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DEPARTMENT OF
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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

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 ALTER OR
	)	AMEND
Case No. 39576	)	
	)	SUBCASE NO.: 29-13407

I.

This *Order on Motion to Alter or Amend* denies the *Motion to Alter or Amend* filed by the Caspersons and confirms enforcement of a settlement agreement entitled *Portneuf River Settlement Agreement Basin 29: Portneuf River* (hereafter "*Portneuf Agreement*").

II. PROCEDURAL BACKGROUND

An *Order on Motion to Enforce Settlement* was issued holding that the *Portneuf Agreement* was binding on the parties who failed to attend a mandatory settlement conference. The *Order on Motion to Enforce Settlement* resulted from a *Motion to Enforce Settlement Agreement* brought by multiple parties who attended the settlement conference and reached an agreement as set forth in the *Portneuf Agreement*. The Caspersons failed to attend the mandatory settlement conference.

A *Motion to Reconsider* was filed by the Caspersons. The *Motion to Reconsider* was granted as to subcase 29-13406¹ and denied as to subcase 29-13407. *Order on Motion to Reconsider* (July 12, 2005). The Caspersons then filed a *Motion for Permissive Review*. The motion was denied. *Order on Motion for Permissive Review* (Sept. 15, 2005). The

¹ The *Portneuf Agreement* did not include 29-13406.

Caspersons filed a *Motion to Alter or Amend Special Master's Recommendation*, and a hearing was held December 21, 2005. The Caspersons filed additional briefing on January 9, 2006. The *Motion to Alter or Amend* asserts that the *Order on Motion to Enforce Settlement* erred because the settlement conference was not mandatory, because the *Portneuf Agreement* contains provisions not agreed to at the settlement conference, and because the agreement contravenes public policy.

III. STANDARD OF REVIEW

Motions to Alter or Amend must be filed within 21 days from the date the *Special Master's Recommendation* appears on the Docket Sheet. *AOI* § 13. The Caspersons filed a timely *Motion to Alter or Amend Special Master's Recommendation*. No responsive briefing was filed.

The Caspersons raised four main arguments in the *Motion to Alter or Amend Special Master's Recommendation*. First, they argue that the settlement conference was not mandatory. Second, they assert they cannot be bound to provisions in the *Portneuf Agreement* that were not agreed to at the settlement conference. Third, they claim the *Portneuf Agreement* is unenforceable because it is contrary to public policy on hydropower uses. Finally, the Caspersons suggest the Special Master should reject the law of the case on which the *Order on Motion to Enforce Settlement* relied.

IV. ANALYSIS

The court issued an *Order Setting Mandatory Settlement Conference* on August 26, 2004. The *Order Setting Mandatory Settlement Conference* warned that failure to attend the settlement conference could result in sanctions by the court.

The settlement conference was held November 10, 2004. District Judge Barry Wood acted as the settlement moderator. The Caspersons failed to attend the settlement conference. At the conclusion of the settlement conference, an agreement was reached by the parties in attendance. The *Order on Motion to Enforce* held the Caspersons were bound to the agreement.

A. The Settlement Conference Was Mandatory

The Caspersons argue that they should not be bound to the terms of the *Portneuf Agreement* because the settlement conference was not mandatory. They rely on language in a letter sent by Settlement Moderator Judge Wood. The letter stated in part:

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.

Letter from Judge Barry Wood (attached hereto as Exhibit 1).

The Caspersons argue that the letter's description of "mediation [as] a non-binding, confidential process" meant the settlement conference was not mandatory. Therefore, they contend they cannot be bound to the *Portneuf Agreement* because it was the product of a non-mandatory settlement conference. The argument is not persuasive.

The *Order Setting Mandatory Settlement Conference* stated that the settlement conference was mandatory. It included a warning in **bold type** that sanctions may apply to parties who failed to attend. The argument is that the phrase "non-binding" in the letter nullified the court order. That is not the case. Judge Wood used the phrase "non-binding" to explain how trials differ from settlement conferences. By referring to a "non-binding" process, Judge Wood was differentiating settlement conferences from trials which result in a decision imposed by a court. Settlement conferences do not result in a decision by the court, but are a process where the parties reach an agreement. The settlement conference was "non-binding" because the parties could decline to settle if they attended the settlement conference. The "non-binding" language contained in Judge Wood's letter did not alter the mandatory nature of the settlement conference.

