeding of the Twin Falls meeting must be null and void. This is especially critical since the court appears to be saying that Judge Wood had the authority to bind all parties in this non-binding conference. There appears to be no notes available to this conference only Randy Budes interpretation of the conference, which everyone had to stand up and agree to. It is amazing how that worked, it was a non binding meeting and then everyone has to stand up at the end of the day and bind themselves to Randy Budes interpretation of the all day discussion. And to top it off, Candice McHugh disagreed with one of the main issues that he said was agreed to and she said it was not. This issue was the fact that Candice said that the transporting of water shrink free on the upper 10 feet of storage water in the dam, was not resolved. That issue got swept into this agreement by stating that all objections would be dropped, and that language is still in the agreement. This issue has not been resolved satisfactory, there is a shrink issue.

7. The court did not allow me to finish my argument, and looking at the analysis of the case, I think it is appropriate that I be allowed to finish my argument. Please advise if this is possible.
8. I also argue the fact that this agreement pits the water users who have ownership in the power plant against those who do not. This agreement has been carefully set up to assure diversion of water from agricultural use to the power plant operations. First Mr. Budge files objections on the agricultural user's water. At that time he was representing the Power Company (Marsh Valley Development) who's water right are required to stay subordinate to agricultural users. These requirements are by state law and by agreement on the river system. Now he has the objections in place against the agricultural users running interference with the agricultural users then he puts his other hat on and represents Portneuf Marsh Valley Canal Co. who has irrigation rights on the system. Then we just happen to create an upper and lower users group where the lower users all have interest in the power plant and they face off against the upper users to get some control of the water the upper users have desperately needed and used for a decade. Then to top it off, Mr. Budge who filed the objections in the first place, comes up with the solutions to solve the objections that he files in the first place for the power plant company and all parties just happen to get bound to his version of the Twin Falls meeting. I object to such a set up.
9. I disagree with the statement issued by the court that it must follow precedence in this case. This case is totally different from any other case ever presented. The court has little precedence set based on the fact that there has never been a case where someone was forced to be bound to an agreement that was in violation of state law (42-203). The case before the court is unprecedented in the State of Idaho, never has there been a case where water users have given up agricultural irrigation water to junior water right holders to be used for hydropower generation. And above all there has never been a case in Idaho where someone was **forced** to become part of an agreement which required that person to give up irrigation water to junior water rights for the generation of power, which is illegal and against the laws of the state of Idaho. There has never been a case where someone was forced to become part of an agreement that allowed junior water users to become senior water users (See Mr. Tuthill's e-mail my

attachment A in the argument). There has never been a case where agricultural water users have even had to give up their water for hydro power generation. There has never been a case where the court stated they didn't have time to listen to the individuals arguments, especially when the court was respectfully asked to hear the remaining arguments whether then or at a later date.

Therefore, I respectfully request that this agreement be certified as an agreement that is in full accordance of the law before any further action is taken. I feel it prudent the court to reconsider and finish listening to my arguments. It would also be prudent to figure out the meaning of this agreement before we proceed with further action, argument and appeals.

Respectfully,

A handwritten signature in black ink, appearing to read "Brett Casperson", written in a cursive style.

Brett Casperson

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER FOR PERMISSIVE REVIEW was mailed July 26, 2005, with sufficient first-class postage to the following:

Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098

James A Spinner
P.O. Box 6009
Pocatello, ID 83205

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

Randall C Budge
P.O. Box 1391
Pocatello, ID 83204-1391

Randolph Calvin Stone
P.O. Box 910
Burley, ID 83318

Brook Casper
7-26-05

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