

**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 67-13701
)	(United States and Nez Perce Tribe
)	Springs or Fountains Claims)
Case No. 39576)	
)	ORDER DENYING MOTION TO
<hr/>)	DISMISS

Background

1863 Treaty

On June 9, 1863, the Nez Perce Tribe concluded a treaty with the United States which reserved certain “springs or fountains” and the necessary surrounding land and rights of way as watering places for the common use of both whites and Indians:

The United States also agree to reserve all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished, and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed; and further, to preserve a perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians.

Treaty with the Nez Perce of June 9, 1863, Article 8, 14 Stat. 647, 651.

Springs or Fountains Claims

On March 25, 1993, the United States of America, as trustee on behalf of the Nez Perce Tribe, and the Nez Perce Tribe both filed *Notices of Claim to a Water Right Reserved Under Federal Law*. The United States included in its *Notice of Claim* the above quoted paragraph concerning springs or fountains from the 1863 Treaty and attached a “Summary of Water Rights Claims for Springs and Fountains.”

Article 3 of the Treaty with the Nez Perce of June 11, 1855, 12 Stat. 957, secured to the Nez Perce Tribe the ‘privilege of hunting, gathering roots and

berries, and pasturing their horses and cattle upon open and unclaimed land' within the area ceded by the Tribe in Article 2 of the Treaty of June 11, 1855. These aboriginal hunting, gathering and grazing rights of the Nez Perce Tribe were reaffirmed to the Tribe in Article 8 of the Treaty of June 9, 1863, 14 Stat. 647. Therefore, the United States claims federal reserved water rights for all of the natural flow of the springs and fountains which the government has been able to identify within the area recognized by the Indian Claims Commission as the exclusive aboriginal use area of the Nez Perce Tribe within the State of Idaho and located within the Snake River Basin Adjudication area. These federal reserved water rights claims have a priority date of time immemorial.¹

Attachment XIV to the United States *Notice of Claim*.

IDWR Notice of Filing

On March 9, 1999, IDWR filed with the SRBA Court its *Notice of Filing of Nez Perce Federal Reserved Rights Claims and Maps, IDWR Basins 67 & 69 (Reporting Area 19), IDWR Basins 81, 82, 83, 84, 85 & 86 (IDWR Reporting Area 22) and IDWR Basins 77, 78 & 79 (Reporting Area 24), Part II*. IDWR attached to the *Notice of Filing* its own summary of the springs or fountains claims and later amendments:

In March of 1993, the United States and the Nez Perce Tribe submitted claims to 4,360 springs² within the Tribe's exclusive aboriginal use area. In November of 1997, the United States and the Tribe withdrew claims to certain springs in IDWR Basins 65, 67, 69, 77, 78, 81, 82, 83, and 84. By this amendment, the United States and the Tribe withdraw or amend claims [*sic*] springs in Reporting Areas 19 and 24, outside of the current Nez Perce Indian Reservation.

For the springs listed on the attached Attachment A, the United States and the Tribe claim one-half of the natural flow of the springs for watering purposes to Article 8 of the Treaty of June 9, 1863, 14 Stat. 647. "Watering purposes" include, but are not limited to, stockwater, wildlife, cultural, and ceremonial purposes. These federal reserved water rights have a priority date of time immemorial. Period of use is January 1 to December 31. For convenience, where the claims correspond to claim numbers assigned by IDWR, those claim numbers are given in Attachment A.³

¹ During the July 11, 2001 hearing on the *Motion to Dismiss*, counsel for the United States said the claimed priority date for the springs or fountains claims was the date of the treaty because the claims are treaty-based.

² It is not clear from the record whether the United States and the Nez Perce Tribe originally claimed 4,360 different springs or duplicate United States / Nez Perce claims were actually half that number-- 2,180. Probably the latter. The total number of claims has changed as IDWR and the parties reconciled their lists.

³ Attachment A to IDWR's *Notice of Filing* entitled, "New and Amended Spring and Fountain Claims, Notice of Claim to Water Rights Reserved Under Federal Law - Nez Perce Tribe," is 46 pages long. The Attachment lists 1,886 claims.

The United States and the Tribe withdraw claims to those springs listed in Attachment B.⁴

“Summary of Amended Water Right Claims for Springs, Nez Perce Federal Reserved Rights Claims,” IDWR *Notice of Filing of Nez Perce Federal Reserved Rights Claims and Maps*.

