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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

Consolidated Subcases: 03-10022 (Instream Flow Claims) and 67-13701 (Springs and Fountains Claims)

**JOINT MOTION FOR APPROVAL OF CONSENT
DECREE, ENTRY OF FINAL PARTIAL DECREES, AND
ENTRY OF SCHEDULING ORDER**

**JOINT MOTION FOR APPROVAL OF CONSENT DECREE
AND ENTRY OF FINAL PARTIAL DECREES**

In settlement of all water rights claims filed by the Nez Perce Tribe and by the United States as trustee for the benefit of the Nez Perce Tribe, the undersigned parties have entered into the Snake River Water Rights Agreement of 2004 (“Settlement Agreement”). As previously reported to this Court, the undersigned parties have completed all steps necessary for implementation of the Settlement Agreement, and have memorialized their agreement in a proposed Consent Decree. Therefore, the parties move this Court to take the following actions: (1) commensurate with this Court’s jurisdiction, approve the Consent Decree and the Settlement Agreement; (2) in Consolidated Subcase 03-10022, dismiss, with prejudice, all instream flow claims of the Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe; (3) in Consolidated Subcase 67-13701, dismiss all claims for springs or fountains on private land; (4) in Consolidated Subcase 67-13701, enter partial final decrees for all springs and fountains claims on federal public lands; (5) enter partial final decrees in the name of the United States as trustee for the Nez Perce Tribe for 50,000 acre feet of multiple-use federal reserved water rights for use on tribal lands; and (6) enter partial final decrees for 205 state minimum stream flows as recommended by the Director of the Department of Water Resources (IDWR).¹

The order sought by this Joint Motion is fully in accordance with Idaho Rule of Evidence 408, as well as the policy underlying that rule, and the policy of the State of Idaho favoring out-of-court settlement of federal reserved water right claims.

¹ The minimum stream flows were adopted by resolution of the Idaho Water Resource Board on February 8, 2005, and approved by the Idaho Legislature in Chapter 150, 2005 Idaho Session Laws. Two minimum stream flows were inadvertently omitted from the resolution; the Water Board has filed applications for the two omitted water rights. 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.

**JOINT MOTION FOR ENTRY OF SCHEDULING ORDER
GOVERNING APPROVAL OF CONSENT DECREE AND
ENTRY OF FINAL PARTIAL DECREES**

The Consent Decree anticipates the following actions by this Court: Because of the unique nature of each action, the processes and schedules necessary for completion of the actions are discussed separately below.

1. Dismissal of all claims in Consolidated Subcase 03-10022.

The Consent Decree calls for the dismissal of all claims in Consolidated Subcase 03-10022. These claims will be dismissed with prejudice, with a provision prohibiting refile of the claims in the SRBA or any other forum. Dismissal of these claims will resolve all outstanding objections filed in Consolidated Subcase 03-10022. *See, e.g., International Union of Operating Engineers v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993) (dismissal with prejudice pursuant to settlement agreement acts as final judgment on the merits and precludes parties from reasserting the same claims in a subsequent action). Because the SRBA is a general adjudication, the Court's judgment that the claims should be dismissed with prejudice is binding not only on the parties to the Settlement Agreement, but is conclusive on all parties to the adjudication, as well as non-parties. *See Idaho Code § 42-1420* (“[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system”). Thus, dismissal of the claims with prejudice will resolve all outstanding objections in Consolidated Subcase 03-10022 in favor of the objectors, and the parties do not anticipate the need for any further proceedings in Consolidated Subcase 03-10022 aside from a hearing to determine whether to enter the Order of Dismissal.

Thus, the parties propose to proceed in Consolidated Subcase 03-10022 by filing, two weeks after entry of a scheduling order, a joint motion for entry of an order dismissing all claims with prejudice. A hearing would be scheduled on the proposed order, and notice provided to all

JOINT MOTION FOR APPROVAL OF CONSENT DECREE, ENTRY OF FINAL PARTIAL DECREES, AND ENTRY OF SCHEDULING ORDER - 3

objectors in Consolidated Subcase 03-10022. The motion would include a request that the Court administratively stay the filing of the Order of Dismissal until such time as the Court approves the Consent Decree and enters it as a final judgment.²

2. Dismissal of All Claims to Springs or Fountains on Private Lands; and Entry of Partial Decrees for Springs or Fountains on Federal Public Lands.

The Consent Decree calls for the dismissal of all springs or fountains claims on private lands and state lands. These claims will be dismissed with prejudice, with a provision prohibiting refiling in the SRBA or any other forum. Dismissal of these claims will resolve all outstanding objections filed in Consolidated Subcase 67-13701 relating to springs on private lands and state lands, including objections filed by non-signatories to the Consent Decree.

The Consent Decree also calls for the Court to enter partial decrees for all spring or fountains claims with a point of diversion on federal public land. The only objectors to springs or fountains claims with points of diversion on federal public lands are the State of Idaho, Idaho Power Company, Agland, Inc., Burley Irrigation District, Twin Falls Canal Company, Wilder Irrigation District, and the City of Lewiston. Of these objectors, the only party who is not a signatory to the Consent Decree is the Idaho Power Company.

