

**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 Subcase No. 92-00080
) (Nez Perce Tribe Multiple-Use Claims)
)
) **MEMORANDUM DECISION AND**
) **ORDER DISMISSING OBJECTIONS IN**
) **PART WITH PREJUDICE AND IN PART**
) **WITHOUT PREJUDICE**
)
)

Dismissing with prejudice the objections of Mardell Edwards, Mark Jackson, and Claude Simmons to the Nez Perce Tribe’s specific multiple-use claims filed pursuant to the Snake River Water Rights Agreement of 2004. General objections to terms of settlement agreement are dismissed without prejudice and may be raised in proceedings relating to approval of consent decree.

Appearances

Ms. Heidi Gudgell, Senior Staff Attorney, Nez Perce Tribe Executive Committee, for the Nez Perce Tribe.

Ms. Vanessa Boyd-Willard and Mr. Frank Wilson, United States Department of Justice, for the United States in its capacity as trustee for the Nez Perce Tribe.

Mr. Steven Strack, Deputy Attorney General, for the State of Idaho.

Mr. Claude Simmons, *pro se*.

Mr. Mark Jackson, *pro se*.

Ms. Mardell Edwards did not appear.

**MEMORANDUM DECISION AND ORDER DISMISSING OBJECTIONS IN PART WITH PREJUDICE
AND IN PART WITHOUT PREJUDICE**

I.

PROCEDURAL BACKGROUND

The Nez Perce Tribe (the “Tribe”) and the United States acting on behalf of the Tribe filed claims with the Idaho Department of Water Resources (“IDWR”) for three categories of water rights which included the 101 multiple-use claims which are the subject of this decision, non-consumptive or instream flow claims, and springs or fountains claims. The instream flow claims were filed on March 24, 1993. On March 31, 1994, abstracts of the instream flow claims were reported by IDWR and litigation over those claims began. On December 22, 1998, at the request of the parties, the court entered an *Order of Mediation and Appointment* in the consolidated instream flow subcase “for the purposes of the mediation of the claims that are the subject of these consolidated subcases, along with such other matters that necessarily relate to the resolution of those claims.” The instream flow claims proceeded on a dual track—litigation and mediation. On March 9, 1999, abstracts of the springs or fountains claims were reported. These claims were referred to a special master and continued on a separate litigation track. On November 10, 1999, the court (Judge Barry Wood presiding) granted motions for summary judgment of the State and others concluding 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, Irrigation Districts, and Other Objectors Who Have Joined or Supported the Various Motions*, Subcase 03-10022 (November 10, 1999) at 47. The Tribe and the United States appealed. On June 3, 2003, while the appeal was pending, then SRBA Presiding Judge Roger Burdick ended the court-ordered mediation but the parties continued to negotiate. On May 21, 2004, a *Mediator’s Term Sheet* encompassing all three categories of claims as well as other matters not specifically within the jurisdiction of this court was lodged with the court. Abstracts of the multiple-use claims had yet to be reported. The *Term Sheet* was approved by the United States Congress, the Idaho Legislature and the Nez Perce Tribal Executive Committee. The *Term Sheet* and related agreements are sometimes referred to as the “Snake River Water Rights Agreement of 2004” or the “Nez Perce Settlement Agreement” (The “Agreement”). So far as relevant to the multiple-use claims and the objections to those claims now before the court, the

Agreement provided for 101 federal reserve claims for a total of 50,000 acre feet per year to serve the Tribe's multiple use water needs. On June 29, 2005, the parties to the *Agreement* filed a "Joint Motion for Approval of Consent Decree, Entry of Final Partial Decrees, and Entry of Scheduling Order." This court then entered a **Scheduling Order and Notices of Hearing, Re: Implementation of the Nez Perce Settlement Agreement** (August 3, 2005) which established the following relevant deadlines:

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/initial hearing on contested rights.

