

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

<b>In Re SRBA</b>	)	<b>Consolidated Subcase 03-10080</b>
	)	<b>(Shoshone-Bannock Tribes)</b>
	)	
<b>Case No. 39576</b>	)	<b>ORDER DISMISSING WITH PREJUDICE</b>
	)	<b>SHOSHONE-BANNOCK TRIBES'</b>
	)	<b>INSTREAM FLOW CLAIMS, I.R.C.P. 41(a)(2)</b>
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**I.  
PROCEDURAL BACKGROUND**

1. This matter came before the Court pursuant to a *Motion to Withdraw Shoshone-Bannock Tribes' Instream Flow Claims in Consolidated Subcase No. 03-10080*, filed by the Shoshone Bannock Tribes ("Tribes") on April 23, 2002.

2. Consolidated subcase 03-10080 consists of 1083 off-reservation instream flow claims filed by the Tribes for fish habitat on stream reaches in the Salmon River Basin, the Clearwater Basin and the Snake River Basin below Hells Canyon Dam. *See Amended Case Management Order: Federal and Tribal Non-Consumptive (Instream Flow) Claims*, (April 1, 1996). Exhibit A to this *Order* lists individually each of the 1083 claims by claim number. The subject claims are for treaty-reserved rights based on the Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, 674-75.<sup>1</sup> The claims were initially filed in 1993 by the United States on behalf of

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<sup>1</sup> Article IV of the Treaty reserved to the Tribes the right outside the reservation "to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

the Tribes. The claims were later adopted by the Tribes and are being prosecuted by the Tribes on their own behalf, rather than the United States on behalf of the Tribes. *See Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1478 (1995).

3. The Tribes previously entered into the 1990 Fort Hall Indian Water Rights Agreement with the State of Idaho, the United States and certain other water users. The Agreement settled all water right claims filed on behalf of the Tribes to water rights in the upper Snake River Basin (upstream from Hells Canyon Dam). The Agreement was ratified via a *Consent Decree* issued by Judge Hurlbutt and filed in the SRBA on August 2, 1995. The Agreement reserved unto the Tribes the right to assert federal reserved water right claims for instream flows on stream reaches in the Salmon River Basin, the Clearwater Basin and the Snake River Basin below Hells Canyon Dam. Consolidated subcase 03-10080 is comprehensive of these instream flow claims.

4. This Court set April 15, 2002, as the deadline for filing motions for summary judgment and other dispositive motions in the consolidated subcase. A motion for summary judgment was timely filed by a group of objectors. Following completion of the briefing schedule, the matter was scheduled to be argued on August 20, 2002. Prior to the expiration of the deadline, the State of Idaho and the Tribes notified the Court of a pending settlement agreement that would result in the withdrawal and dismissal of the Tribes' claims. The Court temporarily stayed the proceedings based on the representation.

5. On April 16, 2002, the Tribes filed with the Court an unexecuted copy of a document entitled "*The 2002 Shoshone-Bannock Tribes and the State of Idaho Instream Flow Articles of Understanding, Articles of Understanding By and Between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation and the State of Idaho*" ("*Understanding*"). The *Understanding* was expressly made contingent on the approval of the Shoshone-Bannock Tribes' general membership through a referendum vote in accordance with the Tribes' 1936 Constitution and Bylaws. *Understanding*, Article 5, Section 5.5 ("approval contingency"). The Court, over concerns of the nature of the approval contingency, set the matter for status conference.

6. On April 22, 2002, prior to the date and time set for the status conference, the State of Idaho filed a *Notice Pursuant to Amended Scheduling Order for Filing Dispositive Motions Dated April 2, 2002*. In the *Notice* the State of Idaho informed the Court that the Idaho

Water Resource Board, a party to the *Understanding*, would not approve the *Understanding* without certain changes and ,therefore, no agreement had been reached with the Tribes.

7. On April 23, 2002, the Tribes filed a *Motion to Withdraw Shoshone-Bannock Tribes' Instream Flow Claims in Consolidated Subcase No. 03-10080* (“*Motion to Withdraw*”). In the *Motion to Withdraw* the Tribes alleged that a binding agreement with the State of Idaho had been reached via the *Understanding* and that in accordance with the terms of the *Understanding* the Tribes were moving for a withdrawal of the subject claims. Alternatively, the Tribes asserted that if the Court determined that no binding resolution had been reached between the State of Idaho and the Tribes, the Tribes nonetheless were seeking to voluntarily withdraw the claims.

8. On April 24, 2002, the Court held the status conference and addressed the Tribes’ *Motion to Withdraw*. At the status conference, the Court ruled as a matter of law that the *Understanding* did not constitute a binding agreement with the State of Idaho. The Court explained that irrespective of whether or not the Tribes and the State of Idaho had reached a meeting of the minds regarding the *Understanding*, the Court would not accept the *Understanding* as a final resolution of the claims because of the approval contingency. Specifically, because there could be no assurances that the Tribes’ general membership would approve the terms of the *Understanding*, there was no final resolution of the claims. In the event the *Understanding* was not approved, the matter would ultimately have to be litigated anyway, albeit after considerable delay. Additionally, because of the history of lengthy delays in the consolidated subcase the Court was not willing to take a “wait and see” approach and stay the proceedings based on the speculative nature of the resolution. Hence the Court would not accept the *Understanding* as a final resolution of the claims. Following the ruling by the Court, the Tribes then proceeded with the alternative motion to voluntarily withdraw the subject claims with the express acknowledgement that any such withdrawal would be with prejudice. The Court granted the *Motion* and indicated that a written order would follow.

