

**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 03-10022
	)	(Nez Perce Instream Flow Claims);
Case No. 39576)	
	)	Consolidated Subcase 67-13701
	)	(Nez Perce Springs or Fountains Claims);
)	
	)	Subcases 71-10886 <i>et. al</i>
	)	(State Minimum Stream Flow Claims);
)	
	)	Consolidated Subcase 92-80
	)	(Nez Perce Multiple Use Claims).
)	
	)	SCHEDULING ORDER AND NOTICES
	)	OF HEARING, RE: IMPLEMENTATION
	)	OF NEZ PERCE SETTLEMENT
	)	AGREEMENT

I. BRIEF PROCEDURAL HISTORY

A. Instream Flow Claims

1. The Nez Perce Tribe and the United States as trustee for the benefit of the Nez Perce Tribe filed numerous instream flow claims for stream reaches within the Snake River Basin Adjudication. At least 194 objections were filed to the claims, including 56 objections filed by the Shoshone-Bannock Tribes. On April 1, 1996, the Court entered a ***Case Management Order: Federal and Tribal Non-Consumptive (Instream Flow) Claims.*** The ***Order*** stated that all instream flow claims filed by the United State as trustee for the benefit of the Nez Perce Tribe and all claims filed by the Nez Perce Tribe on its own behalf would be consolidated into one subcase, which was designated as Consolidated Subcase 03-10022. On July 20, 1998, *Motions for Summary Judgment*

were filed by several of the objectors. On December 22, 1998, the Court issued an ***Order of Mediation and Appointment***, appointing Frances McGovern as Mediator. The process then continued on a dual track, i.e. litigation and mediation.

2. On November 10, 1999, then-Presiding Judge Barry Wood issued an ***Order on Motion for Summary Judgment***. The ***Order*** granted the *Motions for Summary Judgment*, and in sum, concluded that “the Nez Perce do not have Indian reserved instream flow water rights extending beyond the boundaries of the present Reservation, wherever those boundaries may be.” ***Order on Motions for Summary Judgment of the State, Idaho Power, Potlatch, Irrigation Districts, and Other Objectors Who Have Joined and/or Supported the Various Motions***, Subcase 03-10022 (November 10, 1999) at 47.

3. On November 17, 1999, a *Notice of Appeal* was filed to the ***Order on Motions for Summary Judgment*** by the Nez Perce Tribe. The United States filed a *Notice of Appeal* on December 21, 1999. On June 2, 2003, then-Presiding Judge Roger Burdick ended the Court ordered mediation. However, the parties continued negotiations. On May 21, 2004, a *Mediator’s Term Sheet* was lodged with the Court. The *Term Sheet* set forth a variety of conditions to be met in resolving the consolidated subcase including a deadline for completing the *Term Sheet* by March 31, 2005, and the Court holding monthly status conferences to ensure deadlines were being met. The *Term Sheet* included settlement terms for all of the Nez Perce Tribe’s claims even though the original mediation order pertained only to the instream flow claims. On April 21, 2004, oral argument before the Supreme Court was vacated and this Court was delegated limited jurisdiction for purposes of ruling on matters necessary to the implementation of the *Term Sheet*. Monthly status conferences were held in accordance therewith.

4. On June 27, 2005 the Idaho Supreme Court issued an *Order Granting Motion for Remand* of the appeals of the ***Order on Summary Judgment*** with a directive to address those issues raised by the Shoshone-Bannock Tribes, which the Supreme Court ruled were not properly before the Court on appeal.

B. Springs or Fountains Claims, Consolidated Subcase 67-13701

The Nez Perce Tribe also filed numerous “Springs or Fountains” claims located on private, federal and state lands. At least 16 parties filed objections to these water right claims. On May 8, 2000, the claims were consolidated into Subcase No. 67-13701. This consolidated subcase proceeded on a litigation course before Special Master Terrence Dolan. The case was stayed by Special Master Dolan on July 16, 2004, pending the outcome of the negotiations. Consolidated Subcase 67-1301 is still before Special Master Dolan.

C. Motion for Approval of Consent Decrees

On June 29, 2005, the participating parties to the negotiations in the above-captioned subcases filed the following:

1. *Joint Motion for Approval of Consent Decrees, Entry of Final Partial Decrees and Entry of Scheduling Order.*
2. *Proposed 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*

These pleadings called for the Court’s implementation of the *Term Sheet*, which is also known as the Snake River Water Rights Agreement of 2004 (Settlement Agreement). On July 1, 2005, as a part of the *Joint Motion*, the State of Idaho Water Resources Board filed *Motions to File Late Notices of Claim* for each of the State Minimum Stream Flow Claims in basins that had already been reported by the Department of Water Resources.

D. July 19, 2005 Scheduling Conference

On July 19, 2005, in Caldwell, Idaho the Court held a scheduling hearing for the implementation of the proposed Settlement Agreement and entry of the Consent Decree. At the hearing, Shoshone-Bannock Tribes, by and through counsel Mr. William Bacon, raised objections to the proposed settlement. In particular, the Shoshone-Bannock Tribes stated that they had been excluded from the negotiation process and that the 56 objections filed to the Nez Perce instream flow claims were still outstanding.

II. SCHEDULING ORDER

Therefore, the Court orders the following:

A. **State Minimum Flow Claims 71-10886 et al.**

These claims, of which there are 205, are for newly created water rights established on March 24, 2005, when the Governor of Idaho signed House Bill 154 (2005), creating a new code section I.C. 42-1507, which establishes minimum instream flows for certain stream reaches in the Clearwater and Salmon basins and directs the Water Resources Board to file the claims in the SRBA. On July 27, 2005, following notice and a hearing, the Court issued an *Order Granting Motion to File Late Notices of Claim* for the claims that are in administrative basins for which director's reports have been issued; which include basins 71, 72, 81, 82, 83, 84, 85 and 86. These rights shall be reported in accordance with I.C. § 42-1411. Claims were also filed in basins 73, 74, 75, 77, and 79. Because director's reports have not yet been issued for these basins the claims are timely. However, it is the intent of the Court to have all State Minimum Stream Flow Claims included in the same director's report and therefore such Claims in basins 73, 74, 75, 77, and 79 will be reported in advance of the director's reports for these basins.

Based on the foregoing, IT IS ORDERED that notice of filing all state minimum stream flow claims shall proceed as follows:

1. Basins 73, 74, 75, 77, 78 and 79: IDWR shall serve actual notice of filing of the director's report to all claimants in these basins and a statement regarding where such claims can be reviewed, as these claims will be reported in advance of the director's reports for the respective basins.

2. Basins 81, 82, 83, 84, 85, and 86: IDWR shall also serve actual notice of filing of the director's report to the claimants in these basins and a statement regarding where such claims can be reviewed. Although these basins have already been reported, the notice in the director's reports indicated that a late claims director's report would be issued once per year in "February." [Because IDWR must serve actual notice on these same claimants regarding the filing of the director's reports for the Nez Perce Multiple Use Claims, and the time for filing the director's reports is the same, said notice for filing of director's reports for State Minimum Stream Flows can also be included with such service.]

3. Notice to claimants in basins 71, 72 and all parties to the adjudication shall be pursuant to docket sheet. The notices of filing director's reports in basins 71 and 72 did not state specifically when late claims director's reports would be filed, so docket sheet notice is proper.

4. The Court orders the following reporting schedule for the State Minimum Stream Flow Claims.

August 31, 2005	IDWR to file <i>Director's Report</i> for all State Minimum Stream Flow Claims, together with the following dates.
November 1, 2005	Objections Due
January 6, 2006	Responses Due
January 17, 2006	Hearing on Uncontested Water Rights, status conference/initial hearing on objections. 1:30 p.m. (MDT), Snake River Basin Adjudication Courthouse, 253 3rd Ave. N. Twin Falls, Idaho. Telephone participation is available by calling 1-918-583-3445, then dialing participant code 406128.

If there are no objections to the instream flow rights, or upon resolution of any objections to the State Minimum Stream Flow Claims, the Court will enter an order decreeing the water right claims, but staying the entry of the Partial Decrees until the Court approves the Consent Decree. The Court will also determine how to proceed on any objections following a review of the issues raised.