Forty-three timely objections were filed to the Tribe's multiple use claims. On January 5, 2006, the United States and the Tribe filed a *Joint Motion to Dismiss Objections*. After the initial hearing on contested rights the court determined that only eleven of the 43 objections were filed by SRBA claimants. All but those eleven objections were then dismissed because the objectors, not having a claim to a water right in the SRBA, did not have standing in the SRBA. **Order Dismissing Objections with Prejudice** (January 24, 2006); I.C. § 42-1401A (1); *Fort Hall Water Users Association v. United States*, 129 Idaho 39, 921 P.2d 739 (1996). A hearing was held in Lewiston, Idaho on April 20, 2006 on the *Joint Motion to Dismiss Objections* filed by the Tribe and the United States. On May 8, 2006, this court entered an **Order** dismissing all of the remaining objections except for the objections of Mardell Edwards, Mark Jackson and Claude Simmons. The court also requested additional briefing from the parties regarding these remaining objections. **Order Dismissing Certain Objections for Failure to Oppose Motion to Dismiss or Comply with Court Order; Order Requesting Additional Briefing from Remaining**

Objectors. (May 8, 2006). Additional briefing was received from the remaining three objectors as well as a joint response brief from the Tribe and the United States.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on August 10, 2006. The parties did not request additional briefing nor does the court require any. The matter was, therefore, submitted for decision on the next business day, August 11, 2006.

III.

THE CLAIMS

The Tribe has filed 101 multiple-use claims based upon a federal reservation. *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908). The claimed priority date is 1855 which corresponds with the date the reservation was established. The water is to be used on lands held by the United States in trust for the Tribe, on lands owned by the Tribe in fee, and on allotted lands held in trust or under restrictions against alienation. The cumulative total of the claims is 50,000 acre feet per year. The claims include both surface and groundwater sources. The majority of the claims come directly from the Clearwater River (including the mainstem and the North and South Forks), or groundwater sources that are hydraulically connected to the Clearwater. Most, but not all of the claims contain provisions that protect existing water rights. Surface source claims not diverted from the mainstem, North Fork and South Fork of the Clearwater River, or hydraulically connected groundwater sources, and those previously decreed rights in the *Siegrist Degree*, contain a provision which protects priorities established prior to April 20, 2004, by subordinating the Tribe's right. The claims provide:

Notwithstanding the Priority Date of this water right, the Tribe and the United States shall exercise this right in a manner that ensures persons lawfully diverting water prior to April 20, 2004, will continue to receive their full entitlement under state law.

All of the Tribe's multiple-use claims contain a provision which protects existing water rights from changes in points of diversion and places of use outside of the relevant sub-basin. This is significant because transfers of tribal rights according to the terms of the *Agreement* are to be administered by the Tribe in accordance with a Tribal Water Code which has not yet been developed. This provision will prevent inter-basin transfers affecting existing rights.

IV. THE OBJECTIONS

The remaining objectors, Mardell Edwards, Mark Jackson and Claude Simmons, have standing as parties in the SRBA because they have claims for water rights in the SRBA. Mardell Edwards has the following relevant water rights or claims: 85-10644 for .02 cfs, from an unnamed stream, tributary to Threemile Creek; 85-04351A for .016 cfs from Butcher Creek tributary to the South Fork Clearwater River; 85-04352 for .02 cfs from a spring tributary to Mill Creek; 85-04354 for .02 cfs from a spring tributary to Mill Creek. Mark Jackson has groundwater right 84-12161 for .06 cfs. Claude Simmons has groundwater right 84-10842 for .04 cfs. The three objectors initially objected to the Tribe's claims on similar grounds. Mardell Edwards asserted that the water rights should not exist because the Nez Perce reservation was diminished. She referred to Judge Wood's *Order on Motions for Summary Judgment*. Claude Simmons also stated that the Nez Perce water rights should not exist because the reservation has been diminished. He attached to his objection references to various cases and to Judge Wood's *Order on Motion for Summary Judgment*. Mark Jackson's objection stated that the Nez Perce water right should not exist. He did not state a reason for the objection but he cited a number of cases in support of his objection which disclose that his objection was based on the same argument as that asserted by Ms. Edwards and Mr. Simmons: diminishment of the reservation. *E.g., City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S.Ct. 1478 (2005); *Hagen v. Utah*, 510 U.S. 399, 421, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir., 1999).

At a hearing held on January 17, 2006 the court allowed briefing from the remaining objectors. Ms. Claude Simmons filed a timely brief asserting that disputes exist as to the following issues: The boundaries of the reservation; the priority dates of the claimed water rights; whether the Tribe can put 50,000 acre feet to beneficial use; and whether the Snake River Water Rights Act of 2004 might place non-Indian successors-in-interest to allotments under the jurisdiction of a tribal court. Neither Ms. Edwards nor Mr. Jackson filed briefs but all three of the remaining objectors appeared at the hearing on April 20, 2006. After that hearing, the court requested additional briefing limited as follows:

Based on the foregoing, each remaining objector is hereby ordered to identify specifically which of the 101 multiple-use claims to which their objection is intended to apply and the specific basis for the objection, including how the claim being objected to potentially impacts the water right of the objector and specifically whether or not the multiple use claim being objected to and the objector's water right are diverted from the same source. Finally, if it is contended a multiple-use claim potentially affecting an objector's water right should not exist then provide specifics as to why it should not exist.

All three of the objectors filed timely briefs in response. Mr. Simmons asserts that his water right (84-10842) is hydraulically connected to Tom Taha Creek and that the Tribe's claims from the same source will injure him. Water right 84-10842 is a groundwater right to .04 cfs with a domestic purpose of use and a 1976 priority date. He objects to Nez Perce Claim Nos. 84-12211 and 84-12207. Claim No. 84-12211 is a claim for groundwater within the Tom Taha Creek subbasin. The claim is for 17 A.F.Y. This claim contains the subordination provision:

Notwithstanding the Priority Date of this water right, the Tribe and the United States shall exercise this right in a manner that ensures persons lawfully diverting water prior to April 20, 2004, will continue to receive their full entitlement under state law.

Nez Perce Claim No. 84-12207 is a claim for 23 A.F.Y. from surface water sources within the Tom Taha Creek subbasin. This claim contains the same subordination provision. Both multiple- use claims also contain a provision protecting existing rights, notwithstanding the priority date, from changes in points of diversion or places of use outside of the subbasin. This provision provides in relevant part:

Notwithstanding the Priority Date of this water right, changes in Points of Diversion or Place of Use to locations outside of this subbasin shall not injure the legal entitlement to water of those persons lawfully diverting water prior to the time of the change to the Points of Diversion or Place of Use.

In addition to Mr. Simmons' objections based upon actual injury to his water right he asserts the following:

1. Granting a decree of Claim Nos. 84-12211 and 84-12207 would be premature because there is no tribal water code.
2. Claim Nos. 84-12211 and 84-12207 state that changes in point of diversion and place of use may occur in violation of his equal protection rights.

3. The purpose of use element in Claim Nos. 84-12211 and 84-12207 violates Art. XV, §1 of the Idaho Constitution and deprives him of due process.
4. The 1855 priority date of Claim Nos. 84-12211 and 84-12207 in conjunction with the subordination provision violates the prior appropriation doctrine.
5. He may be forced to litigate future water right disputes in Tribal Court.
6. Tribal fee land should not be included in the places of use in Claim Nos. 84-12211 and 84-12207.

Mr. Jackson owns water right No. 84-12161 which is a decreed groundwater right for .06 cfs for domestic and stockwater purposes with a 1998 priority date. Mr. Jackson asserts that Nez Perce Claim Nos. 84-12214 and 84-12213 should not be decreed for the following reasons:

1. The reservation boundaries have changed.
2. The purpose for which the reservation was formed did not include the uses claimed by the Tribe.
3. There is no tribal water code.
4. The agreement provides that any land the Tribe may have purchased since 1855 would receive a priority date of 1855 which violates the Idaho Constitution and is not fair to Mr. Jackson.
5. The Tribe would administer its water rights pursuant to the Tribal Water Code and Jackson would be forced to litigate water disputes in the Tribal Court.
6. The *Agreement* is vague and open to different interpretations.
7. Mr. Jackson has recently acquired two parcels of property adjoining the property described in his water right. If he applies for a new water right on that property it will have a priority date after April 20, 2004 and will be junior to the Tribe's rights. He questions why the Tribe should receive an 1855 priority date on fee lands acquired after 1855 but he will receive a junior priority date.

Ms. Edwards failed to state which of the Tribe's claims she objects to. Her brief refers to the following objections:

1. She accepts the fact that the Tribe probably has a federal reserve water right but she asserts that the reservation has been diminished and that the Tribe has received compensation.

2. 50,000 A.F.Y. is excessive for the amount of land now held in trust for the Tribe or owned in fee by tribal members.
3. The water right claims should not be granted until the reservation boundaries have been determined. She cites Judge Wood's *Order on Motions for Summary Judgment* and *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir., 1999) in support of this argument.

Ms. Edwards' has the following relevant water rights or claims: 85-10644, .02 cfs, 1918 priority date, unnamed stream, tributary to Threemile Creek; 85-04351A, .016 cfs, 1949 priority date, Butcher Creek tributary to the South Fork Clearwater River; 85-04352, .02 cfs, 1952 priority date, spring tributary to Mill Creek; 85-04354, .02 cfs, 1952 priority date, spring tributary to Mill Creek. Of the Nez Perce Tribe's claims that might potentially impact Ms. Edwards' claims, the court notes that Claim Nos. 85-15560 (surface water within the Threemile Creek subbasin) and 85-15457 (surface water within the Butcher Creek subbasin) have the subordination provision.

V. ISSUE PRESENTED

The Tribe and the United States assert that the objections should be dismissed pursuant to I.C.R.P 12(b)(6), failure to state a claim upon which relief can be granted. The Tribe and United states assert that even if the allegations made in the objections were true, none of the water rights or claims held by any of the objectors would be affected by any of the Tribe's multiple-use claims.

VI. DISCUSSION

Although the negotiations resulting in the *Snake River Water Rights Agreement of 2004* originated with the Nez Perce Tribe's instream flow claims, the scope of negotiations expanded to include the multiple-use claims. Although the parties to the negotiation agreed on the claims, abstracts of the claims had yet to be reported by IDWR. As such, the multiple-use claims initially came before the Court as part of the *Joint Motion for Approval of Consent Decree*.

Parties to the adjudication, who did not become parties to the proceedings pertaining to the instream flow claims, had yet to have the opportunity to object to the multiple-use claims. In an effort to avoid deviating from established SRBA procedures by requiring parties with rights affected by the multiple-use claims to raise individual objections as part of the proceedings on the *Joint Motion for Approval of Consent Decree*, the Court instead ordered that the multiple-use claims be reported to afford parties to the adjudication the opportunity to file objections in accordance with SRBA procedures.¹

Most of the objections pertained generally to the *Agreement* and not to individual multiple-use claims affecting existing claims. For example, the objections raised issues such as reservation diminishment, objections to the total quantity reserved, the priority date, purposes of use and the vagueness of the *Agreement*. Although the multiple-use claims have a combined quantity limitation of 50,000 A.F.Y, the claims consist of 101 separate claims with diversions from many different surface and groundwater sources throughout a geographic region. As previously discussed, most of these claims are subordinated to water rights existing prior to April 20, 2004.

In providing an opportunity to object to the multiple-use claims it was not the intent of the Court to address issues pertaining generally to the terms of the *Agreement* unless a specific term necessarily affected an individual water right claim of an objector. Rather parties having generalized objections to the *Agreement* will have the opportunity to be heard in conjunction with proceedings on the *Joint Motion for Approval of Consent Decree*. In an effort to segregate issues of a generalized nature from issues pertaining to specific water rights, the Court ordered that the objectors identify specific multiple-use claims affecting their water right claims. The rationale being that an objection to a multiple-use claim not hydraulically connected to a water right of the objector essentially amounts to an objection of a generalized nature and is therefore more appropriately addressed in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*.

¹ For purposes of case management and the filing of objections, the claims were initially consolidated with the intent to review the objections and then determine which claims and/or issues could remain consolidated for resolution and which would have to proceed independently.

