

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 )  
 ) PARTIAL DECREE PURSUANT TO  
 ) I.R.C.P. 54(b) FOR  
Case No. 39576 )  
 )  
 ) Water Right 82-12234  
\_\_\_\_\_)

NAME AND ADDRESS: STATE OF IDAHO  
IDAHO WATER RESOURCE BOARD  
322 E FRONT ST  
PO BOX 83720  
BOISE, ID 83720-0098

SOURCE: TENMILE CREEK TRIBUTARY: SOUTH FORK CLEARWATER RIVER

QUANTITY: 247.00 CFS

While the instream flow and the future allocation for non-DCMI uses and base flows are to be decreed in cubic feet per second (cfs), such quantities are intended to reflect the percentages of the unimpaired exceedence flows at the quantification point described in this water right. The unimpaired exceedence flows were estimated using regional regression equations developed by the United States Geological Service. Upon further finding and order of the director that gaging stations are required to maintain the approved minimum flows under this right, such measuring devices shall be permanently installed and maintained as specified by the director. If actual flow data become available, the quantities in this water right will be adjusted as necessary to give effect to the exceedence assumption stated above. Such adjustments do not result in a material change to the water right and are not subject to the notice and hearing requirements set forth in this partial decree, but shall comply with the notice and consultation requirements of Section 42-1507(4), Idaho Code.

Future non-DCMI = 0.4

This water right is subordinated to future non-Domestic-Commercial-Municipal-Industrial ("non-DCMI") development in an amount up to 0.4 cfs based on 5 percent of the lowest unimpaired median monthly flow or the amount available above a base flow which is equivalent to the unimpaired monthly 80% exceedence flow whichever is less. The 80% monthly exceedence flows are as follows: Jan - 8 cfs, Feb - 9 cfs, Mar - 16 cfs, Apr - 66 cfs, May - 134 cfs, Jun - 55 cfs, Jul - 13 cfs, Aug - 7 cfs, Sep - 7 cfs, Oct - 7 cfs, Nov - 8 cfs, and Dec - 7 cfs.

PRIORITY DATE: 04/01/2005

Use of water under this right shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application to beneficial use or by an application, permit, or license on file or issued by the director under the provisions of Chapter 2, Title 42, Idaho Code, with a priority of water right date earlier than the date of priority of this right.

POINT OF DIVERSION: T29N R06E S35 NWNESE (Instream Ending Point) Within Idaho County

There are no diversions associated with this minimum stream flow water right. The quantification point for this instream flow water right is at the above location.

| PURPOSE AND PERIOD OF USE: | PURPOSE OF USE      | PERIOD OF USE  | QUANTITY  |
|----------------------------|---------------------|----------------|-----------|
|                            | Minimum Stream Flow | 01-01 TO 01-31 | 18.00 CFS |

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PURPOSE AND PERIOD OF USE (continued)

|                     |                |            |
|---------------------|----------------|------------|
| Minimum Stream Flow | 02-01 TO 02-28 | 23.00 CFS  |
| Minimum Stream Flow | 03-01 TO 03-31 | 38.00 CFS  |
| Minimum Stream Flow | 04-01 TO 04-30 | 148.00 CFS |
| Minimum Stream Flow | 05-01 TO 05-31 | 247.00 CFS |
| Minimum Stream Flow | 06-01 TO 06-30 | 138.00 CFS |
| Minimum Stream Flow | 07-01 TO 07-31 | 30.00 CFS  |
| Minimum Stream Flow | 08-01 TO 08-31 | 11.00 CFS  |
| Minimum Stream Flow | 09-01 TO 09-30 | 11.00 CFS  |
| Minimum Stream Flow | 10-01 TO 10-31 | 14.00 CFS  |
| Minimum Stream Flow | 11-01 TO 11-30 | 18.00 CFS  |
| Minimum Stream Flow | 12-01 TO 12-31 | 18.00 CFS  |

The purpose of this instream flow is to preserve fish and wildlife, scenic, and recreational values and to protect and enhance water quality, and is equivalent to the unimpaired monthly 30 percent exceedence flows.

Use of water under this right shall be non-consumptive.

PLACE OF USE:

The place of use for this water right is the reach above the quantification point.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This water right was established by Chapter 150, 2005 Idaho Session Laws (codified as Section 42-1507, Idaho Code). In accordance with such law, this water right will not become effective until the governor issues a proclamation certifying that all conditions for the effectiveness of the Snake River Water Rights Agreement of 2004 have been satisfied. The Idaho Water Resource Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to this water right after complying with the notice and consultation procedures of Section 42-1507(4), Idaho Code. The petition must set forth any significant change in circumstances and evidence of the public interest supporting the proposed amendment. The Director will notify the general public and specific persons or notify interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the water right should be amended in the public interest.

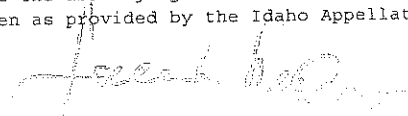
When this water right is not capable of being maintained using existing flows, Idaho Code Section 42-1507 authorizes the Idaho Water Resource Board to maintain the flow through operation of the water supply bank authorized by Section 42-1761 through 42-1765, Idaho Code, and by other available methods consistent with Idaho Law.

This water right shall be subordinated to all future DCMU uses.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

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John M. Melanson  
Presiding Judge of the  
Snake River Basin Adjudication

DISTRICT COURT - SRBA  
TWIN FALLS CO., IDAHO  
FILED \_\_\_\_\_

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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

CONSENT DECREE APPROVING  
ENTRY OF PARTIAL FINAL DECREES  
DETERMINING THE RIGHTS OF THE  
UNITED STATES AS TRUSTEE FOR  
THE BENEFIT OF THE NEZ PERCE  
TRIBE AND THE NEZ PERCE TRIBE  
TO THE USE OF WATER IN THE  
SNAKE RIVER BASIN WITHIN IDAHO  
AND PARTIAL FINAL DECREES  
DETERMINING MINIMUM STREAM  
FLOW WATER RIGHTS HELD BY THE  
IDAHO WATER RESOURCES BOARD

**CONSENT DECREE**

The Parties to this Consent Decree are the United States, the State of Idaho, the Nez Perce Tribe, and the Idaho Water Users listed on Attachment 1.

1. Definitions.

The following definitions apply for the purposes of this Consent Decree.

A. "Agreement" means the document titled "Mediator's Term Sheet", a copy of which is attached as Attachment 2, previously submitted to this Court on April 20, 2004, as an attachment to the Joint Status Report on Settlement Efforts and Motion for

Stay, and since ratified and confirmed by the Congress of the United States, the Idaho Legislature, and the Nez Perce Tribal Executive Committee.

B. "Partial Decrees" means the partial decrees for multiple use federal reserved water rights held by the United States as trustee for the benefit of the Nez Perce Tribe, "springs or fountains" federal reserved water rights held by the United States as trustee for the benefit of the Nez Perce Tribe, and state minimum stream flow water rights held by the Idaho Water Resources Board, all attached as Attachments 4 through 6.

2. General dismissal of all water right claims. With the exception of the partial decrees described herein, the Parties agree to the dismissal, with prejudice, of all water right claims submitted in the Snake River Basin Adjudication (SRBA) by the Nez Perce Tribe and by the United States as trustee for the benefit of the Nez Perce Tribe. Attachment 3 provides a list of all claim numbers to be dismissed and explains certain clerical corrections required for claim numbers.

3. Entry of Partial Decrees for multiple use federal reserved water rights.

The parties agree to entry of and incorporate herein the partial decrees for multiple use federal reserved water rights, attached hereto as Attachment 4, following compliance with the notice, objection, and hearing requirements of Section 42-1411A, Idaho Code. The United States and the Nez Perce Tribe will continue to exercise these water rights in a manner consistent with the expectation of the parties to the Agreement that most of the 50,000 acre feet per year will be diverted from the Clearwater River.

4. Entry of Partial Decrees for “springs or fountains” federal reserved water rights.

The parties agree to entry of and incorporate herein the partial decrees for “springs or fountains” federal reserved water rights, attached hereto as Attachment 5. Notices of claim were filed for each of the water rights described in the partial decrees and opportunity was provided for objections. The notices of claim and the objections thereto have been the subject of litigation in SRBA Consolidated Subcase 67-13701. Entry of the partial decrees and dismissal of all remaining claims pursuant to Section 2 of this Consent Decree would resolve the outstanding issues between the signatories<sup>1</sup> by confirming the federal reserved water rights of the United States as trustee for the benefit of the Nez Perce Tribe for the non-exclusive use of springs or fountains on federal public lands within the area ceded by the Nez Perce Tribe in the Nez Perce Treaty of June 9, 1863, 14 Stat. 647 and dismissing all claims to springs and fountains on private and state-owned lands.