B. Nez Perce Multiple Use Claims (on-reservation claims)

The Nez Perce Tribe and the United States as trustee for the Tribe filed *Notices of Claim* for multiple uses on trust lands and tribal fee lands (“tribal lands”). The United States and the Tribe originally claimed a total of 223,698 acre feet per year (AFY) from surface water sources and 14,629 AFY from groundwater sources. These claims 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. In the notice of filing director’s reports for these basins, claimants were notified that they would receive further notice when the Nez Perce Tribe’s claims were reported. Ultimately, in settlement of the claims of the United States and the Nez Perce Tribe, the parties to the *Joint Motion* agreed to quantify the Tribe’s multiple use water right claims for tribal lands in the amount of 50,000 acre-feet per year, and is comprised of 101 individual claims. The negotiated settlement identifying the individual multiple use claims has not yet been reported in a director’s report. The parties requested that the Court stay any further action on the original notices of claims pending the outcome of the Court’s determination whether to accept the negotiated settlements.

Based on the foregoing, THE FOLLOWING ARE HEREBY ORDERED:

1. Consolidation of Claims and Designation as Consolidated Subcase 92-80

It is anticipated that any objections filed will pertain to the negotiated settlement in general as opposed to elements of specific claims. The Court therefore intends to consolidate the multiple use claims for purposes of filing and processing objections in order to avoid the necessity of filing of identical objections to each claim. Following the response period, if necessary, the Court will hold a status conference for purposes of separating and aligning issues for further proceedings. In the event an objection is filed to a specific claim the Court will handle the matter on a case-specific basis.

IT IS ORDERED that the 101 claims comprising the Nez Perce Tribes multiple use or on-reservation claims are ordered consolidated until further order

of the Court. For purposes of identification the consolidated subcase is designated as Consolidated Subcase 92-80.

2. Notice to Parties: IDWR shall serve actual notice of filing of the director's report and a statement regarding where such claims can be reviewed, to all claimants in Basins 81, 82, 83, 84, 85 and 86, in which all of the multiple use water right claims of the United States as trustee for the benefit of the Nez Perce Tribes are located. The parties to the *Joint Motion* shall prepare a descriptive summary of the negotiated settlement to be included in the notice of filing of director's report served by IDWR. (In this mailing IDWR can include actual notice of the filing of the director's report for the State Minimum Stream Flow Claims).

3. The Court orders the following reporting schedule for the multiple use claims.

August 8, 2005	Parties to <i>Joint Motion</i> to provide IDWR with descriptive summary of negotiated agreement to be served on claimants
August 31, 2005	IDWR to file director's report and serve notice of filing for Nez Perce Multiple Use Water Right Claims
November 1, 2005	Objections due
January 6, 2006	Responses due
January 17, 2006	Status conference on uncontested water rights, status conference/initial hearing on objected to water rights. 1:30 p.m. (MDT), Snake River Basin Adjudication Courthouse, 253 3rd Ave. N. Twin Falls, Idaho. Telephone participation is available by calling 1-918-583-3445, then dialing participant code 406128.

If objections are filed to the multiple use claims, the Court may further consolidate issues raised in those objections, or issue orders for the objectors to submit statements of issues to further define their objections. If no objections are raised, the Court will hold a status conference to determine how best to proceed on the claims, and whether the claims should be handled in accordance with Idaho Code §42-1411A.

C. Springs or Fountains Claims, Consolidated Subcase 67-13701

Consolidated Subcase 67-13701 is still assigned to Special Master Dolan. At the July 19, 2005, scheduling conference, the parties to the *Joint Motion* represented that the all outstanding issues raised by objections and/or motions to participate pertaining to claims on federal land were either resolved or in the process of being resolved. The parties proposed filing a joint motion to dismiss “springs or fountains” claims on state and private land, and filing a joint motion to decree the claims on federal public land within four weeks after entry of this **Order**. Upon such filing, the motions will be committed to the Special Master, and he shall be directed to issue a *Special Master’s Report and Recommendation* as to whether the claims should be decreed or dismissed. The Special Master will be directed to address any outstanding objections or motions to participate and include the terms of such resolution in his *Special Master’s Report and Recommendation*. Following the issuance of a *Special Master’s Report and Recommendation*, any entry of partial decrees or dismissal of claims will be stayed pending entry of consent decree.

Based on the foregoing, IT IS HEREBY ORDERED that the parties shall file and serve on parties to the consolidated subcase, the above-described motions to dismiss or for entry of partial decree on or before August 31, 2005.

D. Dismissal of Claims in Consolidated Subcase 03-10022

The proposed *Consent Decree* calls for the dismissal of all claims in Consolidated Subcase 03-10022. The *Joint Motion* calls for these claims to be dismissed with prejudice. The parties to the *Joint Motion* propose filing a joint motion for entry of an order dismissing all claims with prejudice. The parties propose that a hearing be set following the filing of the joint motion and service of it upon parties to the consolidated subcase.

Based on the foregoing, THE FOLLOWING ARE HEREBY ORDERED:

- August 31, 2005:** Deadline for parties to file and serve motion to dismiss claims in Consolidated Subcase 03-10022
- September 20, 2005** Notice of Status Conference on motion at **1:30, p.m. (MDT), at the Blaine County Courthouse, 201 2nd Ave S, Hailey, Idaho.** Telephone participation will be available by calling 1-918-583-3445 and entering 406128 when prompted

E. Shoshone-Bannock Tribes' Objections

Many of the issues raised by the Shoshone-Bannock Tribes can be addressed in the course of the procedures previously outlined in this *Scheduling Order*. For example, if the Shoshone-Bannock Tribes intend to raise objections to the general dismissal of the water right claims of the Nez Perce Tribe and/or the United States acting as trustee for the Nez Perce Tribe, then such objections can be heard in accordance with this *Scheduling Order*. Similarly, if the Shoshone-Bannock Tribes object to entry of partial decrees for the 50,000 AFA for multiple use federal reserved rights, the entry of partial decrees for "springs or fountains" federal reserved rights, or the entry of partial decrees for state minimum stream flow water rights, such objections may also be raised in accordance with this *Scheduling Order*. Other issues, however, require separate scheduling to efficiently determine the rights of the parties and move toward completion of the adjudication. These issues, so far as can be determined by the Court, are as follows:

1. The present status of the outstanding 56 objections of the Shoshone-Bannock Tribes to the Nez Perce claims

In the Supreme Court's *Order Granting Motion for Remand* in Supreme Court Case Nos. 26042 and 26128, entered on June 27, 2005, the Court stated:

The fifty-six (56) objections of the Shoshone-Bannock Tribe to the Nez Perce claims have never been litigated nor are they the subject of this appeal. Technically, they are still in the trial court. If there are questions concerning their efficacy in light of the Nez Perce Settlement Mediator's

Term Sheet those are proper matters for the trial court to create appropriate factual and legal records.

Pursuant to the proposed *Consent Decree*, the claims to which the Shoshone-Bannock Tribes objected are to be dismissed with prejudice. If the Shoshone-Bannock Tribes contend that their 56 objections would not be completely resolved by dismissal of the Nez Perce Tribe's claims, then such matters must be brought before the Court by way of a Statement of Issues.

The Statement of Issues shall state with particularity the legal and factual basis for the assertion that dismissal of the Nez Perce claims would not completely resolve the fifty-six (56) Shoshone-Bannock objections, and why such objections should not be dismissed with prejudice if the *Consent Decree* dismissing the Nez Perce claims as proposed is entered. Upon receipt of such Statement of Issues, the Court shall conduct a scheduling conference to discuss further proceedings, briefing schedules, etc. If no Statement of Issues is filed as provided herein, then issues that could have been raised therein shall be deemed to have been waived.

2. Whether the Shoshone-Bannock Tribes were excluded from negotiations leading to the *Mediator's Term Sheet* and, if so, whether the Shoshone-Bannock Tribes were prejudiced by such exclusion.