In its *Notice of Filing*, Attachment A, IDWR assigned each claim a United States of America, Department of Interior, Bureau of Indian Affairs number (BIA #) and a separate Nez Perce Tribe number (NPT #). For instance, the same spring in Basin 69 has a BIA number of 67-13514 and a NPT number of 67-13701.⁵

Objections

The State of Idaho filed the first *Objection* to all the United States and Tribe springs or fountains claims on September 16, 1999. The State objected to all the claimed elements and alleged the water right should not exist. Its objection to “owner” alleged:

The claims filed by the United States, as trustee for the Nez Perce Tribe, and by the Nez Perce Tribe, on its own behalf, are duplicative and inconsistent. If the United States claims legal title to the claimed water right as the “trustee” of the Tribe, then the Tribe cannot maintain separate legal title to the same water right. In the alternative, if the duplicate claims are intended to be cumulative, they must be disallowed as an impermissible expansion of the federal reserved water rights doctrine.

Fifteen other entities followed suit by filing similar *Objections* to all the springs or fountains claims.⁶ John M. Nuttman, *pro se*, filed *Objections* to United States and Nez Perce Tribe claims on five particular springs in Basin 85.

Order of Reference

On February 2, 2000, then-Presiding Judge Barry Wood entered an ***Order of Reference Appointing Terrence A. Dolan Special Master for the Nez Perce Tribe Federal Reserved Water Rights in Reporting Areas 19, 22 and 24, Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 and 86.***

⁴ Attachment B is 23 pages long and lists 979 withdrawn claims.

⁵ No reason was given why some claims were given different prefix numbers than the basin numbers.

⁶ The other objectors are: Payette River Water Users Association, Sinclair Oil Company, d/b/a Sun Valley Company, Little Salmon Water Users, Inc., Thompson Creek Mining Company, Thousand Springs Ranch, Bogus Basin Recreational Association, Inc., Settlers Irrigation District, Pioneer Irrigation District, Newfoundland Partners, Idaho Power Company, Agland, Inc., Burley Irrigation District, Twin Falls Canal Company, Wilder Irrigation District and the City of Lewiston. On August 9, 2000, Bogus Basin Recreational Association, Inc., was granted leave to withdraw from the consolidated subcase and its *Objection* was dismissed.

Order Consolidating Subcases

On May 8, 2000, the Special Master entered an ***Order Consolidating Subcases and Order for Report of Overlapping Claims***. The ***Order*** consolidated all springs or fountains claims filed by the United States and the Nez Perce Tribe under consolidated subcase 67-13701. The ***Order*** also required IDWR to identify all claims in Reporting Areas 19, 22 and 24 (Basins 67, 69, 77-79 and 81-86) which overlap with the springs or fountains claims and state whether the claims are on federal public land or private land.

Overlapping or Competing Claims⁷

IDWR filed its *Report Identifying Competing Claims* on August 29, 2000. The 284 page *Report* listed all claims for water sources which might overlap with the United States and Nez Perce Tribe springs or fountains claims. The landowners' names and water right claim numbers were listed under such categories as private, Forest Service, BLM and State of Idaho.

The United States and Nez Perce Tribe filed their *Joint Response to IDWR Report re: Competing Claims* on September 29, 2000, and concluded there were substantial problems with IDWR's *Report*. They suggested the effort to identify competing claims be abandoned or, in the alternative,

[T]he United States and the Tribe will produce an initial report identifying the springs claims by private claimants upon which we [United States and the Tribe] relied in developing the federal/tribal claims. IDWR would then review that more limited list to update any changes of ownership, location, or other relevant components of the private claims.

The State of Idaho agreed with the alternate proposal and on October 27, 2000, the Special Master entered an ***Order for United States and Nez Perce Tribe Report***. The United State filed its *Notice of Compliance with "Order for United States and Nez Perce Report"* on January 4, 2001. Of the 1,886 springs or fountains claims, the *Notice* described in detail 1,243 possible competing private claims and 40 claims where the land ownership status is "indeterminate or uncertain." On February 20, 2001, IDWR filed its *Findings Re: United*

⁷ The issue of overlapping or competing claims, while not directly relevant to the pending *Motion*, is reviewed because of the latent issue of notice to all affected parties, including those whose claims may be impacted by the United States and Nez Perce Tribe springs or fountains claims.

States' Nez Perce Tribe Report (Private Claims Upon Which Federal Claims are Based), Reporting Areas 19, 22 and 24, Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85, & 86.

Motion to Dismiss

On May 4, 2001, a group calling itself "Objectors," including nearly all those who actually filed *Objections* in consolidated subcase 67-13701, filed a *Motion to Dismiss*.⁸ The Objectors argued the springs or fountains claims the Nez Perce Tribe filed on its own behalf "should now be dismissed, because they are not properly before this court due to the fact that the Nez Perce Tribe did not pay the required filing fee."

The State of Idaho filed a *Response to Objectors' Motion to Dismiss* on May 18, 2001, so it could be heard on the issue. The State agreed with the Objectors that while the Tribe is subject to filing fees under I.C. § 42-1414 when it filed separate claims in its own name,

[L]ittle consequence would flow from dismissal of the Tribe's claims. The Tribe, through its trustee the United States, could still pursue its claims to the fullest extent of the law. And, as the beneficiary of the claims filed on its behalf by the United States, the Tribe would remain a 'claimant' pursuant to the terms of Idaho Code § 42-1401A(1).

The Nez Perce Tribe filed its *Response* on July 5, 2001, and argued the *Motion to Dismiss* is untimely, the act of paying a filing fee is not a jurisdictional event and "it would be manifestly unjust to require the Tribe to pay 'filing fees' that could amount to several million dollars-- an amount that would effectively preclude the Tribe from asserting any of its treaty-reserved water rights in the SRBA."

The United States filed its *Opposition* the same day. It argued the Court lacks jurisdiction to hear the *Motion* because the objectors lack standing and the Tribe has not waived its sovereign immunity. Further, the United States argued IDWR has treated Tribes as immune and has never required filing fees which would "discourage Indian Tribes from

⁸ Those "Objectors" who joined in the *Motion to Dismiss* but who have **not** filed an objection in consolidated subcase 67-13701 are: J.R. Simplot Company, Agwild, Inc., Bar-U, Inc., Buck Creek Ranch, Inc., Glen Dale Farms, Inc., ML Investment Company, Potato Storage, Inc., SSI Foods, Inc., SSI Food Services, Inc., Simplot Cattle Company, Simplot Dairy Products, Inc., Simplot Livestock Company, Simplot Meat Products, Inc., Sunnyslope Orchards Partnership, TM Ranch Company, A&B Irrigation District, Falls Irrigation District, Aberdeen-Springfield Canal Company, Boise-Kuna Irrigation District, New York Irrigation District, Big Bend Irrigation District, City of Ketchum, North Side Canal Company and Milner Irrigation District. Idaho Power Company and John M. Nuttman did not join the *Motion to Dismiss* although they filed *Objections*.

participating in 'litigation critical to their welfare,' irrespective of whether their interests may be adequately represented by the United States."

Hearing on Motion to Dismiss

A hearing on the Objectors' *Motion to Dismiss* was held on July 11, 2001, at the SRBA Courthouse in Twin Falls, Idaho. Peter C. Monson and Frank Wilson appeared for the United States; K. Heidi Gudgell appeared for the Nez Perce Tribe; Scott L. Campbell appeared for the Objectors, part of the "Federal Claims Coalition;" Steven W. Strack appeared for the State of Idaho; John K. Simpson appeared for the Twin Falls and North Side Canal Companies; and Josephine P. Beeman appeared for the City of Lewiston.

At the close of argument, the parties were allowed to lodge supplemental briefing until July 20, 2001, but no one did so. The matter was then deemed submitted for final decision.

Discussion

Statutory Filing Fee Schedule

Idaho Code § 42-1414 contains the fee schedule for filing a notice of claim in the SRBA with IDWR depending on the type of claim and the acreage, power generating capacity or volume of water:

In order to provide an adequate and equitable cost-sharing formula for financing the costs of adjudicating water rights the department of water resources shall accept no notice of claim required under the provisions of section 42-1409, Idaho Code, unless such notice of claim is submitted with a filing fee based upon the fee schedule set forth below. Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the applicant. The fee schedule set forth below applies to adjudication proceedings commenced or enlarged on or after January 1, 1985.

