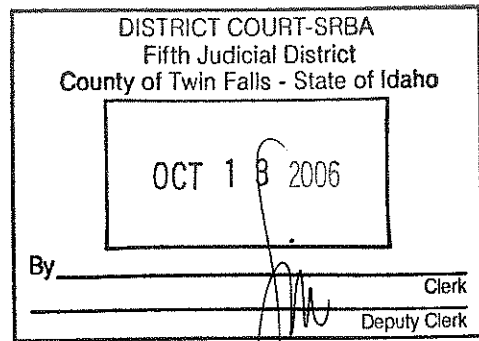




IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Consolidated Subcase 03-10022
	)	(Nez Perce Instream Flow Claims);
Case No. 39576	)	
	)	Consolidated Subcase 67-13701
	)	(Nez Perce Springs or Fountains Claims);
	)	
	)	Subcases 71-10886 <i>et. al</i>
	)	(State Minimum Stream Flow Claims);
	)	
	)	Consolidated Subcase 92-80
	)	(Nez Perce Multiple Use Claims).
	)	
	)	SCHEDULING ORDER AND NOTICE OF
	)	HEARING ON JOINT MOTION FOR
	)	ENTRY OF CONSENT DECREE
	)	

I.
PROCEDURE

This matter came before the Court pursuant to a *Notice of Status Conference on Joint Motion for Approval of Consent Decree* issued by this Court in the above – captioned matter on September 12, 2006. On October 3, 2006, a *Joint Status Report and Suggestions for Proceeding with Scheduling of Hearing for Approval of Consent Decree* was filed through counsel on behalf of the Nez Perce Tribe, the State of Idaho, the United States Department of Justice and the Native American Rights Fund. A status conference was held on October 10, 2006, wherein the Court heard from the parties in regards to further proceedings related to the *Joint Motion for Approval of Consent Decree*.

II. ORDER REQUIRING FILING OF AMENDED PROPOSED PARTIAL DECREES

On September 5, 2006, pursuant to notice and the opportunity to be heard on objections filed to the Nez Perce multiple-use claims, this Court issued a *Memorandum Decision and Order Dismissing Objections in Part with Prejudice and in Part without Prejudice*, requiring that amendments be made to some of the proposed partial decrees. Included were the seven multiple-use claims diverted from the Mainstem, South Fork, Middle Fork and North Fork of the Clearwater River. The Court determined that the proposed decrees should be amended to clarify that the source for each right is limited to the mainstem of the respective rivers and does not apply to tributaries. Also included were the proposed decrees for water right claims 84-12213 and 84-12214. The Court determined that the proposed decrees need to be amended to reflect that water right 84-12161, held by Mark Jackson, must be administered according to the subordination provisions of multiple-use claim 84-12214.

Finally, the parties to the *Joint Status Report* identified clerical errors in some of the proposed decrees for the springs or fountains claims. Specifically, there are two differing versions of a remark included in the proposed decrees for the springs or fountains claims stating that the water right is a right of diversion and not a flow maintenance claim. The parties proposed amending the decrees for consistency.

III. STANDARD OF REVIEW AND SCOPE OF OBJECTIONS

The *Snake River Water Rights Agreement of 2004* (“*Agreement*”), now sought to be memorialized by the entry of the proposed consent decree, was entered into before all of the water rights covered by the *Agreement* were abstracted, reported and parties were given the opportunity to object. In an abundance of caution, rather than deviating from established SRBA procedure and proceeding directly with the *Joint Motion for Entry of Consent Decree*, the court required that all remaining claims be reported in order to give parties to the adjudication the opportunity to file objections to individual claims and have those objections heard. All claims have now been reported, parties to the adjudication

have all had the opportunity to file objections, and all objections have now been ruled on with one exception. That exception being objections pertaining to the terms of the *Agreement* in general, as opposed to individual claims, were dismissed without prejudice with the proviso that such objections could be reasserted in conjunction with the proceedings on the *Joint Motion for Entry of Consent Decree*. The Court included objections to the proposed decrees not affecting a specific water right of the party filing the objection as falling into this category. The Court finds that in keeping with constitutional due process requirements all parties to the adjudication have now been provided notice and the opportunity to be heard on each of the subject claims filed on behalf of the Nez Perce Tribe. Accordingly, the scope of the objections that can be raised in conjunction with the proceedings will be limited consistent with the appropriate standard of review as set forth below. The proceedings are not intended to be a substitute for raising issues to individual claims which should have been previously raised in objections, nor as a means for re-litigating objections to individual claims nor are the proceedings intended to be a trial on the merits.

Administrative Order 1 (AOI) 4.d.(3) Stipulated Elements of a Water Right provides in relevant part:

Where parties reach an agreement on a contested water right recommendation, they shall file either a stipulation with the Court using a Standard Form 5 or some other stipulation acceptable to the court.

(c) When IDWR does not concur with a proposed settlement, the Presiding Judge or Special Master shall conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right as stipulated in the Standard Form 5 or proposed settlement.

In the case of both federal and state-law based claims the claimant has the ultimate burden of persuasion for each element of a water right. *See* I.C. §§ 42-1411(5) and 42-1411A(12). However, *AOI* 4.d.(3) does not implicate exactly the same issues when applied to claims based on federal law. In the situation of claims based on state law, the claims are investigated and reported by IDWR. The director's report, which contains the recommendation for the right, carries *prima facie* weight. To the extent IDWR does not concur with a settlement proposal there is a conflict between the

evidentiary weight to be accorded IDWR's concurrence and the weight accorded the stipulation. As a result, a hearing is required in order for the Court to resolve the conflict by determining whether the "facts, data, expert opinions and law support the issuance of a partial decree." The depth of the proceeding would depend on the state of the record existing at the time the settlement was reached. A more in-depth proceeding may be required if a settlement were reached from the outset and a record had yet to be developed.

The same issue does not arise in the context of claims based on federal law. IDWR does not investigate and recommend claims based on federal law and therefore IDWR does not sign off on stipulations based on federal law. Instead, the Office of the Idaho Attorney General is required to represent the State of Idaho in all matters regarding claims to water rights established under federal law. I.C. § 42-1411A(16). The issue of a conflict between the director's report and the stipulation does not arise. Although the claimant of a federal claim still has the burden of persuasion on each element, the Court can give evidentiary weight to the stipulation in finding that a *prima facie* case has been established. The Court has never treated an uncontested federal claim, which by statute requires an evidentiary hearing so that the claimant can establish a *prima facie* case, the same as contested federal claims where a settlement was ultimately reached. Although the Court is not obligated to "rubberstamp" the stipulation, the Court can nonetheless rely on the weight of the stipulation and the developed state of the record in determining whether there is a reasonable basis in fact and law supporting the stipulation. To do otherwise essentially undermines the purpose of ordering mandatory settlement conferences in cases based on federal law.

In limiting the scope of the objections, the Court takes into account the following:

- 1) The claims for which decrees are sought to be entered are based solely on federal law. As such, the Idaho Department of Water Resources does not investigate the basis for the claim. The Office of the Attorney General is required to represent the State of Idaho in all matters regarding claims based on federal law. The Office of the Attorney General is a signatory to the *Agreement* and the *Agreement* has been approved by the Idaho legislature and Governor's Office.

2) The negotiations leading to the *Agreement* were Court ordered and extended over a six-year period. All parties who participated in the instream flow claims and the springs or fountains claims had the full opportunity to participate in the Court ordered mediation. Only those individuals who filed objections to the multiple-use claims were not afforded the opportunity to participate in the on-going mediation. Nonetheless, those individuals were afforded the opportunity to object to any of the multiple-use claims affecting their claims or decreed rights.

3) The record in the matter includes numerous affidavits from which the Court can make findings of fact and conclusions of law. There have been lengthy summary judgment proceedings with respect to both the instream flow claims and the springs or fountains claims. The filings were extremely voluminous in both proceedings.

4) All parties to the SRBA were afforded the opportunity to object to individual claims affecting their claims or decreed rights and have those objections fully and fairly litigated. All objections have now been decided.

5) As to components of the *Agreement* not specifically dealing with water rights and falling outside the scope and jurisdiction of the SRBA (other than through enforcement of the terms of the *Agreement*), parties had the opportunity to be heard through their respective political representatives.

Therefore, based on the foregoing criteria, the proceedings will be limited to the presentation of legal arguments and/or evidence on the issues of whether: (1) the proposed decree represents a reasonable factual and legal determination (*United States v. City of Miami*, 664 F.2d at 441 (5th Cir. 1981)); (2) whether it is a fundamentally fair, adequate and reasonable settlement of the entirety of the Tribe's claims (*U.S. v. State of Or.*, 913 F.2d 576, 20 *Env'tl. L. Rep.* 21,232 (9th Cir.(Or.), Aug 27, 1990) (*NO.* 88-4311, 88-4316, 88-4347 and *Davis v. City & County of San Francisco*, 890 F.2d 1438, 1445 (9th Cir. 1989); and (3) whether the terms of the agreement are contrary to law or public policy (*Big Lost Irr. Dist. v. Zollinger*, 83 Idaho 401, 406-07, 363 P.2d 706708-09 (1961)).

IV.
SCHEDULING ORDER

The following schedule IS HEREBY ORDERED:

Filing of amendments to proposed decrees:	NOVEMBER 3, 2006
Objections to proposed consent decree, and briefs in support:	NOVEMBER 10, 2006
Response Briefs:	DECEMBER 1, 2006
Reply Briefs:	DECEMBER 15, 2006
Hearing:	JANUARY 9, 2007

V.
NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that said hearing is scheduled for **Tuesday, January 9, 2007, at 1:30 p.m. (mst), at the Idaho Supreme Court Building, Lower Conference Room, 451 W. State Street, Boise, Idaho.** Parties may participate by telephone by dialing the number 1-918-583-3445 and when prompted entering code 406128.

IT IS SO ORDERED.

Dated: October 13, 2006


JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SCHEDULING ORDER AND NOTICE OF HEARING ON JOINT MOTION FOR ENTRY OF CONSENT DECREE was mailed on October 13, 2006, with sufficient first-class postage to the following:

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