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DEPARTMENT OF
WATER RESOURCES

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dba Shingle Creek LLC

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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

	)	Consolidated Subcase 03-10022
	)	(Nez Perce Instream Flow Claims);
In Re SRBA	)	
	)	Consolidated Subcase 67-13701
Case No. 39576	)	(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).
	)	
	)	OBJECTION TO PROPOSED
	)	CONSENT DECREE AND
	)	MEMORANDUM IN SUPPORT

Willis D. and Betty G. DeVeney dba Shingle Creek LLC ("the DeVenys"), by and through their counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, respectfully submit this Objection to Proposed Consent Decree pursuant to the Court's October 13, 2006 *Scheduling Order and Notice of Hearing on Joint Motion for Entry of Consent Decree*. The DeVenys object to the proposed "springs or fountains" *Partial Decrees* which are Attachment 5 to the proposed Consent

Decree on the basis that they are inconsistent with the underlying Settlement Agreement (Mediator's Term Sheet) as well as applicable treaty law.¹ Thus, the DeVenys are not objecting to the Settlement Agreement itself, but, rather, to the proposed springs or fountains *Partial Decrees* which are not consistent with the Settlement Agreement terms or applicable treaty law.² *This* Objection is supported by the following Memorandum in Support and other matters of record.

BACKGROUND

The springs or fountains clause in the Mediator's Term Sheet does not establish or create any tribal water rights, rather it provides only that the Tribe's **treaty right** of use of water on Federal public lands shall be recognized and established: "The Tribe's **treaty right** of access to and use of water from springs and fountains on Federal public lands within the 1863 Nez Perce Treaty ceded area shall be recognized and established under the agreement." *Mediator's Term Sheet, Section I.I* (emphasis added). Thus, the pertinent treaty language itself must be consulted to determine the extent and nature of any such tribal water rights.

The following "springs or fountains" clause in the 1863 Nez Perce Treaty generally is accepted as the operative language:

¹ In prior SRBA proceedings, the DeVenys have raised a number of procedural issues relating to the 'springs or fountains' claims that ultimately were decided by the SRBA Court in its July 28, 2006 *Memorandum Decision and Order on Challenge*. Pursuant to the October 13, 2006 *Scheduling Order and Notice of Hearing on Joint Motion for Entry of Consent Decree*, those matters are not within the scope of the current proceedings and, while the DeVenys reserve their procedural objections, those procedural matters are not discussed here.

² In prior proceedings, the DeVenys have focused on 26 specific Nez Perce springs or fountains claims to the same sources as their own decreed water rights to springs on the Cannonball Allotment. These 26 SRBA Claim Numbers, 13 in the name of the Tribe and 13 in the name of the U.S. as Trustee for the Tribe, are as follows:

Tribe - 78-11636, 78-11639, 78-11643, 78-11644, 78-11647, 78-11648, 78-11656, 78-11657, 78-11658, 78-11659, 78-11660, 78-11661, and 78-12090.

U.S. as Trustee for Tribe - 78-11275, 78-11278, 78-11282, 78-11283, 78-11286, 78-11287, 78-11295, 78-11296, 78-11297, 78-11298, 78-11299, 78-11300, and 78-12055.

The proposed *Consent Decree* provides for dismissal of the Tribe's springs or fountains claims and for *Partial Decrees* to be issued for the analogous claims by the U.S. as Trustee for the Tribe. Here, the DeVenys generally object to the

The United States also agree to reserve all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished, and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs and fountains from being enclosed; and further, to preserve a perpetual right of way to and from the same, **as watering places, for the use in common of both whites and Indians.**

(Emphases added).

This treaty language specifically provides that the United States would reserve the water rights for use in common by whites and Indians. In other words, the treaty did not recognize any pre-existing Tribal rights in this regard but only a prospective reservation by the United States government for the shared use of whites and Indians.

Further, the only stated use of the water would be for “watering.” The limited purpose for in place watering use is supported by available documentation describing the treaty negotiations (in the case record):

Article 9th [the springs or fountains clause] provides for the United States to reserve all springs or fountains, not adjacent to, or directly connected with the streams or rivers within the lands relinquished, **as watering places**, for the use in common of both whites and Indians. This provision was felt to be one of the great importance, in a country like that, where springs are not abundant. The few that do exist are, for the most part, situated in the midst of **a region valuable only for grazing purposes** and remote from any stream. Were these left to be taken by private individuals, they would give rise to the utmost extortion, in the sale of **water to thirsty men and cattle**, which would not regard the value of either life or property. The Indians had suffered, in this regard already, within the bounds of the Reservation, white men having selected some of these very spots, and enclosed them with substantial fence would neither allow Indians or others to use the water, to **allay their own thirst or that of their horses**, without paying for the same.

Documents Relating to the Negotiation of the Treaty of June 9, 1863, with the Nez Perce Indians

(National Archives Microfilm Publication T494 Roll 6 Frame 654) at 69 (emphases added).³

legality of the standard language for the *Partial Decrees* proposed for issuance.

³ This document appears in the record as an attachment to the *Affidavit of Scott L. Campbell in Support of Pioneer, et al. 's Response to United States and Nez Perce Tribe's Motion to Compel* filed on June 25, 2002.

It must have been anticipated at the time of the 1863 Treaty, that Tribal use of the springs and fountains on the ceded land would not be very extensive as the very purpose of the cession, as revealed by transcripts of the negotiations with the Tribe, was to limit Tribal use and settlement of certain land to avoid conflicts with the white miners who had begun to populate the area:

Superintendent Hale: About a year ago, the Government was informed of the discovery of numerous gold mines in and around your reservation. Knowing that white men would rush in to work these mines, before it would be possible to send a force of soldiers, sufficiently strong to prevent them and that there would be men who would violate the laws framed for your protection, by introducing whisky for sale, and thereby produce difficulty, the Government at once again to inquire as to the best way to preserve peace and protect you from suffering wrong. Knowing you were friendly to the Government, and perceiving, by the Maps, that the Nez Percés had a much larger Reservation, than they could use, so large too, that it would be impossible for the U.S. to protect you, without an army of soldiers, a larger number than could now be spared, the President thought you would be willing to make your Reservation smaller, and by being paid for it, relinquish such portions as contained the Gold mines and as were necessary to enable the miners to work them.

Id. at 13-14

In summary, the treaty language itself, and supporting documentation concerning the treaty negotiations, provide that the United States would reserve a water right for use by whites and Indians and that Indian water use only would be for “thirsty men and cattle” as they passed through the area.

LEGAL SUPPORT

1. **Under Applicable Legal Standards, the Court has the Duty to Confirm that the Terms of the Proposed Consent Decree Do Not Violate the Legislatively Approved Settlement Agreement as well as Applicable Treaty Laws.**

As noted in the Court’s *Scheduling Order on Joint Motion for Entry of Consent Decree*, the purpose of the current proceedings is to determine whether, “1. the proposed decree represents a reasonable factual and legal determination [citation omitted]; 2. whether it is a fundamentally fair, adequate and reasonable settlement of the entirety of the Tribe’s claims [citations omitted]; and

(3) whether the terms of the agreement are contrary to law or public policy [citation omitted].” A comparison of the language in the Consent Decree’s proposed *Partial Decrees* for the springs or fountains claims to the relevant passage in the Mediator’s Term Sheet and to the applicable treaty, establishes that the proposed the *Partial Decrees* are inconsistent with these legal underpinnings. For the reasons discussed below, the Court either should dismiss the proposed springs or fountains *Partial Decrees* which are included as Attachment 5 to the proposed *Consent Decree* or decree them with the revisions identified below.

2. **Since the Springs or Fountains Treaty Provision provides for the Federal Government to Reserve the Springs and Fountains for Use in Common of Both Whites and Indians and the U.S. Forest Service Already has Obtained Partial Decrees for Springs and Fountains on Public Land, the Proposed Tribal Springs or Fountains Rights Should Be Dismissed.**

As noted above, the springs or fountains language in the 1863 Treaty expressly provided for the federal government to reserve the springs or fountains for the use in common by whites and Indians: “The United States also agree to reserve all springs or fountains ... as watering places, for the use in common of both whites and Indians.” Water rights already decreed to the Forest Service for springs and fountains on these public lands satisfy the express language of the springs and fountain treaty provision as the United States, through its agency that manages the land, already has secured water rights in the SRBA to allow the use of the springs and fountains by whites and Indians in common.

For example, the DeVenys and the Forest Service settled their competing claims to spring sources on the Cannonball Allotment by stipulating that the DeVenys’ claims could be decreed with a priority date one day ahead of the decrees that would issue to the Forest Service. These respective decreed priority dates are May 9, 1906 and May 10, 1906. While some case law does indicate that certain tribal water rights are entitled to “time immemorial” priority, this “super” priority date typically is provided to traditional historic water uses of the Tribe. In this instance, the spring or fountain use is

intended for livestock watering and for human consumption associated with tending livestock on the land, which are not traditional Tribal practices, and the “time immemorial” priority should not apply.

Since the Forest Service already has water right decrees for springs and fountains on the pertinent public lands, the express requirement of the springs and fountains treaty provision is satisfied and all the springs and fountains claims of the Tribe should be dismissed.

3. The Proposed Nez Perce Partial Decrees for Springs or Fountains also Should Be Dismissed Based on Applicable Federal Reserved Right Legal Authorities.

The Nez Perce Tribe asserts rights of “up to one-half the natural flow” of the springs or fountains with a “time immemorial” priority date for “human consumption, livestock watering, wildlife watering, cultural and ceremonial purposes.” It appears that these asserted springs and fountains water right elements are based on principles in enunciated *U.S. v. Winans*, 198 U.S. 371 (1905) and its progeny, although *Winans* is not directly translatable to the springs and fountains circumstance.

The treaty provision addressed in *U.S. v. Winans* contained “in common” language similar to the springs or fountains language in the Nez Perce 1863 Treaty. The treaty in *Winans* reserved to the Yakima Indian Nation on ceded land, “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.” *Winans*, 198 U.S. at 378. In *Winans*, the Court concluded that under this treaty right, the Indians could not be entirely excluded from these historic fishing places and that white fishermen’s use of fishing wheels which required exclusive possession of these fishing places to the exclusion of the tribal members violated the Tribe’s *in common* fishing right.

While both have *in common* language, a few important distinguishing factors separate the *Winans* treaty provision from the Nez Perce springs or fountains treaty language. The *Winans* provision concerned historic fishing practices “at usual and accustomed places” that provided an essential traditional source of food and income. Further, the *Winans* language specifically provided

that this *in common* fishing right was secured directly to the Indians. On the other hand, the springs or fountains provision in the 1863 Treaty concerns livestock watering places and livestock grazing which was not a traditional pursuit of the Indians. Further, the springs or fountains provision did not reserve an *in common* right directly to the Indians, but, rather, stated that the United States **itself** would “reserve all springs or fountains ... as watering places, for the use in common of both whites and Indians.” Therefore, the *in common* springs or fountains right explicitly was intended to be reserved by the United States for the benefit of both whites and Indians.

Washington State v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), concerned similar treaty language as *Winans*. In *Washington* at issue was the respective quantities of fish that tribal members and whites could take under these *in common* fishing right treaty provisions. In *Washington*, the Supreme Court held that the Tribes could take a **maximum** of 50% of the fish run, but that the actual amount they would be entitled to would depend on their present-day needs:

It bears repeating ... that the 50% figure imposes a maximum but not a minimum allocation....[T]he central principle here must be **that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood -- that is to say, a moderate living.** Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.

Washington, 43 U.S. at 686-87 (emphasis added).

The Tribe’s proposed partial decrees for the springs or fountains claims describe a quantity of “up to one-half of the natural flow.” Yet, as *Washington* explains, this quantity is the ceiling, not necessarily the actual amount the Indians are entitled to in this instance. Further, for activities not

involving a tribe's traditional means of sustenance or livelihood, it is not even clear whether the maximum available quantity would be as high as 50%.

In order to determine the actual quantity of the springs or fountains that the Tribe is entitled to, if any, it is necessary for the Court to determine the minimum amount the Tribe would need for its livelihood – or a moderate living. Since, it has not been established whether and to what extent the Tribe has utilized the springs or fountains for grazing or for any other purpose, it appears that the Tribe is not entitled to any quantity from the springs or fountains. For this reason also, the Court should disallow or dismiss all these proposed *Partial Decrees*.

4. While Applicable Legal Principles Support Dismissal of the Tribe's Springs or Fountains Claims, Alternatively the Proposed *Partial Decrees* for the Tribe's Springs or Fountains Claims May Be Modified as Indicated in Exhibit 1 Hereto to Incorporate These Legal Principles.

While the Tribe's proposed *Partial Decrees* for the springs and fountains overstate the extent of any current tribal rights to those springs, in lieu of dismissal of those claims, the proposed *Partial Decrees* could be modified to address these quantity, priority date, and scope of use issues. Exhibit 1 hereto identifies the adjustments that would address these matters.

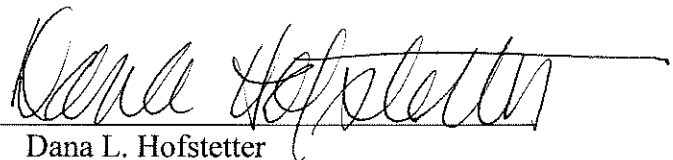
CONCLUSION

For the foregoing reasons, the DeVenys respectfully request dismissal of the tribal springs or fountain claims. In the alternative, the proposed springs or fountains *Partial Decrees* should be modified as indicated on Exhibit 1 hereto to reflect applicable legal standards.

DATED this 9th day of November, 2006.

HOFSTETTER LAW OFFICE, LLC

By


Dana L. Hofstetter

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

PARTIAL FINAL DECREE FOR
Federal Reserved Water Right 78-11275
(Spring or Fountain)

1. Name and address of owner: UNITED STATES OF AMERICA, as trustee for the benefit of the NEZ PERCE TRIBE, acting through the AREA DIRECTOR, PORTLAND AREA OFFICE
Bureau of Indian Affairs
911 N.E. 11th Ave.
Portland, OR 97232
2. Source of water Jorgie Spring
3. Quantity of right Up to one-half of the natural flow, but not to exceed the minimum quantity, if any,
4. Priority date May 10, 1906
~~Time immemorial~~ the Tribe uses for a livelihood as of the date of this Partial Decree.
5. Point of diversion Township 23N, Range 1W, Section 22, NW¼ NE¼ SW¼
6. Purpose of use Human consumption, livestock watering, wildlife watering, cultural, and ceremonial purposes.
7. Period of use January 1 to December 31
8. Place of use Township 23N, Range 1W, Section 22, NW¼ NE¼ SW¼
9. Annual volume of consumptive use Up to one-half of the natural flow, but not to exceed the minimum quantity, if any, the Tribe uses for a livelihood as of the date of this Partial Decree.
10. Other provisions necessary for definition or administration of this water right
 - a. This water right is held by the United States as trustee for the benefit of the Nez Perce Tribe pursuant to the terms of Article 8 of the Nez Perce Treaty of June 9, 1863, 14 Stat. 647, which provides that the subject spring is held by the United States as a "watering place[]" for the use in common of both whites and Indians." ~~This water right is a reserved right under federal law and is not subject to loss for nonuse.~~
 - b. Quantification of this water right as up to one-half of natural flow quantifies the diversion amount only and does not imply a flow maintenance right.

EXHIBIT

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c. This water right does not include the right to divert water away from the immediate vicinity of the spring.

d. The source spring for this water right is located on federal land. This water right shall not be used as the basis to preclude the federal land management agency from managing federal land in the vicinity of the spring or from permitting use of any water right that the land management agency may have for use of this source; ~~provided that no such management or water use shall preclude or interfere with the Tribe's exercise of this water right.~~

e. This water right shall not be implied to prohibit the issuance or confirmation of state-based water rights from this same water source, ~~provided that no such water right shall preclude or interfere with the exercise of this water right.~~

IT IS SO ORDERED.

DATED this ____ day of _____, 2007.

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

f. This Partial Decree is not a determination of the minimum quantity, if any, the Tribe uses for a livelihood.