If the fee is more than \$1,000, payment may be spread out over a five year period at 10% interest. However, after a *Director's* Report is filed, if the claimant fails to comply with the payment schedule, the IDWR "director may prohibit . . . the diversion and use of water in satisfaction of a right claimed or decreed in the adjudication...." I.C. § 42-1415.

Development of Law of the Case

All the parties now agree the United States is exempt from filing fees for springs or fountains claims it filed on behalf of the Nez Perce Tribe. That was not the situation when the claims were filed on March 25, 1993.

On June 30, 1989, the United States petitioned the SRBA Court for an order declaring the United States exempt from the filing fee requirements of I.C. § 42-1414 and § 42-1415 and requiring the Director to accept the United States claims without filing fees. On July 7, 1989, then-Presiding SRBA Judge Daniel C. Hurlbutt, Jr., entered an **Order** requiring the IDWR Director to accept the United States claims for lodging, but not filing, without fees. **Order**, Case No. 39576, July 7, 1989.

On May 21, 1991, Judge Hurlbutt denied the United States *Petition*. **Judgment and Order Denying Petition for Writ of Mandamus or, Alternatively, for Declaratory and Injunctive Relief and Motion for an Accounting**, Case No. 39576, May 21, 1991. Even so, on May 19, 1992, Judge Hurlbutt ordered IDWR to “accept all United States water claims, without the payment of a filing fee, until such time as the issue of federal liability for their payment has been fully and finally resolved by a higher court.” **Order Requiring Idaho Department of Water Resources to Accept Federal Claims Without Filing Fee**, Case No. 39576, May 19, 1992.

The Idaho Supreme Court affirmed Judge Hurlbutt’s denial of the United States *Petition* on March 30, 1992:

We hold that the McCarran Amendment [43 U.S.C. § 666] waives sovereign immunity and subjects the United States to the laws of Idaho in the Snake River Basin Adjudication including the payment of filing fees.
Idaho Dept. of Water Resources v. U.S., 122 Idaho 116, 124, 832 P.2d 289, 297 (1992).

However, on May 3, 1993, the United States Supreme Court reversed the Idaho Supreme Court and held the United States did **not** waive its sovereign immunity with respect to payment of filing fees under Idaho water rights legislation requiring all claimants to pay filing fees:

While we therefore accept the proposition that the critical language of the second sentence of the McCarran Amendment submits the United States generally to state adjective law, as well as to state substantive law of water

rights, we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to extract here.

U.S. v. Idaho, Ex Rel. Dir., Dept. of Water Res., 508 U.S. 1, 8, 113 S.Ct. 1893, 1897, 123 L.Ed.2d 563 (1993).

It was over a month after the United States and the Nez Perce Tribe filed their springs or fountains claims that the issue of filing fees was finally decided-- the United States is exempt from paying filing fees. But all three decisions by Judge Hurlbutt, the Idaho Supreme Court and the United States Supreme Court failed to specifically address whether the Nez Perce Tribe was similarly exempt when it filed its own, albeit identical, claims. The McCarran Amendment does not mention Indian tribes.

Early Discussions About Tribal Filing Fees

Early in 1993, before the United States Supreme Court answered the question of United States filing fees, there were preliminary discussions of how the Nez Perce Tribe's own claims would be handled, including its springs or fountains claims:

The Tribe's claims were accepted by the State with the understanding that litigation over the Tribe's obligation to pay filing fees would be 'postponed' until after the United States Supreme Court decided the then-pending issue of whether the United States was obligated to pay filing fees.

State of Idaho's Response to Objectors' Motion to Dismiss, p. 3.

Rebecca Craven, an attorney for the Nez Perce Tribe in 1993, corroborated that "understanding," but with a slight twist:

My expectation and understanding was that if the U.S. Supreme Court found that Idaho could not impose filing fees on the claims filed by the United States on behalf of the Tribe, that would also resolve the filing fee issue as to the claims to be filed by the Tribe.

Affidavit of Rebecca Craven, p. 3; also see Attachment C to *State of Idaho's Response to Objectors' Motion to Dismiss*.

Unfortunately, when Ms. Craven wrote to Idaho Deputy Attorney General Clive Strong on February 9, 1993, seeking confirmation of their "understanding," her letter was not answered. See Exhibit A to *Affidavit of Rebecca Craven*. It is evident there was no meeting of the minds between the State and the Tribe on the issue of filing fees.