A party to the SRBA has standing to object to a water right even though the water right may not cause injury-in-fact to the objector's right.² The same is true for a party's ability to enter a subcase through the filing of a motion to alter or amend. Ultimately, principles of law may be at issue or law-of-the-case may be established which could affect an objector's water right claim. A general adjudication would come to a standstill if the Court were required to make findings of direct injury in fact or law as prerequisite to proceeding on every objection or motion to alter or amend. Such a prerequisite could also raise issues with respect to compliance with the McCarran Amendment because a general adjudication is treated as a single lawsuit.

In this case, the claims come to the Court pursuant to a comprehensive settlement. Parties to the adjudication have nonetheless now had the opportunity to object to claims which may affect their water rights or claims. However, to the extent the multiple-use claims do not affect a right or claim of an objector the Court can find no legal basis for litigating issues in conjunction with the objection solely for the purpose of attacking the terms of the *Agreement*. Implicit in the concept of a settlement is the acknowledgment of a compromise. Accordingly, because legal and factual issues remain judicially undetermined there may ultimately very well remain colorable differences of opinion as to whether the terms as agreed are precisely in accordance with historical fact and law. That is the nature of a settlement. That being said the Court is not required to "rubberstamp" any settlement agreement and is ultimately charged with duty of reviewing any settlement to ensure its terms are within the bounds of the law, albeit recognizing there has not been an adjudication on the merits. In *Big Lost River Irr. Dist. v. Zollinger*, 83 Idaho 401, 363 P.2d 706 (1961), the Idaho Supreme Court stated:

² *SRBA Administrative Order 1 (AO1)* 2.d defines "claimant as any person who has filed a claim to the use of water in the SRBA. *AO1* 2.q defines party to the adjudication as "any claimant as defined in I.C. §§ 42-1401A(1) and (6)." Idaho Code § 42-1412(1) provides that "any claimant who desires to object to a water right, or to a general provision in the director's report, shall file an objection with the district court within the time specified in the filing of the director's report." Idaho Code 42-14101A(1) defines "claimant" as "any person asserting ownership of rights to the use of water within the state of Idaho." Idaho Code § 42-1401A(6) defines "party" as "any person who is a claimant or any person who is served or joined." In *Fort Hall Water User's Ass'n v. U.S.*, 129 Idaho 39, 921 P.2d 739 (1996), the Idaho Supreme Court specifically held that a claimant as defined by I.C. § 42-1401A(1) is a "party" and therefore has standing to file an objection. *Id.* at 41-42, 921 P.2d at 741-42. Objectors not meeting the definition of claimant do not have standing. *Id.* The SRBA has consistently applied this reasoning. See e.g. *Memorandum Decision and Order on Cross-Motions for Summary Judgment and Notice of Status Conference (91-63 Ownership of Water Rights Between Irrigation Entities and Bureau of Reclamation)* (September 2, 2004). Even though parties have the standing to file an objection they are still nonetheless governed by I.R.C.P. 11 which preclude the filing of a pleading for any improper purpose such as to harass, cause unnecessary delay or needless increase in the cost of litigation. To the extent an objector cannot demonstrate an injury-in-fact or in law to his water right, issues regarding the motive for the filing of the objection are raised.

It is a well settled proposition of law that litigants may stipulate concerning their respective rights involved in the case and are bound thereby where the agreements contained in the stipulation are not obtained through fraud, or contrary to law or public policy, and that the courts will enforce the same.

Id. at 407-08 (quoting *Evans v. Raper*, 185 Okl. 426, 93 P.2d 754, 755). Further:

Any matter which involves the individual rights or obligations of the parties inter sese may properly be made the subject of a stipulation between them, provided the stipulation is not illegal, unreasonable, or against good morals or sound public policy, and does not interfere with the general powers, duties, and prerogatives of the court.

Id. at 408 (quoting *City of Los Angeles v. Cole*, 28 Cal.2d 509, 170 P.2d 928; 83 C.J.S. *Stipulations* § 10a, p.12).