B. Contents of *Portneuf Agreement*

The Caspersons next assert that critical components of the *Portneuf Agreement* were not agreed to at the mandatory settlement conference. Therefore, they should not be bound to any provisions not agreed to during the settlement conference. The Caspersons allege that Section 4 of the *Portneuf Agreement* was not agreed to at the time of the settlement conference. Section 4 states:

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.

Portneuf Agreement at 4.

The attending parties, however, confirmed that the provisions of Section 4 were agreed to at the settlement conference. Although the parties put the agreement in writing after the conference, no new provisions were added. The question of whether a non-attending party can be bound to provisions not discussed at a mandatory settlement conference is intriguing; however, those facts are not apparent here. The contents of Section 4 were agreed to at the mandatory settlement conference.

C. Public Policy

The Caspersons argue that the *Portneuf Agreement* is unenforceable because it contradicts public policy regarding hydropower. This argument arises from the provision contained in Section 4 dividing water use into an Upper Division and a Lower Division. Section 4 provides that, during the extended season, parties in the Upper Division will not make a “call” on parties in the Lower Division. Similarly, Section 4 provides that parties in the Lower Division will not make a “call” on water right holders in the Upper Division. This language could arguably allow hydropower use in the Lower Division when there is not sufficient water for other uses in the Upper Division.²

The Caspersons assert that this possibility renders Section 4 unenforceable since public policy requires hydropower to be subordinated to irrigation uses. The Caspersons cite to Idaho Code § 42-203B as subordinating hydropower uses to other uses:

- (1) The legislature finds and declares that it is in the public interest to specifically implement the state’s power to regulate and limit the use of water for power purposes and to define the relationship between the state and the holder of a water right for power purposes to the extent such right exceeds an established minimum flow. The purposes of the trust established by subsections (2) and (3) of this section are to assure an

² Although the *Portneuf Agreement* does not indicate which signators have hydropower water rights, it appears that Marsh Valley Development, Inc., holds licenses for hydropower use in the Lower Division.

adequate supply of water for all future beneficial uses and to clarify and protect the right of a user of water for power purposes subordinated by a permit issued after July 1, 1985, or by an agreement, to continue using the water pending approval of depletionary future beneficial uses.

Idaho Code § 42-203B. In certain circumstances, Idaho Code § 42-203B provides for subordination of hydropower uses. The statute may have provided the Caspersons with a valid basis for declining settlement had they attended the settlement conference. It does not follow, however, that an agreement to relinquish this subordination is against public policy.

Section 4 of the *Portneuf Agreement* does not contain any clauses repugnant to public policy. It provides for a very limited relinquishment of the subordination of a hydropower use during the extended season and only during certain years. A voluntary agreement not to assert the full measure of a water right is not contrary to public policy. In fact, it is common for water users to agree not to enforce the full measure of their rights in reaching agreements. The courts have upheld such agreements. Ironically, a policy argument similar to the Casperson's was made arguing that Idaho law forbids subordination of hydropower rights because the Idaho Constitution provides for first in time, first in right. The Supreme Court said that this constitutional provision was not a blockade to a valid agreement.

We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society. . . .

Idaho Power Co., v. State, 104 Idaho 575, 587 (1983). Similarly, the *Portneuf Agreement* is a lawful settlement in which the parties agreed not to assert every aspect of their water rights. That is not contrary to public policy.

D. Case Law

Finally, the Caspersons assert the *Order on Motion to Enforce Settlement* erred in applying SRBA case law that did not involve hydropower uses. The *Order on Motion to Enforce Settlement* cited to a prior SRBA decision, *Order on Order to Show Cause Hearing Enforcing Settlement; and Order Staying Discovery and Trial Schedule on Basin-Wide Issue 5-34*, (Subcase no. 91-00005-34) (March 15, 2001) (hereafter "*Order on Order to Show Cause*"). That ruling did not involve hydropower uses. The *Order on Order to Show Cause*

involved a similar fact pattern with a large number of water right claimants objecting to administrative provisions. The court ordered a mandatory settlement conference, and one of the parties failed to attend. The SRBA Court held the non-attending party was bound to the settlement agreement and found the following factors persuasive:

- 1) The court had issued an order setting the mandatory settlement conference.
- 2) The party bound by the agreement had failed to attend the settlement conference.
- 3) The non-attending party received notice of the order setting the mandatory settlement conference.
- 4) The non-attending party failed to notify the court of her inability to attend the settlement conference.
- 5) The non-attending party failed to request a rescheduling of the mandatory settlement conference.
- 6) The parties who attended the settlement conference reached an agreement.