At the Scheduling Conference on July 19, 2005, Mr. Bacon asserted that the Shoshone-Bannock Tribes had been excluded from the negotiations leading to the *Mediator's Term Sheet* and the proposed *Consent Decree*. Based upon the file in this matter, the Court observes:¹

a. The Shoshone-Bannock Tribes are a party to consolidated subcase 03-10022 as a result of objections filed to 56 of the 1,083 off-reservation instream flow claims of the Nez Perce Tribe. All 56 objections are identical as to the basis for the objection and pertain only to claims on the lower main stem of the Snake River (Basin

¹ By making these observations based upon the file in this matter, the Court does not intend to engage in fact finding. If any of the statements made by the court in this summary are not supported by evidence or if there is evidence to the contrary, then such should be noted in the Statement of Issues and the court will consider that evidence in the course of these proceedings.

03), which are alleged to impede the use of Shoshone-Bannock Tribes' water rights as decreed pursuant to the 1990 Fort Hall Indian Water Rights Agreement. All objections state that the priority date of the Nez Perce rights should be junior to 1867, which is the priority date of the Shoshone-Bannock Tribes' rights. Unlike all other objections filed to the Nez Perce instream flow claims, the Shoshone-Bannock Tribe's objections were limited in scope and did not pertain to the overall legal basis for the claims. The Shoshone-Bannock Tribes did not object to any of the other claims that are now alleged to be located in the their aboriginal territories.

b. The proceedings on the Nez Perce claims were bifurcated between entitlement and quantity. The issue of entitlement was decided on a motion for summary judgment. At the summary judgment hearing, counsel for the Shoshone-Bannock Tribes argued *in favor* of the Nez Perce claims with the exception of the 56 claims to which the Shoshone-Bannock Tribes had filed objections. The Shoshone-Bannock Tribes argued:

In general, Shoshone-Bannock supports the right of the Nez Perce Tribe to sufficient water for instream flows to protect its off-reservation fishing rights as part of its reserved rights as first confirmed by two landmark turn of the century cases – *Winters v. United States*, 207 U.S. 564 (1908) and *United States v. Winans*, 198 U.S. 371 (1905).

Shoshone-Bannock Tribes' Brief in Response to Summary Judgment Motions, September 18, 1998, p.1.

A footnote further explained “The Shoshone-Bannock Tribes are involved in this subcase as objectors to a portion of the rights asserted by the Nez Perce Tribe but have not objected to a majority of the claims.”

c. Prior to the hearing on the summary judgment motion, Judge Hurlbutt ordered that the parties to the subcase participate in mandatory mediation. The Shoshone-Bannock Tribes apparently participated. On at least one occasion the Shoshone-Bannock Tribes represented to the Court that they were actively participating in the settlement negotiations. *Status Report of the Shoshone-Bannock Tribes Re: Scheduling, December 11, 2001*. On May 7, 2003, Judge Burdick terminated the mandatory mediation but the parties continued to negotiate. Thereafter, in response to a request by the parties to the

negotiation, this Court set regular monthly status conferences dealing with the progress of negotiations. The Shoshone-Bannock Tribes were provided notice of those monthly status conferences.

d. As set forth above, the Nez Perce Tribe is withdrawing the 56 claims to which the Shoshone-Bannock Tribes objected. Therefore, the issues expressly raised by their objections would be resolved.

e. The Shoshone-Bannock Tribes also filed 1,083 off-reservation instream flow claims for fish habitat in the Salmon, Clearwater and Snake River (below Hell's Canyon) Basins. The claims were similar to those filed by the Nez Perce Tribe, but they were based upon a different treaty. The Shoshone-Bannock Tribes moved to withdraw the claims based upon an *Understanding* entered into with the State of Idaho. *April 16, 2002 letter to the Court and Report to the Court of Shoshone-Bannock Tribes' Signing Articles of Understanding (April 23, 2002); Motion to Withdraw (April 23, 2003)*. The *Understanding*, was not, however, executed by the State of Idaho or others. On April 22, 2002, counsel for the state informed the Court, by letter (with copies to counsel), that the parties to the negotiation had reached an impasse. Judge Burdick then held a status conference on the *Understanding* and informed the parties that he would not accept the *Understanding* as a basis for the withdrawal of the Shoshone-Bannock Tribes' claims because there was no agreement. The Shoshone-Bannock Tribes then alternatively moved to voluntarily withdraw their claims. Judge Burdick then dismissed the claims with prejudice on May 20, 2002. *Order Dismissing with Prejudice Shoshone-Bannock Tribes' Instream Flow Claims, I.R.C.P. 41(a)(2)B*.