In addition to the reasons set forth for the Court declining to accept the *Understanding* as a final resolution of the claims, Article 8.1 of the *Understanding* also expressly provides that the *Understanding* is contingent upon final approval by the court. Pursuant to this express contingency, the Court in its discretion declines acceptance.

9. Prior to the close of the hearing, certain objectors raised the issue of the Court imposing costs and attorney's fees against the Tribes as a condition of dismissal based on the Tribes' attempt to dismiss its claims at this stage of the proceedings. *See* I.R.C.P. 41(a)(2). The Court took the matter under advisement and allowed the parties 14 days from the date of the hearing within which to file any briefing in support of the award of attorney's fees and costs and 14 days thereafter within which to file any briefing in opposition thereto. No briefing was filed.

## II.

### **COURT DECLINES TO AWARD COSTS AND ATTORNEY'S FEES AS A CONDITION OF DISMISSAL**

Certain of the objectors to the consolidated subcase seek to have the Court award attorney's fees and costs as a condition of dismissal pursuant to I.R.C.P. 41(a)(2). I.R.C.P. 41(a)(2) provides in relevant part "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This Court declines to impose the award of attorney's fees and costs as a condition of dismissal.

In *Jones v. Berezay*, 120 Idaho 332, 335-336, 815 P.2d 1072, 1075-76 (1991), the Idaho Supreme Court specifically held that the imposition of terms and conditions of dismissal under I.R.C.P. 41(a)(2) is discretionary with the trial court and that such discretion is not circumscribed by the prevailing party analysis mandated by I.R.C.P. 54(d)(1)(B) and that the award of attorney's fees and/or costs is not a prerequisite to a voluntary dismissal under the rule. *Id.*

This Court, in exercising its discretion 1) must correctly perceive the issue before the Court as one of discretion; 2) act within the boundaries of its discretion and consistent with applicable legal standards; and 3) reach its determination by exercise of reason. *Sun Valley Shopping Center v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). In *Jones*, the Supreme Court upheld the trial court's refusal to impose costs and fees where the dismissal was without prejudice. The Supreme Court held that the purpose of I.R.C.P. 41(a)(2) is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced. *Jones* at 336, 815 P.2d at 1076. In the instant case, this Court specifically imposed as a condition that any dismissal would be with prejudice. The result is that the Tribes will be forever barred from re-filing the instream flow claims in the SRBA or in any other forum. As such, the

objectors will not be put in the position of having to defend against the claims again at some point in the future. Hence, this Court can find no prejudice to the objectors by allowing the Tribes to dismiss the subject claims with prejudice.

In addition, this Court has reviewed the basis for the Tribes' claims including the relevant portions of the Treaty of Fort Bridger of July 3, 1868, and the Idaho Supreme Court's decision in *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972), and finds that there is a good-faith basis to support the merits of the claims. In other words, this is not a situation where the claims were pursued frivolously and then a dismissal sought at the "eleventh hour" after all parties have been forced to prepare for litigation. The Tribes have also made it clear to the Idaho Legislature since prior to the commencement of the SRBA that because of the divisiveness and considerable expense associated with litigating tribal water rights the Tribes favored a policy of negotiation over litigation. The Idaho Legislature responded by directing the Attorney General and Governor to enter into negotiations with federally recognized Indian Tribes. *See 1994 Interim Legislative Committee on the Snake River Basin Adjudication* at 7-8. Toward that end this matter has been stayed for a considerable length of time to allow for such negotiations. However, in recognizing the length of time issues regarding tribal water rights take to pass through the courts and in the interest of a timely completion of the SRBA, the Court had no alternative than to put the matter on a litigation track. Therefore, the fact that the Tribes ultimately decided to not continue to litigate the claims does not make the Tribes' actions frivolous in pursuing the claims to date.

Finally, whether the Court accepts the *Understanding* as a final resolution of the claims or the Court grants the Tribes' *Motion to Withdraw* with prejudice, the net effect to the objectors other than the State of Idaho is the same. The Tribes' claims are dismissed with prejudice in either situation. The *Understanding* between the State of Idaho and the Tribes was for a complete dismissal of the Tribes' claims; and therefore, the terms of the *Understanding* would not affect the water rights of the other objectors nor were other objectors intended to be signatories to the *Understanding*. As such, this Court can find no prejudice to other parties in granting the *Motion to Withdraw* subject to the condition that the dismissal is with prejudice.

For the forgoing reasons, this Court declines to impose the award of costs and attorney's fees as a condition of dismissal pursuant to I.R.C.P. 41(a)(2).

### III.

#### ORDER OF DISMISSAL

Pursuant to I.R.C.P. 41(a)(2) and based on the Tribes' *Motion to Withdraw Shoshone-Bannock Tribes' Instream Flow Claims in Consolidated Subcase No. 03-10080*, the comments of counsel for the Tribes and the comments and ruling of the Court at the April 24, 2002, hearing;

IT IS HEREBY ORDERED that the Shoshone-Bannock Tribes' instream flow claims based on treaty reservations (including the Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, 674-75) and/or federal reservations (Winters Doctrine) and designated comprehensively as Consolidated Subcase No. 03-10080, are hereby **dismissed with prejudice**. All parties to bear their own costs and fees.

IT IS FURTHER ORDERED that a final order disallowing water right claim be entered in each of the individual subcases and that said water rights shall not be confirmed in any partial decree or any final unified decree entered in SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

#### RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

Dated: MAY \_\_\_\_\_, 2002.

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ROGER BURDICK  
Administrative District Judge and  
Presiding Judge of the  
Snake River Basin Adjudication

EXHIBIT A IS COMPUTER GENERATED LIST  
CONTACT CLERK OF THE COURT FOR A COPY