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and Interested Water Users

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 No. 00-92023
	)	
Case 39576	)	Subcase Nos. 02-10135; 36-02013; 36-02018;
	)	36-02026
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR RECONSIDERATION.
	)	
	)	

COME NOW Jeff C. and Jackie Harper, Basin and Range Resource Company, LLC, and Interested Water Users, by and through their counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, and pursuant to Idaho Rules of Civil Procedure ("I.R.C.P.") 11(a)(2)(B) and 7(b)(3), hereby respectfully submit this Memorandum in Support of Motion for Reconsideration ("Memorandum") to the Court to reconsider its Order on Motion for Approval of Settlement ("Order"), entered January 4, 2010. Specifically, this Memorandum further discusses the two (2) issues identified in these parties' Motion for Reconsideration, filed on January 15, 2010.

STANDARD OF REVIEW

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006). A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. I.R.C.P. 11(a)(2)(B).

I. ANALYSIS

- A. **Other Provision No. 4 For The Proposed Partial Decrees For Idaho Power's Water Rights (And Other Provision No. 5 For The Trust Water Rights) Which Subordinate The Respective Rights to "Water Rights Of Those Persons Who Beneficially Used Water Prior To October 1, 1984 And Who Filed An Application Or Claim For Said Use By June 30, 1985," Should Be Revised to Include Valid Beneficial Use Rights First Claimed in the SRBA Consistent with Idaho Constitutional and SRBA Statutory Mandates.**

Other Provision No. 4 for the proposed Partial Decrees for Idaho Power's water rights (and Other Provision No. 5 for the trust water rights) subordinates the respective rights to "water rights of those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985":

This water right is subordinate to the lawful exercise of water rights of those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985.

This proposed language excludes from the subordination the numerous senior beneficial use rights that were first legally claimed in the SRBA after 1985. Thus, this subordination provision may not cover very senior valid beneficial use water rights decreed in the SRBA at the same time it protects certain very junior licensed rights. Thus, this language, if left uncorrected, would be inconsistent

with numerous already issued SRBA Partial Decrees and fundamental Idaho Constitutional water right priority principles.

Courts generally recognize that settlement stipulations must comply with the law. *See United States v. City of Miami*, 664 F.2d at 441 (5th Cir. 1981); *see also Big Lost Irr. Dist. v. Zollinger*, 83 Idaho 401, 406-07, 363 P.2d 706, 708-09 (1961); *see also Scheduling Order on Joint Motion For Entry Of Consent Decree*, SRBA Consolidated Subcase 03-10022 *et al.* (October 13, 2006) at 5. Specifically, courts have recognized that a proposed decree must represent a reasonable factual and legal determination. *See City of Miami*, 664 F.2d at 441. Courts have likewise held that the terms of the agreement must not be contrary to law or public policy. *See Big Lost Irr. Dist.*, 83 Idaho 401, 406-07, 363 P.2d 706, 708-09.

The SRBA Court has previously held that its review of a proposed partial decree and associated settlement agreement, at a minimum, necessarily would include a determination of whether:

(1) the proposed decree represents a reasonable factual and legal determination . . . (2) whether it is a fundamentally fair, adequate and reasonable settlement ...and (3) **whether the terms of the agreement are contrary to law or public policy.**

Scheduling Order on Joint Motion For Entry Of Consent Decree, SRBA Consolidated Subcase 03-10022 *et al.* (October 13, 2006) at 5 (citations omitted) (emphasis added), *quoted in Order Granting Joint Motion For Approval and Entry Of Consent Decree*, SRBA Consolidated Subcase 03-10022 *et al.* (January 30, 2007) at 8.

In its recent Order, this Court focused on the original intent of the parties as determined from the plain meaning of the language used in the original 1984 Swan Falls Agreement. *Order* at 17. This Court found, “based on the record currently before it with respect to this matter, that had the intent been to subordinate Idaho Power’s hydropower rights to those who beneficially used water

prior to October 1, 1984, and who filed claims in the SRBA, the Agreement would have provided as such.” *Order* at 17-18. This Court further reasoned that it had “no legal basis to vary from the plain unambiguous meaning of the terms used within the four corners of the Agreement.” *Order* at 18. Yet, this finding would suggest that this Court is being asked simply to interpret and apply the 1984 Swan Falls Agreement. Actually, this Court is being asked to approve a new SRBA settlement agreement, albeit one based on the original Swan Falls Agreement. Thus, the obligation of the SRBA Court is not simply to assess the original intention of the parties in 1984, but to ensure that this new agreement and the SRBA Partial Decrees that this Court is being asked to issue, comply with current Idaho law and policy. Without revision to include valid beneficial use rights first claimed in the SRBA, proposed Other Provision No. 4 for the Partial Decrees for Idaho Power’s water rights and proposed Other Provision No. 5 for the trust water rights’ Partial Decrees, will violate Idaho Constitutional and statutory mandates.

The Constitution of the State of Idaho clearly establishes that the “[p]riority of appropriation shall give the better right as between those using the water.” Idaho Const. Art. XV, § 3; *see Montpelier Milling Co. v. City of Montpelier*, 19 Idaho 212, 113 P. 741 (1911). Despite this fundamental Constitutional principle, the proposed Partial Decrees would give certain junior water rights priority over senior beneficial use rights. Under the proposed Other Provision No. 4 for the proposed Partial Decrees for Idaho Power’s water rights and proposed Other Provision No. 5 for the trust water rights’ Partial Decrees, only those beneficial use rights claimed prior to June 30, 1985 would be considered protected existing uses. However, there are a number of valid senior beneficial use rights claimed for the first time in the SRBA. Thus, the currently proposed provision could provide, for instance, for the delivery of a 1982 water right and curtailment of a valid 1930 beneficial use right decreed in the SRBA, in violation of Idaho’s Constitutional priority principle. This

outcome would contravene the Constitutional mandate specifically requiring that “[p]riority of appropriation shall give the better right as between those using the water.” An SRBA Partial Decree provision that would result in such an unconstitutional outcome is invalid as a matter of law.

Idaho Code (“I.C.”) § 42-245 provides that senior beneficial use rights (aka Constitutional rights) first claimed in the SRBA are valid:

Any person claiming the right to divert or withdraw and use waters of the state who fails to file a claim as provided in section 42-243, Idaho Code, shall be conclusively deemed to have waived and relinquished any right, title or interest in said right.

The provisions of this section **shall not apply if a claim to the right is filed in a general water rights adjudication proceeding commenced prior to June 30, 1988**, under the provisions of chapter 14, title 42, Idaho Code.

(emphasis added). This law is the product of a series of extensions of previous statutory deadlines, including the one that was incorporated into the original Swan Falls Agreement. *See Harper et al.’s Response to State of Idaho and Idaho Power Company’s Joint Motions Memorandum*, Consolidated Subcase No. 00-92023 (October 5, 2009) at 8. Under this Court’s recent *Order*, senior beneficial use water rights first claimed in the SRBA pursuant to this statute and validly decreed in the SRBA, would not be protected by the proposed subordination while certain more junior rights would be. Since Idaho statutes currently validate senior beneficial use rights first claimed in the SRBA, it would be inconsistent with Idaho law to apply an out of date statutory deadline. In other words, the proposed Idaho Power and trust water SRBA Partial Decrees would be inconsistent with other SRBA Partial Decrees for valid beneficial use water rights.

These inconsistencies would lead to absurd and illogical results, including curtailment of senior rights while junior rights are diverted without limitation. Further, there is the potential for the entire undermining of the subordination provisions if a rebound call results where the juniors protected by the subordination end up being called out by the unprotected seniors. These outcomes

are inherently possible unless these provisions are revised to be consistent with Idaho law and policy to recognize valid senior beneficial use rights first claimed in the SRBA.

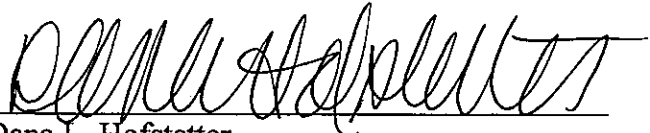
B. Provision 1 To Trust Rights Regarding "Future Beneficial Uses" Should Be Clarified To Include A Date Certain Of October 1, 1984, instead of October 25, 1984, To Ensure Consistency.

The Court's *Order*, stating that it would approve the Settlement and grant the *Joint Motions*, subject to modifications, including that the "term 'future' will be deleted from Other Provision 1 in the *Partial Decrees* for the trust rights and the following underlined language added ' . . . shall be subject to subordination to and depletion by beneficial uses made after October 25, 1984 under water rights acquired pursuant to applicable state law.'" *Order* at 20. Relevant here is the language contained in Other Provision No. 4 for Idaho Power's rights and Other Provision 5 for the trust rights, utilizing the operative date of October 1, 1984 as the cut-off between existing and future uses: "This water right is subordinate to the lawful exercise of water rights of those persons who beneficially used water prior to October 1, 1984 and who filed an application or claim for said use by June 30, 1985." Thus, the Court's use of the October 25, 1984 date in Other Provision 1 leaves a three-week gap between it and Other Provision 4's October 1, 1984 date, leaving in limbo water rights filed during that interim three week period. *Order* at 20. For purposes of uniformity and consistency, and so as not to exclude these interim water rights, it is recommended that this Court set the date certain for distinguishing between future and existing rights in Provision 1 at October 1, 1984, instead of October 25, 1984.

III. CONCLUSION

It is recommended that Other Provision No. 4 for the proposed Partial Decrees for Idaho Power's water rights (and Other Provision No. 5 for the trust water rights) should be modified to include valid beneficial use rights first claimed in the SRBA. In addition, it is recommended that Other Provision 1 for the trust rights should be clarified to reference a date certain of October 1, 1984, instead of October 25, 1984, for purposes of consistency.

RESPECTFULLY SUBMITTED this 29th day of January, 2010.



Dana L. Hofstetter

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document this 29th day of January 2010, by U.S. Mail postage pre-paid to:

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