Sovereign Immunity

Early in the case, no one seriously argued the United States waived its sovereign immunity with respect to payment of filing fees merely by filing claims in the SRBA. Rather, the State of Idaho argued the McCarran Amendment waived the United States' sovereign immunity and the Idaho Supreme Court agreed. However, the United States Supreme Court reversed and held the McCarran Amendment did **not** waive United State sovereign immunity on the issue of Idaho's filing fees.

In the present case, the Objectors argued the Nez Perce Tribe waived its sovereign immunity by filing its own springs or fountains claims and therefore, must pay filing fees:

When the Nez Perce Tribe filed claims on its own behalf in the Snake River Basin Adjudication, that action was analogous to either filing a lawsuit, or to intervening in an existing suit. Therefore, the Nez Perce Tribe waived its sovereign immunity in the Snake River Basin Adjudication.

Objectors' *Memorandum in Support of Motion to Dismiss*, p. 14.

The Objectors reasoned that since the Nez Perce Tribe failed to pay the mandatory filing fee, the proper remedy is for the SRBA Court to dismiss its springs or fountains claims.

Jurisdiction Over Nez Perce Tribe Claims

The SRBA Court acquired jurisdiction to hear and decide the Nez Perce Tribe springs or fountains claims by virtue of the McCarran Amendment. Since 1976, it is axiomatic that state courts have jurisdiction over Indian water rights under the McCarran Amendment. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). It does not matter whether the United States filed the claims on behalf of the Tribe or the Tribe filed the claims on its own behalf. *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). Therefore, arguments concerning sovereignty are irrelevant in the context of general stream adjudications such as the Snake River Basin Adjudication.

The fact the Nez Perce Tribe did not pay filing fees for their own springs or fountains claims does not affect the SRBA Court's jurisdiction. In *Massey v. Stillman*, 128 Idaho 736, 918 P.2d 605 (Idaho App., 1996), the Idaho Court of Appeals was asked whether a party's

failure to prepay the appropriate filing fee invalidated the district court's grant of a summary judgment. The Court answered, no:

The alleged failure of certain parties to prepay the appropriate filing fee does not, however, void the action taken by the county official, interfere with the jurisdiction of the district court or this Court, or invalidate the summary judgment.

Massey, 128 Idaho at 738, 918 P.2d at 607.

Statutory Remedies For Non-Payment of Filing Fees

Idaho Code § 42-1414 provides IDWR with two options in the event of non-payment of filing fees in the SRBA. If a notice of claim is submitted without the appropriate flat fee, IDWR can refuse to accept the claim. Or if the claimant fails to pay the variable water use fee, IDWR can reject and return the notice of claim to the claimant. Of course, here, IDWR was ordered to file the Nez Perce Tribe claims without filing fees "until such time as the issue of federal liability for their payment has been fully and finally resolved by a higher court."

Order Requiring Idaho Department of Water Resources to Accept Federal Claims Without Filing Fee, Case No. 39576, May 19, 1992.

In this situation, since the *Notice of Filing of Nez Perce Federal Reserved Rights Claims and Maps* (director's report) has already been filed, the sole statutory remedy available is for IDWR is to "prohibit . . . the diversion and use of water in satisfaction of a right claimed or decreed in the adjudication..." I.C. § 42-1415. Such a remedy would certainly be contested by the United States and the Tribe given the federal law basis of its claims.

In any event, it seems clear that dismissal of the springs or fountains claims filed by the Nez Perce Tribe on its own behalf is not an appropriate remedy. Besides, as the State of Idaho pointed out, little consequence would flow from dismissal of the Tribe's claims. The United States will continue to pursue its claim for the benefit of the Tribe and the Tribe would remain a "claimant" in the SRBA under I.C. § 42-1401A(1).⁹

⁹ During the July 11, 2001 hearing on the *Motion to Dismiss*, counsel for the United States agreed if the United States and Tribe springs or fountains claims are proven, there will be only one decree in the name of the United States for the benefit of the Tribe for each spring or fountain. The Tribe's claims would then be withdrawn or dismissed.

Order

THEREFORE, IT IS ORDERED that the Objectors' *Motion to Dismiss* is **denied**.

DATED August 10, 2001.

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO DISMISS was mailed on August 10, 2001, with sufficient first-class postage prepaid to the following:

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