Order on Order to Show Cause at 16. The factors cited by the court are remarkably similar to the facts at issue here. The only notable factual distinction is that some of the parties to the *Portneuf Agreement* use hydropower. That difference does not allow this Special Master to discard the law of this case.

There has been no showing that would require this court to ignore the holding in *Order on Order to Show Cause*. To the contrary, its principles are important to the Snake River Basin Adjudication. Participation in settlement conferences has helped resolve multiple cases, both simple and complex. Participation has been mandatory, but settlement is not mandatory where the parties attend and participate in good faith. Parties who attend are free to disagree with settlement proposals, and they have. In such situations, the parties retain the ability to go to trial. Courts have long encouraged alternate dispute resolutions such as mandatory settlement conferences. These have been used successfully in the SRBA. It is vital to the process that the court has authority to require mandatory attendance.

V. PARTY STATUS OF MARSH VALLEY DEVELOPMENT, INC.

In researching the hydropower issue relating to the *Portneuf Agreement*, it became apparent that Marsh Valley Development, Inc., has not filed a claim in the SRBA. Marsh Valley Development, Inc., has filed for and obtained licenses. Presumably, Marsh Valley Development, Inc., asserts standing in the SRBA based on its licenses.

SRBA Administrative Order 1 defines a party to the adjudication as “any claimant defined in Idaho Code §§ 42-1401A(1) and (6).” *AOI* § 2q. A claimant is any person “asserting ownership rights to the use of water within the state of Idaho. . . .” Idaho Code § 42-1401A(1). Although Marsh Valley Development, Inc., did not assert a claim in the SRBA, it did obtain administrative licenses. Since the administrative licenses were issued in 2001, Marsh Valley Development, Inc., was not required by statute to file claims in the SRBA. See I.C. § 42-1420(d). As a license holder, Marsh Valley Development, Inc., is asserting an ownership right to the use of water. Marsh Valley Development, Inc., apparently asserts standing based on its licenses. It is logical that a license holder may defend its rights by filing objections in the SRBA, even where it has not filed a claim.

Additionally, Marsh Valley Development, Inc., may be joined as a party pursuant to I.R.C.P. 19(a)(1) based on its licenses and based on the relationship of these licenses to other rights claimed in Basin 29.

VI. CONCLUSION

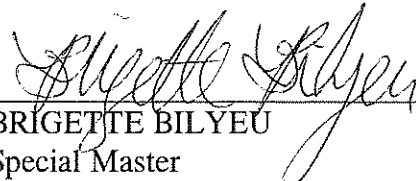
The Caspersons raised several questions about whether they can be bound to the *Portneuf Agreement*. They contend that the settlement conference was not mandatory, that Section 4 was not agreed to at the settlement conference, and that the *Portneuf Agreement* is contrary to public policy. Finally, the Caspersons ask the court to reject the law of the case on settlement conferences because this case involves a hydropower water use.

This Special Master finds that the settlement conference was mandatory, that the provisions in the *Portneuf Agreement* were agreed to at the settlement conference, and that the agreement does not contradict public policy. Finally, the Special Master finds no reason to reject the law of the case. Accordingly, the *Portneuf Agreement* is binding on the Caspersons.

THEREFORE, the *Motion to Alter or Amend* IS **DENIED**.

IT IS ORDERED that Marsh Valley Development, Inc., is joined as a party pursuant to I.R.C.P. 19(a)(1). Marsh Valley Development, Inc., has until March 25, 2006, to file claims in the SRBA.

Dated: February 24, 2006.



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

DISTRICT COURT
FIFTH JUDICIAL DISTRICT
STATE OF IDAHO

Attachment B



RODERICK BARRY WOOD
DISTRICT JUDGE
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DRAWER A
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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:

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ALTER OR AMEND was mailed on February 24, 2006, with sufficient first-class postage to the following:

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