The parties suggest proceeding in Consolidated Subcase 67-13701 by having the parties file a joint motion for entry of an order dismissing the claims on private lands and decreeing the claims on federal public lands. The joint motion would be filed four weeks after entry of the scheduling order. Notice would be provided to all objectors in Consolidated Subcase 67-13701, and a hearing held on the joint motion. The motion would include a request that the Court

² Because the parties' agreement to dismiss the claims is contingent upon Court approval of the Consent Decree, the stay of the individual orders dismissing certain claims and decreeing others until such time as final decisions are rendered on all claims is central to the process described herein.

administratively stay the filing of the Order of Dismissal and the Entry of Partial Final Decrees until such time as the Court approves the Consent Decree and enters it as a final judgment.

3. Entry of Partial Decrees for State Minimum Stream Flows.

As part of the settlement agreement, the State agreed to establish state minimum stream flows on a number of streams. This action was accomplished in Chapter 150 of the 2005 Idaho Session Laws, which established the minimum stream flow water rights with the elements as defined in the resolution of the Idaho Water Resource Board dated February 8, 2005.

Unlike the other proposed partial decrees that accompany the Consent Decree, the state minimum stream flows are not based on claims before this Court, but are new water rights established by State statute in accordance with the terms of the Settlement Agreement. The parties have agreed that these water rights should be decreed as defined in the director's recommendations, drafts of which are attached to the Consent Decree. Upon the issuance of an order allowing the filing of late claims for the minimum stream flow water rights, the recommendations will be reported by the Department of Water Resources. If any objections are filed to the Director's recommendations by third parties, they will be resolved in accordance with the procedures of Idaho Code § 42-1411 and Administrative Order No. 1.

4. Decree of multiple use federal reserved water rights.

Pursuant to an order of this Court, the Nez Perce Tribe and the United States as trustee for the Tribe filed Notices of Claim for all federal reserved water rights claims with IDWR on March 24, 1993.³ For multiple uses on trust lands and tribal fee lands ("tribal lands"), the United States and the Tribe claimed a total of 223,698 acre feet per year (AFY) from surface water

³ At the time of filing, Idaho Code §§ 42-1409 and 42-1411 required federal agencies and Indian tribes to file their claims with the director of IDWR, who was responsible for abstracting and reporting the claims.

sources, and 14,629 AFY from groundwater sources. The stated purposes of use included domestic, commercial, municipal and industrial uses (DCMI), irrigation, livestock and wildlife watering, lake level maintenance, fish propagation facilities, and hydropower generation. The water right claims were based on the federal reserved water rights doctrine first enunciated in *Winters v. United States*, 207 U.S. 564 (1908), and had a claimed priority date of June 11, 1855.

The multiple use federal reserved water rights of the United States and the Tribe were scheduled to be reported in conjunction with the filing of the Director's Reports for Basins 81, 82, 83, 84, 85, and 86, all of which were filed between September 21, 2004, and January 20, 2005. Because of the ongoing effort to implement the Settlement Agreement, including negotiation of the elements of these claims, notices of claim for these water rights claims have not been served on other claimants, and the objection period required by Idaho Code § 42-1411A(7) has not been initiated.

Given that the State has now entered into settlement agreements with the United States and the Tribe addressing the multiple use water right claims, the parties, by this Joint Motion, move that the Court issue a stay on any further action on the original notices of claims, including the amending of such claims and the initiation of the notice and objection period for such claims, pending the outcome of the Court's determination whether to accept the negotiated settlements.

In settlement of the water right claims of the United States and the Tribe, the parties to the Settlement Agreement have agreed to quantify the Tribe's multiple use water right claims for tribal lands in the amount of 50,000 AF per year. Such water right could be used for irrigation, DCMI, or hatchery and cultural uses, at the discretion of the Tribe. Most of the water to fulfill the claims would come from the Clearwater River. Water can be diverted from tributary streams and from aquifers not hydraulically connected to the Clearwater River, but only in a manner that

ensures persons lawfully diverting water prior to April 20, 2004, will continue to receive their full legal entitlement under state law. The Tribe has also agreed to require that the Tribal Water Code be no less protective of groundwater resources than is state law governing the use of aquifers, including those state laws restricting the depletion of aquifers and the lowering of the pumping level of other groundwater users.

The issue before the Court is how to provide notice of the negotiated multiple use water rights to other claimants in the SRBA and allow such claimants to be heard on the issue of whether the negotiated settlements should be entered as partial final decrees. Idaho Code provisions allow for the filing of negotiated agreements in lieu of notices of claims. Idaho Code § 42-1401 sets forth the intent of the Legislature to “provide a statutory procedure for incorporating a negotiated agreement between a federal reserved water right claimant and the state of Idaho into an adjudication.” Idaho Code § 42-1407(4)(d) provides that the commencement order for a general adjudication shall include a “provision that requires all claimants to file a notice of claim or negotiated agreement for all water rights from the water system.” The Commencement Order for the SRBA provides that “[a]ny person claiming a right to use water pursuant to federal law shall file either a notice of claim or negotiated agreement as required by the notice of order commencing the adjudication or as otherwise ordered by the court.” Commencement Order (SRBA District Court Nov. 19, 1987).

The parties suggest proceeding by sending out notices of the negotiated agreements to claimants in Basins 81, 82, 83, 84, 85, and 86.⁴ The notices of negotiated agreements would include a narrative description of the Tribe’s and United States’ original notices of claim for

⁴ The multiple use water right claims of the United States as trustee for the benefit of the Nez Perce Tribe are all within Basins 81, 82, 83, 84, 85, and 86.

238,327 AFY of water rights for use on tribal lands, and explain that the negotiated agreements have been submitted to the Court as proposed settlements of those notices of claim. For purposes of convenience, the parties respectfully suggest that prior to sending the notices, the Court order that the negotiated agreements for the various water rights be consolidated into a single subcase. The United States and the Tribe have been working closely with IDWR to prepare the appropriate notices. Once the order of consolidation is issued, the notices could be sent out within a few days.

The notices of proposed settlement would include notification to claimants that if they desire to be heard on the question of whether the Court should accept the negotiated settlements, they should file motions to participate in the Consolidated Subcase within 60 days. All participants would file briefs 30 days after that defining their positions on the issue of whether the negotiated settlements represent a fair and equitable settlement of the federal reserved multiple use water rights claims of the United States as trustee for the benefit of the Nez Perce Tribe. Fifteen days later, responsive briefs would be due, followed shortly thereafter by a hearing.

If the Court accepts the negotiated settlements after completion of the hearings, then no further proceedings would be necessary. If, however, the Court rejects the negotiated settlements, then the terms of the Settlement Agreement would be unfulfilled, and resolution of the federal reserved multiple use water rights claims of the United States as trustee for the benefit of the Nez Perce Tribe would have to proceed on the normal litigation track described in Idaho Code § 42-1411A. Accordingly, the Court would lift the stay on the filing and litigation of the original claims and establish a timetable for amendment of the claims and the provision of notices of the claims to claimants in Basins 81, 82, 83, 84, 85, and 86.

5. Approval and Entry of Consent Decree as Final Judgment.

The final step in disposing of all water rights claims of the Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe will involve Court approval of the Consent Decree. Before determining whether to approve the Consent Decree, the Court will have determined the motions to dismiss all instream flow claims, the motion to dismiss certain springs or fountain claims and decree other springs or fountains claims, and the motion to approve the negotiated agreements for the tribal land water right claims. The Court will also have resolved any objections to the director's recommendations for decree of the state minimum stream flow water rights. Thus, very few specific issues should be left to resolve with regard to whether the Court should approve the overarching Consent Decree. The parties anticipate the only process necessary will be the process typically associated with approval of a consent decree; *i.e.*, a showing that the consent decree is fundamentally fair, adequate, and reasonable and conforms to applicable laws. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990); *see also S.E.C. v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984) ("Unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved").

CONCLUSION

The parties believe that the schedule submitted herein will allow the water right claims of the Nez Perce Tribe and the United States to be completely resolved within the next six to twelve months. The parties are committed to working with the Court and with other claimants to resolve all issues and objections in the most efficient manner possible.

DATED this 11th day of April, 2005.



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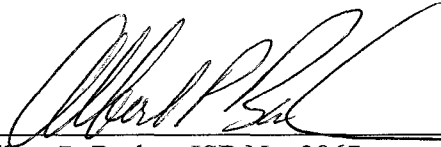
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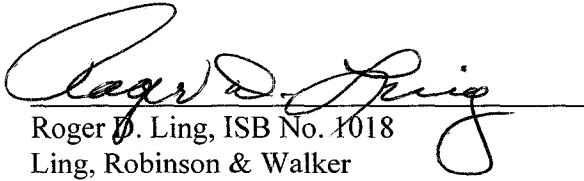
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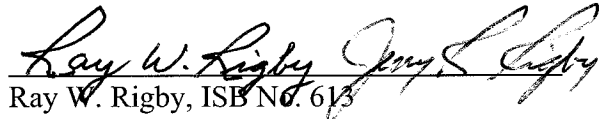
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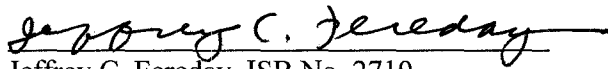
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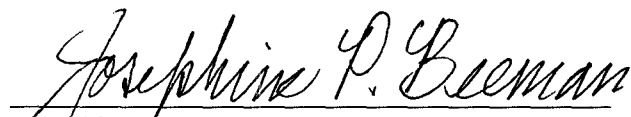
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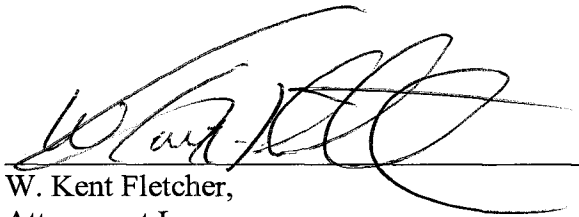
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A handwritten signature in black ink, appearing to read 'W. Kent Fletcher', is written over a horizontal line.

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