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NEZ PERCE TRIBE

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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

Case No. 39576

**Subcase Nos.: 85-00016, 85-02049,
85-02063, 85-02065, 85-02146,
85-02147, 85-04483, 85-11087 and
85-15424**

**NEZ PERCE TRIBE'S RESPONSES TO
THE UNITED STATES' FIRST SET OF
DISCOVERY REQUESTS TO THE NEZ
PERCE TRIBE**

1. The Nez Perce Tribe (the "Tribe") objects to the United States' First Set of Discovery Requests to the Nez Perce Tribe, and the definitions and instructions contained therein, to the extent they request information beyond that required to be provided under the Idaho Rules of Civil Procedure. Although in some cases, as a matter of comity and cooperation, the Tribe has or will volunteer information which may go beyond that strictly required under those rules, by doing

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so we do not waive this objection. These responses are provided in accordance with the Idaho Rules of Civil Procedure irrespective of any definitions and instructions that may accompany the discovery requests.

2. These responses are made subject to all objections as to competence, relevance, materiality, and admissibility. These responses are subject to all objections that would require the exclusion of any statement, material, or information herein provided if such requests were asked of, or any statement, material, or information provided were made by witnesses present and testifying in court. All such objections are reserved and may be interposed at any time, including at trial.

3. The Tribe specifically objects to these discovery requests to the extent they seek information protected by the attorney work-product doctrine, the attorney-client privilege, the deliberative process privilege, any other applicable privileges recognized in Article V of the Idaho Rules of Evidence, and the rules governing the discovery relating to experts as set forth in Rule 26(b)(4) of the Idaho Rules of Civil Procedure. This objection is intended to apply to all of the United States' discovery requests that seek such information and may not be repeated specifically for each request to which it applies. The Tribe, to the extent applicable and possible, has construed each request as requesting only information and/or documents not subject to any applicable protection.

4. No incidental or implied admissions are intended by these responses. The fact that the Tribe has responded to any discovery request or part thereof should not be taken as an admission that the Tribe accepts that the discovery request, or the response or objection thereto, constitutes

admissible evidence. Similarly, the fact that the Tribe has responded to all or part of a request is not intended to and shall not be construed to be a waiver by the Tribe of all or part of any objection to other requests. The Tribe's answer(s) to any discovery request(s) herein do not constitute a waiver of the Tribe's right to object to future additional or supplemental discovery requests regarding the same or similar matters.

Interrogatory No. 1:

Identify each person who provided information for or participated in the preparation of the responses to these interrogatories, requests for production, and/or requests for admission, and identify the specific interrogatory(s) and request(s) for admission or parts thereof and/or request(s) for which each such person provided information.

Answer:

K. Heidi Gudgell, Senior Staff Attorney, Office of Legal Counsel, 100 Agency Drive, P.O. Box 305, Lapwai, Idaho 83540. Telephone 208-843-7355.

Interrogatory No. 2:

Identify each person who, to your knowledge, has personal knowledge of the facts alleged in your objection and provide a complete and accurate description of each such person's knowledge as it relates to the facts alleged in your objection.

Answer:

The Tribe does not have access to factual information regarding the operation and capacity of the Lewiston Orchards Project ("LOP") and/or the Lewiston Orchards Irrigation District ("LOID") other than information that is in the possession of the United States Bureau of

Reclamation and/or the LOID. The Nez Perce Tribe is not aware of persons who have personal knowledge about the elements of the instant water right claims other than those identified in the *United States' List of Witnesses* dated July 16, 2007, and the *Nez Perce Tribe's Initial Disclosure* dated June 20, 2007. The Tribe also has produced documents numbered NPT 1 - 2757 in its *Supplemental Initial Disclosure* to the United States dated June 28, 2007, and those documents may contain the identity of additional individuals who have personal knowledge of the facts alleged in the Tribe's objections to the instant claims. The Tribe does not currently plan to call any fact witnesses other than those identified by the United States.

Interrogatory No. 3:

Identify all witnesses, regardless of their relationship to the Nez Perce Tribe, that the Tribe intends to rely on to establish its objection(s) at trial in this case, and provide a summary of the testimony that the witness is expected to give.

Answer:

See Answer to Interrogatory No. 2.

Interrogatory No. 4:

Identify each and every person who has reviewed or investigated the allegations set forth in your objections and state in detail:

- (a) the date of each such person's review or investigation;
- (b) a description of each such person's review or investigation;
- (c) the reason each such person's review or investigation was made;
- (d) whether any record, report, or other documentation of each such person's review or investigation was made.

Answer:

The Tribe objects to this interrogatory on the bases that it is overly broad and unduly burdensome. The Tribe has no way to know of every person who has reviewed or investigated its objections which were filed with the SRBA Court on March 21, 2005. The Tribe further objects to this interrogatory on the basis that it generally seeks information beyond that required to be produced by the Idaho Rules of Civil Procedure, and specifically, that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine.

Notwithstanding, and without waiving, these objections, the Tribe answers that its objections to the instant claims were prepared by K. Heidi Gudgell and Ryan W. Sudbury, both of whom are attorneys in the Tribe's Office of Legal Counsel. The Tribe's objections were based on legal research, a review of the instant claims, and information publicly available on the website of the Idaho Department of Water Resources ("IDWR").

Request for Production No. 1:

Please make available for review or provide copies of all records, reports, and other documentation identified in Interrogatory No. 4.

Response:

Not applicable – see Answer to Interrogatory No. 4.

Interrogatory No. 5:

Identify each and every person contacted or consulted by you, your attorney(s), or anyone else on your behalf, as an expert or consultant (whether in-house or staff expert or consultant or an outside expert or consultant) in any field, in any manner whatsoever, with respect to these

claims, and provide the following information:

- (a) The name, address, occupation, job title, and field of expertise for each such person contacted or consulted.
- (b) The date of first [sic] contact or consultation with that person and the name of each person contacting him or her on your behalf.
- (c) The dates of all subsequent contacts, communications, meetings, or consultations with that person, and the names of all persons present at such contacts, communications, meetings, or consultations.
- (d) Identify any reports that were made by the consultant or the person contacted, and indicate [sic] whether the report was written or oral.

Answer:

The Tribe objects to this interrogatory on the basis that it generally seeks information beyond that required to be produced by the Idaho Rules of Civil Procedure, and specifically, that it seeks information protected by the attorney-client privilege and/or the attorney work-product doctrine. Notwithstanding, and without waiving, these objections, the Tribe answers that it does not currently plan to call any expert witnesses and has not retained anyone to provide the kinds of information or to prepare the kinds of reports sought by this interrogatory.

Notwithstanding, and without waiving these objections, the Tribe answers that it has had a contract for over 10 years with Al Kersich. Mr. Kersich is a civil engineer who, on behalf of the Tribe, has been involved during that time in settlement negotiations with the United States and LOID regarding the Tribe's water right claims in the SRBA and the impacts of LOID's water use on the Tribe's water right claims. Some Tribal employees and present and former members of the Nez Perce Tribal Executive Committee also participated in those settlement discussions. Any work done by Mr. Kersich and/or these Tribal employees and elected officials, and any

communications between and among these individuals and counsel for the Tribe are protected from disclosure by Rule 408 of the Idaho Rules of Evidence, as well as the attorney-client privilege and/or the attorney work-product doctrine.

Request for Production No. 2:

Please make available for review or provide copies of all written reports identified in Interrogatory No. 5.

Response:

Not applicable – see Answer to Interrogatory No. 5.

Interrogatory No. 6:

Identify any individual(s) that you intend to call as expert witnesses in this matter, setting forth for each:

- a) The name and address of each individual.
- b) A summary of the expected testimony.
- c) The opinions that the individual is expected to give and the basis for each of those opinions.

Answer:

The Tribe does not currently plan to call any expert witnesses of its own in the trial of this matter, but the Tribe may call the representative(s) of IDWR who prepare(s) the report ordered by the Court in its *Order Granting Motion for 706 Report* entered in the instant subcases on July 11, 2007.

Request for Admission No. 1:

Please admit that the United States of America, through the Bureau of Reclamation is the owner of water rights claims 85-16, 85-2049, 85-2063, 85-2065, 85-2146, 85-2147, 85-4483, 85-11087, and 85-15424.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the IDWR Adjudication Recommended Right Reports for these claims currently list the current owner of the instant claims as the United States of America through the Bureau of Reclamation.

Request for Admission No. 2:

Please admit that the sources claimed for water rights 85-16, 85-2049, 85-2063, 85-2065, 85-2146, 85-2147, 85-4483, 85-11087, and 85-15424 are those sources identified on the respective IDWR recommendations for these water rights.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the sources identified in claim numbers 85-16, 85-2049, 85-2063, 85-2065, 85-2146, 85-4483, 85-11087, and 85-15424 are the same as the sources currently identified in the respective IDWR Adjudication Recommended Right Reports for those claim numbers. The source identified in claim number 85-2147 is Captain John Creek, but the IDWR

Adjudication Recommended Right Report for claim number 85-2147 currently identifies the source as Brown's Creek which is a tributary to Captain John Creek.

Request for Admission No. 3:

Please admit that the quantities claimed for water rights 85-4483 and 85-15424 are the legitimate quantities for those respective water rights.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the quantity of water identified in claim number 85-15424 is the same as the quantity of water currently identified in the IDWR Adjudication Recommended Right Report for that claim number.

The Tribe denies that the quantity of water identified in claim number 85-4483 is the "legitimate" quantity of water for that claim number. This claim number is for a water right to store water at, and divert water from, Reservoir "A" which is also known as Mann Lake.

According to the Bureau of Reclamation's website, Reservoir "A" had a total capacity of 3,000 acre-feet until the Bureau performed certain work there in 1999 pursuant to its Safety of Dams program. That work restricted the operating elevation of Reservoir "A" to elevation 1800 feet and reduced the reservoir's total capacity from 3,000 acre-feet to 1,960 acre-feet. This information is available at <http://www.usbr.gov/dataweb/html/lewiston.html>.

Request for Admission No. 4:

Please admit that the priority dates claimed for water rights 85-16, 85-2049, 85-2063, 85-2065, 85-2146, 85-2147, 85-4483, 85-11087, and 85-15424 are the proper priority dates for the respective water rights.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the priority dates identified in claim numbers 85-16, 85-2049, 85-2063, 85-2065, 85-2146, 85-2147, 85-4483, and 85-15424 are the same as the priority dates currently identified in the respective IDWR Adjudication Recommended Right Reports for those claim numbers. The priority date identified in claim number 85-11087 is May 26, 1915, but the IDWR Adjudication Recommended Right Report for claim number 85-11087 currently identifies the priority date as December 31, 1935.

Request for Admission No. 5:

Please admit that the points of diversion claimed for water rights 85-4483 and 85-15424 are the legitimate diversion points for those respective water rights.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the points of diversion identified in these claim numbers are the same as the points of diversion currently identified in the respective IDWR Adjudication Recommended Right Reports for these claim numbers.

Request for Admission No. 6:

Please admit that the purposes claimed for water rights claims 85-16, 85-2049, 85-2063, 85-2065, 85-2146, 85-2147, 85-4483, 85-11087, and 85-15424 are the legitimate purposes for the respective water rights.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the purposes of use claimed in these claims numbers are purposes of use recognized in the Idaho Code.

The Tribe denies that domestic use is a “legitimate” purpose of use for these claims because the Tribe reasonably believes that United States and LOID have not used the water represented by these claim numbers for domestic purposes since the United States and/or LOID began using ground water for domestic purposes in approximately 1985. The Tribe does not have access to factual information supporting this denial other than information that is in the possession of the Bureau of Reclamation and/or the LOID or available on the Bureau of Reclamation’s website. The Tribe has not objected to any ground water claims filed by the United States and/or LOID for domestic purposes.

Further, Claim number 85-2146 indicates that its purposes of use are irrigation, irrigation storage, domestic, and domestic storage, but the IDWR Water Right Report does not include a domestic purpose of use. The IDWR Water Right Report states that the purposes of use are irrigation and irrigation storage.

Request for Admission No. 7:

Please admit that the periods of use claimed for water rights claims 85-16, 85-2146, 85-4483, and 85-15424 are the legitimate periods of use for these respective water rights.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the periods of use identified in claim numbers 85-16, 85-2146, and 85-15424 are the same as the periods of use currently identified in the respective IDWR Adjudication Recommended Right Reports for those claim numbers. The period of use for irrigation from storage in claim number 85-4483 is March 15 - November 15, but the IDWR Adjudication Recommended Right Report for that claim number currently identifies the period of use for irrigation from storage as April 15 - October 1.

Request for Admission No. 8:

Please admit that the places of use claimed for water rights claims 85-16, 85-2063, 85-2065, 85-2146, 85-2147, 85-4483, 85-11087, and 85-15424 are the legitimate places of use for these respective water rights.

If your response is anything but an unqualified admission, please provide a complete explanation of your response.

Answer:

The Tribe admits that the respective IDWR Adjudication Recommended Right Reports for these claims currently identify the place of use as being “within the service area of Lewiston Orchards Irrigation District as provided for under Idaho law.”

DATED this 22nd day of August, 2007.

A handwritten signature in cursive script, reading "K. Heidi Gudgell", is written over a horizontal line.

K. Heidi Gudgell, Senior Staff Attorney
Office of Legal Counsel