Given this factual and procedural setting, it is appropriate for the Court to require further information from the Shoshone-Bannock Tribes regarding their assertions before determining how to next proceed. Therefore, if it is the intention of the Shoshone-Bannock Tribes to now allege that they were excluded from the negotiations that led to the *Mediator's Term Sheet*, then such matters must be brought before the court by way of a Statement of Issues. The Statement of Issues shall state with particularity the factual basis for the claim that the Shoshone-Bannock Tribes were excluded from negotiations,

including when they allege they were excluded from such negotiations and under what circumstances they were excluded. If the Shoshone Bannock Tribes assert that they were prejudiced by such exclusion, then the Statement of Issues shall state, with particularity, the factual and legal basis for that claim. If no Statement of Issues is filed as provided herein, then issues that could have been raised therein shall be deemed to have been waived.

Based on the foregoing, THE FOLLOWING ARE HEREBY ORDERED:

- August 31, 2005:** Deadline for Shoshone-Bannock Tribe to filing and serve Statement of Issues on parties to negotiated settlement
- September 20, 2005** **Notice of Status Conference on Statement of Issues at 1:30, p.m. (MDT), at the Blaine County Courthouse, Hailey, Idaho, Telephone participation will be available by calling 1-918-583-3445 and entering 406128 when prompted.** At the hearing the Court will determine how to next proceed including setting a briefing schedule, a hearing on the merits and rule on any motions for discovery.

III. SUMMARY OF DEADLINES

A. State Minimum Stream Flow Claims:

- August 31, 2005** IDWR to file *Director's Report* for all State Minimum Stream Flow Claims, together with the following dates.
- November 1, 2005** Objections Due
- January 6, 2006** Responses Due
- January 17, 2006** Hearing on Uncontested Water Rights, status conference/initial hearing on objections. **1:30 p.m. (MDT), Snake River Basin Adjudication Courthouse, 253 3rd Ave. N. Twin Falls, Idaho.** Telephone participation is

available by calling 1-918-583-3445, then dialing participant code 406128.

B. Nez Perce Multiple Use Claims

- August 8, 2005** Parties to *Joint Motion* to provide IDWR with descriptive summary of negotiated agreement to be served on claimants
- August 31, 2005** IDWR to file director's report and serve notice of filing for Nez Perce Multiple Use Water Right Claims
- November 1, 2005** Objections due
- January 6, 2006** Responses due
- January 17, 2006** Status conference on uncontested water rights, status conference/initial hearing on objected to water rights. **1:30 p.m. (MDT), Snake River Basin Adjudication Courthouse, 253 3rd Ave. N. Twin Falls, Idaho.** Telephone participation is available by calling 1-918-583-3445, then dialing participant code 406128.

C. Springs and Fountains Claims

Parties shall file previously described motions decree on or before **August 31, 2005.**

D. Dismissal of Claims in Consolidated Subcase 03-10022.

- August 31, 2005** Deadline for parties to file and serve motion to dismiss claims in consolidated subcase 03-10022
- September 20, 2005** Notice of Status Conference on motion at **1:30, p.m. (MDT), at the Blaine County Courthouse, 201 2nd Ave S, Hailey, Idaho.** Telephone participation will be available by calling 1-918-583-3445 and entering 406128 when prompted.

E. Shoshone-Bannock Tribe's Objections

- August 31, 2005** Deadline for Shoshone-Bannock Tribe to filing and serve Statement of Issues
- September 20, 2005** **Notice of Status Conference on Statement of Issues at 1:30, p.m. (MDT), at the Blaine County Courthouse, Hailey, Idaho, Telephone participation will be available**

by calling 1-918-583-3445 and entering 406128 when prompted. At the hearing the Court will determine how to next proceed including setting a briefing schedule, a hearing on the merits and rule on any motions for discovery.

IT IS SO ORDERED.

Dated August 3, 2005.

/s/ John Melanson

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication