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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	)	
	)	
	)	Subcases 51-02002, <i>et al.</i> [Exhibit A]
	)	(Riddle Ranches/Jackson)
	)	and
Case No. 39576	)	Subcases 51-12756, <i>et al.</i> [Exhibit B]
	)	Subcases 51-12604, <i>et al.</i> [Exhibit C]
	)	(US/Shoshone-Paiute Tribes)
	)	
	)	BRIEF IN SUPPORT OF
	)	JOINT MOTION FOR ENTRY
	)	OF CONSENT DECREE
	)	

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I. STATEMENT OF THE CASE

i. The Nature of the Proceedings

The United States is pursuing, for the benefit of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation in the Snake River Basin Adjudication, three hundred and sixty-nine (369) notices of claim under the implied-reservation of water doctrine for water to fulfill the purposes of the Duck Valley Indian Reservation which was established by three executive orders entered on April 16, 1877, May 4, 1886, and July 1, 1910.

ii. The Course of the Proceedings

On February 13, 1998, the United States filed a Notice of Claim to a Water Right Reserved under Federal Law with the Idaho Department of Water Resources, hereinafter the “IDWR”, which claimed water rights for the benefit of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation. Additionally, the United States filed eight amended Notices of Claim on or about February 27, 1998. The District Court entered its *Order Granting Motion to Amend Claims* on May 19, 1998.

On October 24, 1998, the Director of the Idaho Department of Water Resources filed the *Director's Report, Irrigation and Other Uses, Reporting Area 6, Volume Three, Federal Reserved Water Rights Filed on behalf of the Shoshone-Paiute Tribes*, hereinafter referred to as the “Director’s Report for the Shoshone-Paiute Claims.” The IDWR added specific subcase nos. to the margins of the notice of claim. In addition, two more notices of claim were added to provide a mechanism for parties to object to the text in the Director’s Report describing the claims. Presently, the total number of claims of the United States is 369.¹

¹ Five discrepancies need to be noted. The Director’s Report listed notice of claim number 51-12603 for a stockwater claim. This notice of claim number did not end up on the Court’s list of notices of claim in Exhibits B and C. The Director also had assigned notice of claim number 51-12603 to a stockwater claim for the U.S. Department of Interior, Bureau of Land Management, and the Court later entered a partial decree for that agency.

The District Court referred the matter to Special Master Terrence A. Dolan on December 23, 1998.

On January 12, 1999, the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, hereinafter the “Tribes”, filed a motion to intervene in the subcases involving both the non-consumptive use claims and consumptive use claims filed by the United States. In addition, the Tribes filed a separate motion to participate in the subcases related to Riddle Ranches. Special Master Haemmerle entered on February 16, 1999 an *ORDER GRANTING SHOSHONE-PAIUTE TRIBES’ MOTION TO PARTICIPATE* in the subcases related to Riddle Ranches. Special Master Dolan entered on December 6, 1999 an *ORDER GRANTING TRIBES’ MOTION TO INTERVENE, ORDER REQUIRING WRITTEN STATUS REPORTS AND ORDER FOR SCHEDULING CONFERENCE*.

On October 13, 2005, the State of Idaho, Riddle Ranch, and J.R. Simplot Company, hereinafter the “Objectors,” made an offer of judgment in this matter to the United States as trustee for the benefit of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation.² The Objectors clarified the offer of judgment in letters dated October 28, 2005 and November 8, 2005 and in an e-mail dated November 10, 2005.³

The United States conditionally accepted the offer of judgment in a letter dated November 15, 2005.

Thus, the Director had inadvertently assigned notice of claim number 51-12603 to two separate water uses. Another problem existed. The first two digit number in a water right number denotes the hydrologic basin where the water is diverted. Notices of claim 51-12603 through 51-12607 were water uses in basin 55 and not Basin 51 as their number indicates. The Director filed on January 9, 2006 a Notice of Renumbering of Federal Reserved Water Right Claims. This notice changed notice of claim numbers 51-12603 through 51-12607 for the United States as trustee for the benefit of the Shoshone-Paiute Tribes to notice of claim numbers 55-13603 through 55-13607. Notice of claim number 51-12603 remains assigned to a water use decreed for the U.S. Department of the Interior, Bureau of Land Management.

² The term “Riddle Ranch” refers to Riddle Ranch, Inc. and Nancy and Peter Jackson.

³ See *Affidavit of David J. Barber Dated January 9, 2006*.

On December 21, 2005, the District Court entered its *ORDER VACATING TRIAL SCHEDULING ORDERS AND ORDER SETTING SCHEDULE FOR FILING MOTION FOR ENTRY OF PARTIAL CONSENT DECREE*, hereinafter "*Scheduling Order*", which set the following, dates:

January 9, 2006	Deadline to file motion for entry of partial consent decree and brief in support thereof.
February 10, 2006	Deadline to file objections to motion for entry of partial consent decree and brief in support thereof.
February 27, 2006	Deadline to file reply briefs regarding motion for entry of partial consent decree or objections thereto.
March 23, 2006	Hearing on motion for entry of partial consent decree and objections thereto.

The present *JOINT MOTION FOR ENTRY OF CONSENT DECREE* and this brief are submitted in accordance with this schedule.

iii. Statement of Facts

A. A Brief History of the Duck Valley Indian Reservation

The Duck Valley Indian Reservation, hereinafter referred to as the "DVIR", straddles the border between the States of Idaho and Nevada. The DVIR was created in three separate executive orders entered on April 16, 1877, May 4, 1886, and July 1, 1910. Idaho Summary Judgment Exhibit 10;⁴ Idaho Summary Judgment Exhibit 21.⁵ Most of the DVIR is within the Owyhee River drainage basin. The East Fork of the Owyhee River flows into the DVIR in its southeastern corner and flows out of the DVIR in the northwestern corner of the DVIR. Blue Creek, a tributary of the East Fork of the Owyhee River, flows into the DVIR from the north and

⁴ Exhibit 10: Executive Order April 16, 1877 and Executive Order May 4, 1886, I Kappler 866.

⁵ Exhibit 21: Western Shoshone Superintendent George Haggett to Commissioner of Indian Affairs, April 27, 1910, CCF, 1907-39, Western Shoshone, Entry 121. Box 32, Folder: 37137-10 Western Shoshone 341, RG 75, NARA Archives I.

into the East Fork in the DVIR. Marys Creek flows into the DVIR from the southeast and flows out of the DVIR in its northeastern corner.

B. An Overview of the Notices of Claim for the DVIR and of the Consent Decree.

The following table summarizes the actual purposes that are designated in the 369 claims and the status of the claim under the consent decree:

TABLE I

Purpose of Use	Number	Consent Decree
Domestic, Commercial, Municipal, & Industrial:	60	To be decreed as claimed
Stockwater, Wildlife, Religious, & Ceremonial:	263	To be decreed for Stockwater only
Irrigation	15	To be decreed as claimed
Irrigation – Nevada point of diversion (POD) & Idaho place of use (POU)	2	To be decreed as claimed
Lake Level Maintenance - (claim nos. 55-13487 & 55-13695)	2	To be decreed as Storage for Irrigation and Stockwatering
Storage in Mountain View Reservoir for Irrigation, Livestock, Recreation, Wildlife & Fish with a Nevada POD – (claim no. 55-13697)	1	To be decreed as Storage for Irrigation and Stockwatering
Storage in Mountain View Reservoir for Irrigation, Livestock, Recreation, Wildlife & Fish – (claim no. 55-13653)	1	To be decreed as Storage for Irrigation and Stockwatering
Storage in Boyle Creek Reservoir for Irrigation and Wildlife – (claim no. 55-13654)	1	To be decreed as Storage for Irrigation
Irrigation – (claim no. 55-13816)	1	To be decreed as disallowed ^o
Irrigation Ground Water Recharge with a Nevada POD & Nevada recharge ponds – (claim no. 55-13696)	1	To be decreed as disallowed
Miscellaneous (These are the two claim nos. 51-12899 and 55-13822 that the Court added for objections to the text of the Directors Report)	2	To be decreed as disallowed
Wildlife habitat:	11	To be decreed as disallowed
Instream flow for Fisheries, Religious, and Ceremonial Purposes:	7	To be decreed as disallowed
Lake Level Maintenance for Fisheries, Recreation, Religious, and Ceremonial Purposes (claim nos. 55-13485 & 55-13486)	2	To be decreed as disallowed
Total	369	

^o The offer of judgment, as amended, only excluded one irrigation claim from recognition.

In summary, the end result is that eleven claims for wildlife habitat, seven instream flows, three lake level maintenance claims for fisheries, two miscellaneous claims for the DVIR, one claim entirely within the State of Nevada and one irrigation claim are decreed as disallowed. The remainder of the claims is decreed in the amount as claimed, although some purposes of use are deleted from the water right descriptions.

C. An Overview of the Notices of Claim for Riddle Ranch and of the Consent Decree

Exhibit A lists twenty-four notices of claim for the Riddle Ranch. The United States for the benefit of the Shoshone-Paiute Tribes filed objections to all of these notices of claim. These twenty-four objections are withdrawn under the terms of the consent decree. The United States on behalf of the Department of the Interior, Bureau of Land Management, filed objections to six of the notices of claim for the Riddle Ranch, and all of these objections have been previously resolved. The Court granted the Tribes' motion to participate in twenty-one of the notices of claim for Riddle Ranch, and the Tribes filed six objections to the notices of claim for Riddle Ranch. Thus, objections of the Shoshone-Paiute Tribes to the water rights for Riddle Ranch remain to be resolved. All other objections have previously been or are resolved under the consent decree.

ARGUMENT

I. THE SPECIAL MASTER SHOULD RECOMMEND TO THE DISTRICT COURT THAT IT ENTER THE CONSENT DECREE BECAUSE IT IS FAIR, ADEQUATE, REASONABLE AND CONSISTENT WITH APPLICABLE LAW.

Federal courts have required that consent decrees be "fundamentally fair, adequate, and reasonable." *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990).⁷ In addition, the

⁷ The federal courts have derived this rule from F.R.C.P. 23(e), which requires court approval of settlement of class action lawsuits. Since I.R.C.P. 23(e) is identical to F.R.C.P. 23(e), Idaho courts would apply the same standard to consent decrees.

consent decree has to be consistent with law and cannot adversely affect third parties. *United States v. City of Miami, Fla.*, 664 F.2d 435, 441 (5th Cir. 1981). Even with these requirements, federal courts have entered consent decrees to which only some of the litigating parties have consented. For example, in *United States v. Oregon*, the State of Idaho strenuously objected to implementation of the pending Columbia River Fish Management Plan, hereinafter the "Plan." Nonetheless, the federal district court approved the Plan over Idaho's objection. *United States v. Oregon*, 699 F.Supp. 1456 (D.Or. 1988). The Ninth Circuit affirmed and reviewed the Plan as if it were a consent decree. 913 F.2d 576, 580.

The proposed Consent Decree in this matter meets the requirements outlined above because it is fair, adequate reasonable and consistent with applicable law. First, the Consent Decree is consistent with applicable law because it resolves claims for federal reserved water rights in a manner which is consistent with *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), and its progeny. The proposed Consent Decree is a straightforward application of the *Winters* doctrine to this executive order reservation.

Second, the proposed Consent Decree is fundamentally fair, adequate, and reasonable. Since the United States, as the claimant of the water rights, accepted the offer of judgment and worked with the Objectors to draft the consent decree in order to implement the offer of judgment, this analysis must begin with a presumption that it is fair, adequate, and reasonable resolution. Nonetheless, a brief comparison of the claims submitted by the United States on behalf of the Tribes with the consent decree is appropriate. Table I in the Statement of Facts describes the differences between the claims and the consent decree. There are a total of 369 claims. Stockwater and wildlife claims are over 70% of the total number of claims, although the quantity of water is quite small. The consent decree recognizes all of the stockwater claims in

the full amount of the claim. The only change is that the purpose of use is described as only "stockwater." The consent decree recognizes all claims for domestic, commercial, municipal, and industrial purposes. In terms of quantity, the irrigation claims represent the largest quantity of water claimed for the DVIR, and the consent decree recognizes all but one of the irrigation claims.

The consent decree provides for the disallowance of eleven claims for wildlife habitat, seven instream flow claims, two lake level maintenance claims for fisheries, recreation, religious, and ceremonial purposes, and one irrigation claim. Second, two other lake level maintenance claims would be described as storage for the purposes of irrigation and stockwatering. Finally, the United States under the consent decree would withdraw its objections to the claims for Riddle Ranch and Nancy and Peter Jackson.

In sum, the Consent Decree is a fair, adequate and reasonable because it is most likely similar to a litigation outcome on these claims. For all of these reasons, the Special Master should recommend to the District Court that it enter the Consent Decree.

II. THE UNITED STATES HAS AUTHORITY TO SETTLE LITIGATION ON BEHALF OF AN INDIAN TRIBE.

While the Tribes are not a signatory to the Consent Decree, the law is well settled that the United States as trustee for an Indian Tribe has authority to litigate water right claims on their behalf. In *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), the U.S. Supreme Court stated: "As a fiduciary, the United States had full authority to bring the *Winters* rights claims for the Indians and bind them in the litigation." 460 U.S. at 626-627 (*citing Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912)), *see also Nevada v. United States*, 463 U.S. 110 (1983). Indeed, the issue of the scope of this litigation authority has already arisen regarding the Snake River Basin Adjudication. The Shoshone-Bannock Tribes

sued the United States in U.S. District Court in 1993 challenging the decision of the United States not to file instream claims on behalf of the Shoshone-Bannock Tribes regarding unoccupied lands outside the geographic boundaries of the Fort Hall Indian Reservation. The District Court denied the motion for a preliminary injunction, and the Court of Appeals for the District of Columbia affirmed. The Court stated:

In both civil and criminal cases, courts have long acknowledged that the Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review. . . .

. . .
As to the Attorney General's refusal to assert the Tribes' claims in the Idaho water rights adjudication, that decision was presumptively within her discretion.

Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1480-1481 (D.C. Cir. 1995). Just as the Attorney General has prosecutorial discretion to decide what claims to assert, the Attorney General likewise has discretion regarding the conduct of litigation, including the decision to accept an offer of judgment made by an opposing party. 28 U.S.C. §§516-519. Thus, the United States has the legal authority to enter into the consent decree as the trustee for the Tribes.

CONCLUSION

The Consent Decree is consistent with applicable law because it applies the *Winters* doctrine to the executive order reservations withdrawn for the benefit of the Shoshone-Paiute Tribes. The Consent Decree is a fair, adequate, and reasonable resolution of the United States' claims for the benefit of the Shoshone-Paiute Tribes and federal law is clear that the United States has the authority to enter into the consent decree on behalf of the Tribes. For all of these reasons, the Special Master should recommend that the Court enter an Order approving the Consent Decree and entering the Partial Final Decrees attached thereto.

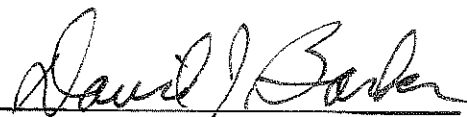
RESPECTFULLY SUBMITTED this 9th day of January 2006.

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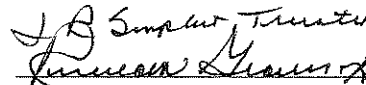
J. R. SIMPLOT COMPANY


Terry T. Uhling, Senior Vice President,
Secretary and General Counsel
Date: Jan 09, 2006

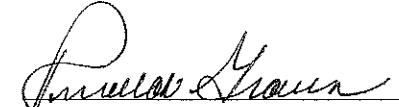
SIMPLOT LIVESTOCK CO.


Terry T. Uhling, Secretary
Date: Jan 09, 2006

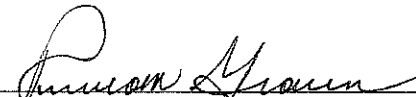
J. R. SIMPLOT SELF-DECLARATION
OF REVOCABLE TRUST


~~J. R. Simplot Trustee~~
~~Ronald N. Graves, Attorney-in-Fact~~
J. R. Simplot
By: Ronald N. Graves, Attorney-in-Fact
Date: Jan 9 2006

M. L. INVESTMENT COMPANY


Ronald N. Graves,
Secretary/Treasurer
Date: Jan 9 2006

TM RANCH COMPANY


Ronald N. Graves, Secretary
Date: Jan 9 2006

RIDDLE RANCH, INC.

PETER & NANCY JACKSON

for David J. Barber
CHARLES HONSINGER

1/9/2006
Date

CERTIFICATE OF SERVICE

I certify that on this 9th day of January 2006, I caused to be served the original and/or copy of this BRIEF IN SUPPORT OF JOINT MOTION FOR ENTRY OF CONSENT DECREE on the following persons by the indicated method:

1. Original to:

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ML Investment Co.
TM Ranch Co.
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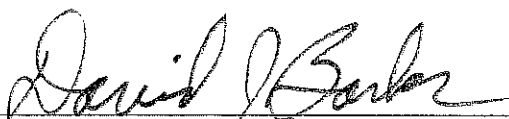
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Not Applicable



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