Consistent with this obligation, the Court will conduct separate proceedings to allow parties to be heard on the terms of the proposed consent decree.

1. Mr. Simmons' objections to multiple-use claims 84-12211 and 84-12207.

In applying the foregoing reasoning to the objections to specific multiple-use claims, Mr. Simmons identified multiple-use claims 84-12211 and 84-12207 as being hydraulically connected with his domestic groundwater right 84-10842 within the Tom Taha Creek subbasin. Both 84-112211 and 84-12207 contain the subordination provision protecting lawful diversions of water rights existing prior to April 20, 2004. Mr. Simmons' 84-10842 right has a 1976 priority and is therefore protected by the subordination provision. The claims also contain the provision against inter-basin transfers resulting in injury to existing rights. Based on the foregoing, the Court finds that Mr. Simmons has no claims potentially impacted by any of the multiple-use claims.

Mr. Simmons also argues that issuing decrees for claims 84-12211 and 84-12207 would be premature because there is no tribal water code. He also argues that he may be forced to litigate future water right disputes in Tribal Court. The fact that issues may remain regarding the administration and enforcement of a water right is not probative as to whether or not the water right exists. The State of Idaho acting through IDWR will be responsible for administering Mr. Simmons' right. The Tribe will be responsible for administering its rights. Issues pertaining to specific intergovernmental mechanisms, if any, between the Tribe and the

State of Idaho to ensure mutual compliance and enforcement of Tribal and state-law based water rights can be raised in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*.

Mr. Simmons also argues that changes in the point of diversion and place of use to claims 84-12211 and 84-12207 may occur in violation of his equal protection rights. The Court disagrees. Mr. Simmons' right is protected by the subordination provision. The Tribe will only be permitted to exercise its rights in a manner which does not interfere with Mr. Simmons' right. The claims also include provisions precluding inter-basin transfers injuring existing rights.

Mr. Simmons also argues that the purpose of use element in claims 84-12211 and 84-12207 violates Art. XV, §1 of the Idaho Constitution and deprives him of due process. As previously determined no actual injury will result to Mr. Simmons groundwater right irrespective of the purpose of use. However, if Mr. Simmons wishes to contest the purpose of use he may do so in conjunction with the proceedings on *Joint Motion for Approval of Consent Decree*.

Mr. Simmons also raised the argument that the 1855 priority date of claims 84-12211 and 84-12207 in conjunction with the subordination provision violates the prior appropriation doctrine. As previously discussed, Mr. Simmons' groundwater right is protected by the subordination provision and therefore not affected by the 1855 priority. General arguments pertaining to the priority date for a federal reserved water right may be raised in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*.

Finally, Mr. Simmons argues that Tribal fee land should not be included in the places of use for claims 84-12211 and 84-12207. No judicial finding has been made regarding whether the places of use for 84-12211 and 84-12207 are located on fee or trust land. However, because both rights are subordinate to Mr. Simmons' right his right remains unaffected whether the places of use are located on either Tribal or fee land. Although federal reserved water rights do not typically apply to after-acquired or ceded lands the places of use for these claims is pursuant to a settlement compromise. See ***Order Disallowing Uncontested Federal Reserved Water Right Claims (Mountain Home AFB: 61-11783, 61-11784 and 61-11785 (Federal Reserved Water Rights for Mountain Home AFB disallowed) (April 6, 2001)***. Any issues pertaining to the ability of the Court to decree federal reserved rights on fee land pursuant to a settlement may

be raised in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*.

2. Mr. Jackson's objections to multiple-use claims 84-12214 and 84-12213.

Mr. Jackson identified claims 84-12214 and 84-12213 as being hydraulically connected to his water right. Mr. Jackson has water right 84-12161 which is a decreed groundwater right for .06 cfs for domestic and stockwater purposes with a 1998 priority date located within the Clearwater subbasin of basin 84. Multiple-use claim 84-12214 is a groundwater claim for 152 AFY to groundwater sources within the Clearwater River subbasin of Basin 84 that are not hydraulically connected with the Clearwater River. The claim also contains the subordination provision protecting existing rights. The claim also contains the following provision pertaining to groundwater sources in the Clearwater subbasin of Basin 84 that are hydraulically connected to the Clearwater River.

To the extent that groundwater sources within the Clearwater River subbasin of Basin 84 are hydrologically connected to the Clearwater River, diversions from those sources shall be considered to be exercise of water right 84-12213 and not a part of this water right. The presumptions regarding connectivity in water right 84-12213 apply to determinations of whether a diversion is part of this water right.

Multiple-use claim 84-12213 is a 2691 AFY claim to surface water sources within the Clearwater River subbasin of Basin 84 and hydraulically connected groundwater sources. The claim does not contain the subordination provision. The claim also contains the following provision:

For groundwater wells in the vicinity of the Clearwater River, a hydrological connection to the Clearwater River is presumed when well levels respond to changes in the flow of the Clearwater River. Further, wells within 500 feet of the ordinary high water mark or within 200 feet of the 100-year flood plain of the Clearwater River and drilled and sealed to a depth below the bed of the Clearwater River are presumed to be connected to the Clearwater River. These presumptions do not preclude demonstration of a hydrological connection using other methods.

The issue is whether Mr. Jackson's right may be affected by either multiple-use claim 84-12214, which contains the subordination provision, or by multiple-use claim 84-12213, which does not contain a subordination provision. At the hearing counsel for the State of Idaho

explained that because of the abundance of unappropriated available water, it was determined by the parties to the *Agreement* that a subordination provision was not necessary for the 7 mainstem claims as the Tribe's claim would not affect other rights. Mr. Jackson stated at the hearing that the well for his right is more than 2 miles from the Clearwater River and more than 1000 feet in elevation above the river. He also stated that his well level does not respond to changes in river flows. Based on these representations the presumption of connectivity provision of Tribal wells affecting Mr. Jackson's right would not apply. Accordingly, any Tribal well affecting Mr. Jackson's right would fall under multiple-use claim 84-12214, which is subordinated to Mr. Jackson's right. In order to resolve Mr. Jackson's objection by making the finding that any hydraulically connected Tribal multiple-use claims are subordinate to Mr. Jackson's right, the Court makes the specific finding that Mr. Jackson's groundwater right is not hydraulically connected to the Clearwater for purposes of defining and administering multiple-use claims 84-12213 and 84-12214. **The effect of this finding is that a Tribal use alleged at some point in the future to be affecting Mr. Jackson's water right 84-12161 shall be administered according to the subordination provisions of 84-12214. This avoids any future concerns regarding whether Mr. Jackson must litigate whether a Tribal use falls under the provisions of 84-12214 or 84-12213 and permits the Court to make the finding that all multiple-use claims potentially affecting Mr. Jackson's right fall under multiple-use claim 84-12214 and are subject to the subordination provisions.**

Mr. Jackson also raised the same issues raised by Mr. Simmons' which this Court already addressed as well as couple of issues not previously addressed. Mr. Jackson argues that the boundaries of the reservation have changed. The Court need not address the issue of the boundaries of the reservation for purposes of decreeing the multiple-use claims. As discussed previously, although federal reserved water rights do not typically apply to after-acquired or ceded lands the places of use for these claims is pursuant to a settlement compromise. Any issues pertaining to the ability of the Court to decree federal reserved rights on fee land pursuant to a settlement may be raised in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*. To the extent Mr. Jackson intends to litigate the boundaries of the reservation for some other purpose that would be beyond the scope of this Court's jurisdiction.

Mr. Jackson also argues that the *Agreement* is vague and open to different interpretations. This argument goes directly to the *Agreement* and may be raised in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*.

Finally, Mr. Jackson argues that he has recently acquired two parcels of property adjoining the property described in his water right. If he applies for a new water right on that property it will have a priority date after April 20, 2004 and will be junior to the Tribe's rights. He questions why the Tribe should receive an 1855 priority date on fee lands acquired after 1855 but he will receive a junior priority date. Mr. Jackson's existing rights are protected. Mr. Jackson is not a party to the adjudication *viz-a-viz* claims yet to be filed. Any concerns regarding the effect multiple-use claims may have on future appropriations may be raised in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*. Accordingly, based on the foregoing, the Court finds that Mr. Jackson has no claims potentially impacted by any of the multiple-use claims.

3. Ms. Edwards' objections to multiple-use claims 85-15560 and 85-15457.

Although Ms. Edwards failed to appear at the hearing, the Court nonetheless required the parties to address the issues raised in her briefing. Although Ms. Edwards also failed to identify which specific multiple-use claims potentially affect her water rights, the Court identified the multiple-use claims on the same sources as her rights. Ms. Edwards has the following water rights: Water right 85-10644 has a 1918 priority for .02 cfs with a source described as an unnamed stream, tributary to Threemile Creek; water right 85-04351A has a 1949 priority for .016 cfs with a source described as Butcher Creek tributary to the South Fork Clearwater River; water right 85-04352 has a 1952 priority for .02 cfs with a source described as spring tributary to Mill Creek; and water right 85-04354 has a 1952 priority for .02 cfs with a source described as spring tributary to Mill Creek.

The Court identified two multiple-use claims potentially impacting her water rights. Multiple-use claim 85-15560 is for 33 AFY from surface water sources within the Threemile Creek subbasin and 85-15457 is for 15 AFY from surface sources within the Butcher Creek subbasin. However, both claims contain the subordination provision. The Court also identified multiple-use claim 85-15595 which is from all surface and hydraulically connected groundwater

sources in the South Fork Clearwater basin in Basin 85. Because 85-15595 claims a source from the mainstem it does not contain the subordination provision. The Court noted that Mill Creek was tributary to the South Fork of the Clearwater and the claim could be interpreted to apply to tributary surface sources. Counsel for the State of Idaho clarified that the unsubordinated mainstem claims are only intended to apply to the mainstem and connected groundwater not tributary surface sources. Further, that tributary surfaces sources were addressed in separate claims all containing subordination provisions.

Ms. Edwards also raised the same issues as raised by both Mr. Simmons and Mr. Jackson of which this Court previously addressed. Ms. Edwards will have the opportunity to raise these issues in conjunction with the proceedings on the *Joint Motion for Approval of Consent Decree*. Accordingly, the Court finds that Ms. Edwards has no claims potentially impacted by any of the multiple-use claims.

VII. ORDER

Based on the foregoing discussion the following are hereby ordered:

1. IT IS HEREBY ORDERED that the objections filed by Mr. Simmons to multiple-use claims 84-12211 and 84-12207 are **dismissed with prejudice**. All other objections pertaining to the *Agreement* are **dismissed without prejudice** and may be raised again in conjunction with the forthcoming proceedings to be held on the *Joint Motion for Approval of Consent Decree*.
2. IT IS FURTHER HEREBY ORDERED that the objections filed by Mr. Jackson to multiple-use claims 84-12214 and 84-12213 are **dismissed with prejudice**. It is further ordered that it be clarified, through an amendment to the partial decree for water right 84-12214 or other means acceptable to the parties, that Mr. Jackson's groundwater right be administered in conjunction with the subordination provisions of 84-12214 as set forth in the *Memorandum Decision*. All other objections pertaining to the *Agreement* are **dismissed without prejudice** and may be raised again in conjunction with the forthcoming proceedings to be held on the *Joint Motion for Approval of Consent Decree*.
3. IT IS FURTHER HEREBY ORDERED that the objections filed by Ms. Edwards are **dismissed with prejudice**. Her objections pertaining to the *Agreement* are **dismissed without**

prejudice and may be raised again in conjunction with the forthcoming proceedings to be held on the *Joint Motion for Approval of Consent Decree*.

4. IT IS FURTHER HEREBY ORDERED that the clerk of the SRBA court is instructed to place Mark Jackson, Claude Simmons and Mardell Edward on the certificate of mailing for the forthcoming proceedings on the *Joint Motion for Approval of Consent Decree*.

IT IS SO ORDERED

DATED September 5, 2006

 /s/ John Melanson
JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication