

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 signatories¹ 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

¹ 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.² 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

² 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.

DATE: _____

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication