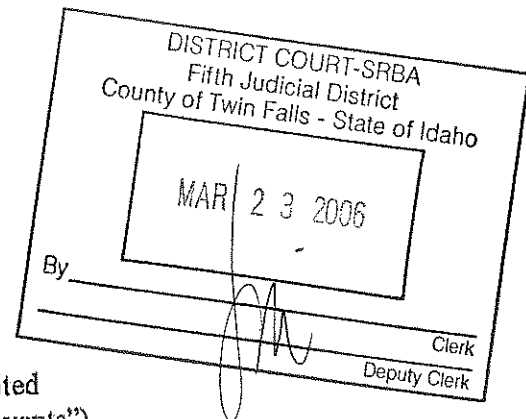


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 & Dempsey Irrigating Company (hereinafter "Movants")



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

Case No. 39576

)  
 ) Subcase Nos.: Basin 29 Water Rights  
 ) Signatories to Portneuf River Settlement  
 )  
 ) MOVANTS LAVA IRRIGATION  
 ) COMPANY, LIMITED and DEMPSEY  
 ) IRRIGATING COMPANY'S MOTION  
 ) TO ALTER OR AMEND ORDER OF  
 ) PARTIAL DECREES ON PORTNEUF  
 ) RIVER

Movants, Lava Irrigation Company, Limited, an Idaho Corporation and Dempsey Irrigating Company ("Movants"), respectfully move the Court to alter or amend the partial decrees and recommended water rights for all water rights subject to and granted pursuant to the Portneuf River Settlement Agreement, dated March 25, 2005. The specific water rights, include but may not be limited to the following:

29-52; 29-13363; 29-13311; 29-13317; 29-11277; 29-4060; 29-589; 29-53; 29-13318;  
 29-4467; 29-10816; 29-11773; 29-11774; 29-4364; 29-13213; 29-13279; 29-13289; 29-13299;  
 29-13310; 29-13321; 29-13320; 29-11681; 29-13334; 29-13535; 29-13536; 29-13521; 29-13580;  
 29-13581; 29-13582; 29-13583; 29-13584; 29-13586; 29-13407; & 29-11775.

The facts, grounds and argument are more fully described as follows:

1. Pursuant to a mandatory court ordered settlement conference of Basin 29 contested water rights held in Twin Falls, Idaho during the fall of 2004 (which involved most of the primary water users diverting from the Portneuf River in Basin 29) a basic term sheet settlement agreement was agreed upon by the attending claimants and objectors before the Special Master.

2. Fundamental to the terms of the settlement, as expressly agreed by the representatives of both the upper and lower reaches of the Basin, and the principal intent of the settlement was to insure that the historical diversions by the water users of the Portneuf River would continue.

3. The settlement contemplated an analysis to be performed by the Department of Water Resource of the historical diversions of water by all water users in the Portneuf (especially in the upper reach above the Topaz gauge) in order to develop a formula which would insure that the diversions above the Topaz gauge could continue at their historical amounts for their historical periods of use.

4. Following the settlement conference, the Department set out to run its analysis of recorded data on the Portneuf (especially the upper Portneuf) in order to create a formula which would determine the historical average drop in the flows of the Portneuf at the Topaz gauge from the last day of regulation, September 15, which would then be deemed to equal the "test" for the historical diversions.

5. Using its own methodology, as the Court's expert, the Department calculated a historical drop in the Portneuf River of no greater than 17.4 cfs would mirror the historical use agreed upon by the parties. The said 17.4 cfs number was accepted to be accurate by the parties and eventually became the number used in the Portneuf River Settlement Agreement. The Agreement, dated March 23, 2005, was executed by all major parties to the pending Basin 29 contested water rights.

6. During the first irrigation season following the execution of the Agreement, the parties were allowed to "test" the formula and discovered that it was extremely tight as against the upper reach diverters. Therefore, the representatives of the upper reach diverters requested the Department re-run the basic numbers provided to them by the Department as used by it in determining the formula which resulted in the calculated 17.4 cfs historical drop in the Topaz gauge.

7. What the Department recently discovered was a major flaw in a specific assumption used by the Department in its creation of the formula. The flaw in the assumption is not with the formula itself but rather the assumption that the original average flows in the Portneuf at the Topaz Gauge on September 15 do not include any reduction in the upper river due to diversions of the Upper Portneuf River water users prior to September 15. In other words the assumption presumes that there have been NO diversions by the junior upper basin water users prior to September 15.

8. The records make it clear that the historical practice of the lower Portneuf River senior water right holders has been to allow the upper basin junior water right holders to divert their junior water rights prior to the end of the normal season of use. This is due to the fact that either the senior water right holders' lands were fully "watered" or due to a willingness by the senior water right holders to allow the junior water right holders to get a head start on their post season diversions.

9. The problem created by the average in-season diversion of the upper river diverters prior to September 15, is that this "average" directly impacts the post season (extended season) rights of the diversions above Topaz Gauge and incorrectly skews the formula agreed upon by the parties against the upper river water right holders. As stated above, the formula assumes that the river above the Topaz Gauge has no junior diversions prior to September 15, when in fact, historically there has been a substantial amount of junior diversions prior to September 15. Attached hereto is a letter from David R. Tuthill from the Department of Water Resources which confirms that to the extent such diversions occurred prior to September 15, "such diversions would impact the historic drop as computed during the period of September 11-15."

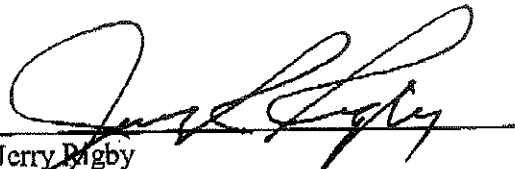
10. Furthermore, it is understood that due to a settlement agreement among the senior water right holders below Topaz Gauge, there may be little if any water available for diversion by the upper river junior water right holders during the normal irrigation season. Should this occur, the formula would incorrectly curtail the upper river junior water rights virtually every year, which would defeat the purpose of the formula and the Settlement Agreement by and among the parties.

Therefore, Movants hereby respectfully move the above entitled Court to require that the

Agreement be modified by adding a provision which requires the historical average of diversions by upper river junior water rights, as of the date of the Agreement, either be met or presumed every year regardless of the change in practice by the lower river senior water right holders, in such a manner so as to allow the computed 17.4 cfs number to continue to accurately reflect the historical drop in the river at the Topaz Gauge.

This motion is supported by the Affidavit of Kirk Irik and a Memorandum in Support of this motion attached hereto.

Dated this 22<sup>nd</sup> day of March, 2006.



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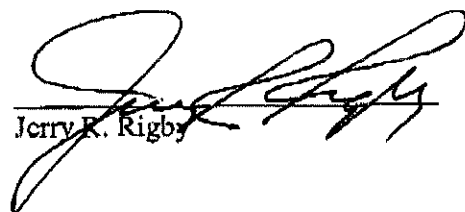
#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 23<sup>rd</sup> day of March, 2006, a true and accurate copy of the foregoing was sent by facsimile transmission and/or U.S. Mail, postage prepaid to the following:

See Attached List

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P.O. Box 83720  
Boise, ID 83720-0098

Deputy Attorney General  
Candice McHugh  
1301 N. Orchard  
P.O. Box 83720  
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