5. Entry of Partial Decrees for state minimum stream flow water rights. The parties stipulate to the entry of the partial decrees for state minimum stream flow water rights, attached hereto as Attachment 6, following compliance with the notice, objection, and hearing requirements of Section 42-1411, Idaho Code. The minimum stream flow water rights were approved by resolution of the Idaho Water Resources Board dated February 8, 2005, and

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<sup>1</sup> The following objectors in Consolidated Subcase 67-13701 are not signatories to this Consent Decree: Marilyn McKenna, Idaho Power Company, John W. Brewer, Willis D. Deveny, Scott and Connie Harris. However, we understand that Idaho Power Company does not oppose the entry of this Consent Decree, and the other parties objected only to those claims which were to springs on private land owned by the individual objectors, which claims are being dismissed pursuant to this Consent Decree.

established by the Idaho Legislature in chapter 148 of the 2005 Idaho Session Laws.<sup>2</sup> The water rights are held in the name of the Idaho Water Resources Board in trust for the people of the state of Idaho. The flows may be modified in accordance with chapter 148 of the 2005 Idaho Session Laws and Section II(A)(4) of the Agreement.

6. Administration of water rights. The United States will administer the multiple use federal reserved water rights set forth in this Consent Decree and the Partial Decrees until such time as the Nez Perce Tribe adopts a Nez Perce Tribe Water Code and such Code is approved by the Secretary of Interior pursuant to Section 7(b) of Title X of Division J of Public Law 108-447 (Snake River Water Rights Act of 2004). Administration of the multiple use water rights by the United States or the Nez Perce Tribe will not be construed or interpreted to preempt or inhibit administration of any state-based water right by the Idaho Department of Water Resources (IDWR) or the jurisdiction of the SRBA Court or its successor over the administration of the attached Partial Decrees.

7. Sharing of Water Use Information. In order to ensure compliance with this Consent Decree and to assure cooperation with regard to the administration of water rights, the Nez Perce Tribe and the State of Idaho will make available to each other a database of all diversions authorized pursuant to that party's authorities within the hydrologic subbasins identified in the attached Partial Decrees for federal reserved multiple use water rights. The

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<sup>2</sup> Two minimum stream flows were inadvertently omitted from the resolution; the Water Board has filed applications 83-11962 and 83-11963 for the two omitted water rights. To fulfill the Agreement, these two omitted water rights are required to be decreed by the Court; it is expected the applications will be approved by the 2006 Legislature, after which recommendations will be filed in the SRBA for the two omitted water rights.

databases will include the following information: (1) the water right number or permit number under which the use will occur; (2) the source of water; (3) a legal description of the point of diversion; (4) a legal description of the place of use; (5) the amount of water to be diverted, stated in cubic feet per second and acre feet per year; and (6) the nature of the use. The databases will be updated as necessary to include new diversions, changes in points of diversion, and changes in places of use.

8. Implementation and Incorporation of Agreement. This Consent Decree implements the Agreement by decreeing the water rights as they were agreed to by the parties to the Agreement. This Consent Decree incorporates the Agreement; provided that nothing in the Agreement or this Consent Decree restricts, enlarges, or otherwise determines the subject matter jurisdiction of this Court or any other court, nor requires the enforcement by this Court of any matter outside of its jurisdiction. Many provisions in the Agreement are covenants among the signatory parties and are neither binding on, nor enforceable by, this Court or non-signatory parties. In the event of a conflict between the Agreement and the Consent Decree, the Consent Decree shall control.

9. Jurisdiction. Nothing in this Consent Decree, the Agreement, or the Partial Decrees shall be construed to restrict, enlarge, or otherwise determine the territorial or subject matter jurisdiction of any parties to the Agreement.

10. Waivers and Releases. At the time the Consent Decree shall be subject to no further appeal, and subject to the certification requirements of the Snake River Water Rights Act of 2004, Title X of Division J of Public Law 108-447; 2005 Idaho Session Laws Chapter 148,

and Nez Perce Tribal Executive Committee Resolution No. 05-210, the waivers and releases specified in Section IV(D)(1) of the Agreement shall become effective.

11. No Establishment of Precedent. Nothing in this Consent Decree or in the Agreement shall be so construed or interpreted: (1) to establish any standard to be used for the quantification of federal reserved water rights or any other Indian water claims of any other Indian Tribes in any judicial or administrative proceeding; (2) to limit in any way the rights of the parties or any person to litigate any issue or question not resolved by this Consent Decree or the Agreement; or (3) to enlarge, restrict, or in any way affect the Treaty hunting, fishing, gathering, or pasturing rights of the Nez Perce Tribe or any other Tribe. This Consent Decree and the Agreement were the result of good faith negotiations for the purpose of resolving legal disputes, including pending litigation, and all parties agree that no offers and/or compromises made in the course thereof shall be construed as admissions against interest or be used in any legal proceeding and nothing in this Consent Decree or the Agreement shall be read as an admission or determination by the parties that any of the actions anticipated by this Consent Decree or the Agreement are necessarily required under any federal or state law.

12. Continuing Jurisdiction. The parties agree that the Court shall retain jurisdiction for the purpose of resolving disputes regarding the implementation and enforcement of this Consent Decree, as well as jurisdiction over the administration of the attached Partial Decrees, to the extent such administration is consistent with the terms of Title 42, Chapter 14, Idaho Code and the McCarran Amendment, 43 U.S.C. § 666.

13. Prior Orders and Judgments. Notwithstanding the status of previous orders, determinations, and judgments entered in Consolidated Subcase 03-10022 (Nez Perce Instream Flow Claims) and Consolidated Subcase 67-13701 (Nez Perce Springs or Fountains Claims), the parties agree that this Consent Decree and the Agreement constitute the final, complete and exclusive agreement and understanding of the parties and the final judgment of this Court as to all water right claims of the Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe in this Case.

14. Resolution and Finality. All parties agree that the Consent Decree and Agreement represent a just, fair, adequate and equitable resolution of the water right claims of the Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe in this Case and that the Consent Decree, Partial Decrees and Agreement constitute the final, complete and exclusive understanding of the parties and the final judgment of the Court with respect to all such claims.

15. Costs and Fees. All parties to this Consent Decree will bear their own costs and fees with regard to the entry of the Consent Decree and all litigation relating to the water right claims submitted in SRBA by the Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe.

16. Consent Decree Binding. The Consent Decree shall bind and inure to the benefit of the respective successors of the parties. Upon entry of the Consent Decree, the Consent Decree shall be binding on all parties in the SRBA.

### RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATE: January 30, 2007



JOHN M. MELANSON  
Presiding Judge  
Snake River Basin Adjudication

**Attachment 1 to Consent Decree**  
**In re SRBA Case No. 39576**

The Idaho Water Users who are Parties to this Consent Decree include the following:

|                                    |                                        |
|------------------------------------|----------------------------------------|
| A & B Irrigation District          | City of New Plymouth                   |
| Aberdeen-Springfield Canal Company | City of Oakley                         |
| Agland, Inc.                       | City of Parma                          |
| Agwild, Inc.                       | City of Paul                           |
| Bar-U-Inc.                         | City of Payette                        |
| Basic American Foods, Inc.         | City of Pocatello                      |
| Big Bend Irrigation District       | City of Rigby                          |
| Boise-Kuna Irrigation District     | City of Ririe                          |
| Buck Creek Ranch, Inc.             | City of Roberts                        |
| Burgess Canal & Irrigation Company | City of Rupert                         |
| Burley Irrigation District         | City of Salmon                         |
| City of Ashton                     | City of St. Anthony                    |
| City of Bliss                      | City of Sugar City                     |
| City of Buhl                       | City of Ucon                           |
| City of Burley                     | City of Weiser                         |
| City of Cascade                    | ConAgra/Lamb-Weston, Inc.              |
| City of Challis                    | Egin Bench Canal, Inc.                 |
| City of Chubbuck                   | Enterprise Irrigation District         |
| City of Council                    | Falls Irrigation District              |
| City of Declo                      | Glen Dale Farms, Inc.                  |
| City of Donnelly                   | Harrison Canal & Irrigation Company    |
| City of Eden                       | Idaho Irrigation District              |
| City of Emmett                     | J.R. Simplot Company                   |
| City of Fairfield                  | Lewiston Orchards Irrigation District  |
| City of Fruitland                  | Little Salmon River Water Users        |
| City of Garden City                | Association                            |
| City of Glenns Ferry               | M.L. Investment Company                |
| City of Grand View                 | Milner Irrigation District             |
| City of Heyburn                    | Minidoka Irrigation District           |
| City of Inkom                      | New York Irrigation District           |
| City of Ketchum                    | Newfoundland Partners                  |
| City of Kuna                       | North Freemont Canal Systems           |
| City of Lewiston                   | North Side Canal Company               |
| City of Mackay                     | Payette River Water Users Association, |
| City of Meridian                   | Inc.                                   |
| City of Middleton                  | Peoples Canal & Irrigation District    |
| City of Minidoka                   | Pioneer Irrigation District            |
| City of Mountain Home              | Port of Lewiston                       |
| City of Mud Lake                   | Potato Storage, Inc.                   |
| City of Nampa                      | Potlatch Corporation                   |

Progressive Irrigation District  
Settlers Irrigation District  
Simplot Cattle Company  
Simplot Dairy Products, Inc.  
Simplot Livestock Company  
Simplot Meat Products, Inc.  
Sinclair Oil Corporation d/b/a Sun  
Valley Company  
Snake River Valley Irrigation District  
SSI Food Services, Inc.  
SSI Foods, Inc.  
Sunnyslope Orchards Partnership  
Thompson Creek Mining Company  
Thousand Springs Ranch  
TM Ranch Company  
Twin Falls Canal Company  
Wilder Irrigation District