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**
	)	**(Nez Perce Tribe and United States**
Case No. 39576	)	**"springs or fountains" Claims)**
	)	
	)	**ORDER DENYING DEVENY**
	)	**OBJECTION and SPECIAL MASTER**
	)	**REPORT AND RECOMMENDATION**
	)	**ON JOINT MOTION TO DISMISS**
	)	**ALL SPRINGS OR FOUNTAINS**
	)	**CLAIMS ON PRIVATE AND STATE**
	)	**LAND, TO DECREE CLAIMS ON**
	)	**FEDERAL LAND AND TO STAY**
	)	**ENTRY OF ORDERS PENDING**
	)	**ENTRY OF CONSENT DECREE**

FINDINGS OF FACT

PROCEDURAL BACKGROUND

DeVeny Motion to Participate

On April 9, 2002, Willis and Betty DeVeny, dba Shingle Creek LLC, of Riggins, Idaho, filed a *Motion to Participate in Consolidated Subcase* in consolidated subcase 67-13701. In the caption of their filing, they referenced six springs or fountains claims filed by the Nez Perce Tribe and the United States: 78-11240, 78-11601, 78-11243, 78-11603, 78-12038 and 78-12703 [78-12073].[1] The claims are for three springs located on the DeVenys' private property. In the DeVenys' *Memorandum* attached to their *Motion*, they alleged they were entitled to intervene because:

[1] The DeVenys listed six springs or fountains claims. The actual number of springs is three because IDWR assigned separate claim numbers to the Nez Perce Tribe's claims from the overlapping United States' claims to the same springs.

> The claims in question are used for stockwater by the DeVenys. **The springs are on the DeVenys private property.** DeVenys have filed a claim and have a decreed water right to the springs in question [emphasis added].[2]

On the DeVenys' two *Objections*, also attached to their *Motion*, they alleged: "It is on **private land** and has not been used by the Nez Perce Tribe for more than 80 years at least, if not more [emphasis added]." No one opposed the *Motion* and on June 10, 2002, the Special Master entered an ***Order Granting DeVeny Motion to Participate***.

DeVeny Inquiry

On March 7, 2005 (two years, eight months after the DeVenys were granted leave to participate), they wrote to the SRBA Court concerning the Court's approval process of the "Snake River/Nez Perce Settlement Agreement and the effect this agreement will have on the Springs and Fountains Case, subcase no. 67-13701." The DeVenys said they "filed for and have a partial decree for the 25 springs that are on our Forest Service grazing allotment which is all **federal land** [emphasis added]"

A telephone status conference on the DeVenys' inquiry and possible resolution of their concerns with the Nez Perce Tribe and the United States was held on April 7, 2005. The parties were unable to settle their differences and the DeVenys were advised that they would have an opportunity to comment on any Nez Perce Tribe settlement agreement at a later date.

Idaho Supreme Court Remand

On June 27, 2005, the Idaho Supreme Court entered its ***Order Granting Motion for Remand***, Supreme Court No. 26042, denying the Shoshone-Bannock Tribe's objection and remanding to the SRBA Court for review of the Nez Perce Tribe settlement agreement and ratification, if appropriate.

Joint Motion for Approval of Consent Decree

On June 29, 2005, the parties filed a *Joint Motion for Approval of Consent Decree, Entry of Final Partial Decrees, and Entry of Scheduling Order*, consolidated subcases 03-10022 and

[2] On June 14 and August 18, 2000, the DeVenys were awarded four ***Partial Decrees*** for water rights to springs and unnamed streams tributary to Shingle Creek: 78-10315, 78-10322, 78-10341 and 78-11965. Presumably, these are the springs on the DeVenys' private property.

67-13701, seeking approval of the "Snake River Water Rights Agreement of 2004" settling all water right claims filed by the Nez Perce Tribe and by the United States for the benefit of the Tribe. "The parties believe that the schedule submitted herein will allow the water right claims of the Nez Perce Tribe and the United States to be completely resolved within the next six to twelve months." *Joint Motion*, at 9.

Order for Special Master Report and Recommendation

SRBA Presiding Judge John M. Melanson's 15 page ***Scheduling Order and Notices of Hearing, Re: Implementation of Nez Perce Settlement Agreement***, consolidated subcases 03-10022, 67-13701, 92-80 and subcases 71-10886, *et al*., dated August 3, 2005, states in relevant part:

> Consolidated Subcase 67-13701 is still assigned to Special Master Dolan. . . . . Upon such filing [of the Nez Perce Tribe and United States *Joint Motion to Dismiss*], 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.

Scheduling Order, at 8.

NEZ PERCE TRIBE AND UNITED STATES JOINT MOTION

On August 31, 2005, the Nez Perce Tribe and the United States filed their *Joint Motion to Dismiss with Prejudice All Springs or Fountains Claims of the United States and Nez Perce Tribe Located on Private and State Land, for Partial Decrees of Claims Located on Federal Land, and to Stay Entry of the Orders Pending Entry of the Consent Decree* in consolidated subcase 67-13701. The parties requested three things of the Court:

1. Dismissal of all springs or fountains claims on **private and state land**;
2. Partial decree(s) of all springs or fountains claims on **federal land**; and
3. **Stay of entry** of the dismissal and partial decree(s) "until such time as the final Consent Decree has been entered resolving all of SRBA claims filed by the

United States, as trustee for the Tribe, and by the Tribe on its own behalf." *Joint Motion*, at 4.

DEVENY OBJECTION

On September 15, 2005, the DeVenys filed their *Objection to Joint Motion of the Nez Perce Tribe and the United States to Decree Claims on Federal Land on Cannonball Allotment on the Nezperce National Forest*. Their *Objection* related only to 14 springs on the Cannonball Allotment on the Nez Perce National Forest (federal land) where the DeVenys have been awarded partial decrees for certain springs and where they hold a grazing permit for their cattle.

In their *Objection*, the DeVenys sought dismissal of the Nez Perce Tribe and United States claims, or in the alternative, inclusion of language in the partial decrees that would address their concerns. The DeVenys spelled out their concerns in their *Objection* and their April 28, 2005 letter (attached to their *Objection*) to Idaho Deputy Attorney General Steve W. Strack. For purposes of discussion, their concerns can be viewed in two broad categories: entitlement and administration. The following quotes are from their letter to Mr. Strack unless otherwise indicated:

[Entitlement]

> The springs are not in the same condition they were when the treaty was negotiated in 1863. . . . At the time of the treaty who knows what the springs were like. Maybe they did not even exist.
>
> . . .
>
> There are several indications that had this gone to Court, the Tribe would not have prevailed. We are disappointed that this settlement was reached by agreement in which we had absolutely no part. . . . In other cases, no Tribe has ever been granted water rights off the reservation. The diminishment issue has not been settled.
>
> . . .
>
> The Oneida case recently ruled that a Tribe could not bring a claim years afterward. In the Nezperce case they have waited 142 years to bring a claim.
>
> . . .
>
> There is no such thing as time immemorial. Even in 1863 the Nezperce were not a single tribe, but several separate bands. Earlier, prior to the Nez Perce, there were just bands of individuals roaming the Earth, not the Nez Perce as such.

[Administration]

> We have been granted a partial decree on the springs in question and the Forest Service has a partial decree. Our priority date is one day superior to the Forest Service as specified in the stipulation agreement [DeVeny *Objection*].

. . .

> We have several concerns about granting the Nezperce Tribe a water right. The water is there and anyone or anything that passes by is free to drink. The Tribe is free to drink in a transitory manner as long as this does not interfere with or infringe on our livestock use. Use by others has been going on for years. Will this continue or will the Tribe prevent others from using their half of the natural flow? How will the use be measured and monitored?
>
> . . .
>
> How will the Tribe assert this right if it is granted? Will they charge us on the assumption that our cows are using the Tribe's part of the water?
>
> . . .
>
> Another concern is will the Tribe also claim some right to the forage if they have a right to the water, or will they attempt to intervene in the Forest Service management of the grazing permit.

SRBA records indicate that on March 20 and May 7, 2003, Shingle Creek LLC (the DeVenys) was decreed five water rights to springs with language in the partial decrees referring to a stipulation between the DeVenys, Shingle Creek LLC and the United States.[3] The following appear to be the DeVenys' five stockwater rights on the Nez Perce National Forest mentioned by the DeVenys:

78-10338 – .03 cfs for stockwater use in Idaho County from May 15 to November 15 with a priority date of May 9, 1906:
Howard Spring
Cannon Ball Spring
Cottonwood Spring
Log Through Spring
Aitken Spring
Blue Gulch Spring
Alder Spring
Springs
Clyde Spring
Morrison Ridge Spring
Chain Spring

78-12180 – .02 cfs from an unnamed spring for stockwater use in Idaho County from May 15 to November 15 with a priority date of May 9, 1906.

[3] The language reads: "The operation, use, and administration of this water right is also subject to the terms and conditions of the stipulation and joint motion for order approving stipulation entered into on August 29, 2002, between the United States of America and Willis DeVeny, Betty DeVeny and Shingle Creek LLC, filed in the office of the Idaho County Recorder and recorded on October 31, 2002, as instrument No.: 425169; the provisions of such stipulation to apply fully to this water right." The parties did not offer the actual stipulation as part of the record in this consolidated subcase.

78-12181 – .02 cfs from Rodger Spring for stockwater use in Idaho County from May 15 to November 15 with a priority date May 9, 1906.

78-12182 – .02 cfs from Smokey Spring for stockwater use in Adams County from May 15 to November 15 with a priority date of May 9, 1906.

78-12183 – .02 cfs from an unnamed spring for stockwater use in Idaho County from May 15 to November 15 with a priority date of May 9, 1906.

NEZ PERCE TRIBE AND UNITED STATES RESPONSE

On September 26, 2005, the Nez Perce Tribe and the United States filed their *Response to the Willis D. & Betty G. DeVeny Objection to Joint Motion to Decree Springs or Fountains Claims on Federal Land*. They argued that the DeVenys waived their right to participate as to springs or fountains claims on **federal land**:

> All of the claims to which the DeVenys objected [claims to three springs on the DeVenys' **private land**] will be dismissed with prejudice if and when the Court approves the Joint Motion To Dismiss All Claims Located on Private and State lands. Upon their dismissal, the DeVenys' interests will not be threatened by those claims and their objections will become moot.
>
> . . .
>
> The DeVenys did not object to any of these claims on federal land until now, six years later and on the eve of the entry of decrees finally resolving and approving the comprehensive settlement of all of the Nez Perce Tribal claims. Nor have the DeVenys filed any Response or Motion to Participate regarding these particular claims on federal land. . . . In other words, by not timely filing an objection, response or motion to participate regarding any of the 28 federal land claims at issue in the instant matter, the DeVenys have waived their rights to be a party and to object to the entry of a partial decree in this matter.[4]

Nez Perce Tribe and United States *Response*, at 3-4.

The Nez Perce Tribe and the Unites States further argued that even if the DeVenys' *Objection* is permitted, their concerns are addressed by the express terms of the proposed partial decrees[5] and the 1863 Nez Perce Treaty.[6]

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[4] All springs or fountains claims on private, state and federal land were reported by the Director of the Idaho Department of Water Resources in his *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 (Reporting Area 22) and IDWR Basins 77, 78 & 79 (Reporting Area 24)*, filed March 9, 1999. The deadline to file objections was September 17, 1999.

[5] A copy of the proposed partial decree for federal reserved water right 78-11275 (Jorgie Spring) is attached for reference. The claim was one of the 28 springs or fountains claims cited by the DeVenys in their *Objection* and is part of Attachment 5 to the *Joint Motion for Approval of Consent Decree, Entry of Final Partial Decrees, and Entry of Scheduling Order,* consolidated subcases 03-10022 and 67-13701, filed June 29, 2005.

HEARING ON JOINT MOTION AND DEVENY OBJECTION

A hearing by telephone on the Nez Perce Tribe and United States *Joint Motion* and the DeVeny *Objection* was held on September 29, 2005. Peter C. Monson, Vanessa Boyd Willard and Frank Wilson appeared for the United States; K. Heidi Gudgell and Steven C. Moore appeared for the Nez Perce Tribe; Willis and Betty DeVeny appeared *pro se*; Steve W. Strack appeared for the State of Idaho; Josephine P. Beeman appeared for the City of Lewiston; James W. Givens appeared for John W. Brewer; Jeffrey C. Fereday appeared for Dr. Scott and Connie Harris; Michael P. Tribe appeared for the Burley Irrigation District; and Candice M. McHugh appeared for IDWR.

All of the remaining parties who filed timely objections to the United States and Nez Perce Tribe springs or fountains claims located on federal land joined in the *Joint Motion*. Only the DeVenys opposed the *Joint Motion*.

During the hearing, the Nez Perce Tribe and the United States agreed that if their *Joint Motion* is granted, it would be better that only a special master report and recommendation be entered now followed by resolution of any motions to alter or amend and notices of challenge. Then, if the Presiding Judge also agrees that the *Joint Motion* is warranted, he could 1) dismiss all springs or fountains claims on private and state land and, 2) partially decree such claims on federal land as part of "the final Consent Decree . . . resolving all of SRBA claims filed by the United States, as trustee for the [Nez Perce] Tribe, and by the Tribe on its own behalf." No one offered evidence beyond the current record and the DeVenys did not suggest language in the proposed partial decrees that would address their concerns.

CONCLUSIONS OF LAW

WAIVER

SRBA Administrative Order 1, Rules of Procedure (AO-1), 10, k, states:

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[6] The 1863 Treaty "springs or fountains" section states:

> 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 Percé Indians, June 9, 1863, Article 8, 14 Stat. 647, 651.

> Any party to the adjudication who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. **A party to the adjudication who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend*** [emphasis added].

In the present matter, the DeVenys were granted leave to participate in consolidated subcase 67-13701 because some springs or fountains claims were located on their private property. That was their sole concern and the reason why they objected to those claims.

In support of their *Motion to Participate*, the DeVenys invoked both ***I.R.C.P. 24(a)***, Intervention of right, and ***(b)*** Permissive intervention. Because the claims were located on their private property, it was clear that the DeVenys were entitled to intervention of right because they claimed an "interest relating to the property or transaction which is the subject of the action and the applicant [the DeVenys] is so situated that the disposition of the action may as a practical matter impair or impede applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." ***I.R.C.P. 24(a)(2)***. The DeVenys also alleged that their "participation will not delay these subcases." DeVeny *Motion to Participate*, at 3.

The Nez Perce Tribe and the United States stated that the key issue is this: have the DeVenys waived their right to participate as to any springs or fountains claims on federal land? The Special Master believes the answer is, yes.

The DeVenys were granted leave to participate because of their interests as owners of private property where certain of the springs or fountains claims were located. At the time the DeVenys filed their *Motion to Participate* and accompanying *Objections*, they must have known that the Nez Perce Tribe and the United States also filed similar claims on federal land. IDWR's March 9, 1999, *Notice of Filing of Nez Perce Federal Reserved Rights Claims and Maps* included **all** springs or fountains claims – on private, state **and** federal land. Yet despite that fact, the DeVenys chose to object only to claims filed on private land, particularly their own land. The ***Order Granting DeVeny Motion to Participate*** was, for all practical purposes, an opportunity for them to file late objections to six springs or fountains claims on their private property. In fact, their *Objections* were over 2 years, 8 months late. If one were to consider the DeVenys' March 7, 2005, inquiry to the SRBA Court concerning the "Snake River/Nez Perce

Settlement Agreement" as late objections to springs or fountains claims on **federal** land, those objections would be over 4 years, 5 months late.

The Special Master does not believe that the DeVenys' *Objections* to springs or fountains claims on their private property somehow "bootstrap" their pending *Objection* to similar claims on federal land. ***I.R.C.P. 24(c)*** requires that a person desiring to intervene "shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." The DeVenys objected to springs or fountains claims on private land, not federal land. The unavoidable consequence is that the DeVenys waived their right to participate as to springs or fountains claims on federal land.

Both and ***I.R.C.P 12*** and ***AO-1, 10, k*** require certain defenses to be asserted in responsive pleadings; otherwise, the defenses are waived. In the present matter, that means that because the DeVeny's only objected to springs or fountains claims on private land, they waived their right to object to similar claims on federal land.

DEVENY CONCERNS

Although not necessary to determine the matter, the DeVenys' concerns with administration of springs or fountains rights on the Cannonball Allotment on the Nez Perce National Forest where the DeVenys hold spring stockwater rights for their cattle warrant some discussion:

> The water is there and anyone or anything that passes by is free to drink. The Tribe is free to drink in a transitory manner as long as this does not interfere with or infringe on our livestock use. Use by others has been going on for years. Will this continue or will the Tribe prevent others from using their half of the natural flow? How will the use be measured and monitored?
> . . .
> How will the Tribe assert this right if it is granted? Will they charge us on the assumption that our cows are using the Tribe's part of the water?
> . . .
> Another concern is will the Tribe also claim some right to the forage if they have a right to the water, or will they attempt to intervene in the Forest Service management of the grazing permit.

The Nez Perce Tribe and the United States argued that the DeVenys' concerns "are already completely addressed by the express terms of the proposed decrees and the 1863 Nez Perce Treaty itself." While the Special Master generally agrees with that argument, the

DeVenys' concerns focus more on how those "express terms" will be interpreted. Stated more broadly, how will these unique federal reserved water rights "blend " with state law based water rights and the DeVenys' grazing privileges on federal land?

In this context of federal reserved water rights on federal land used to graze cattle, the DeVenys are trail blazers and they raised legitimate questions that may have no final answers now. Undoubtedly, the answers will have to be developed over time with all parties dealing in good faith to protect the resources while recognizing everyone's vested interests. But for now, the DeVenys' concerns must be addressed in the context of administration of their state law based water rights by IDWR[7] and administration of the Nez Perce National Forest and the DeVenys' grazing permits by the United States Department of Agriculture, Forest Service – both areas beyond the jurisdiction of the SRBA Court.

ORDER

THEREFORE, IT IS ORDERED that the DeVenys' *Objection to Joint Motion of the Nez Perce Tribe and the United States to Decree Claims on Federal Land on Cannonball Allotment on the Nezperce National Forest* is **denied**.

RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that:

1. All springs or fountains claims on **private and state land** should be **dismissed**;

2. Partial decrees should be entered for all springs or fountains claims on **federal land** as proposed; and

3. Any motions to alter or amend and notices of challenge to this ***Order Denying DeVeny Objection and Special Master Report and Recommendation*** should be resolved by the Presiding Judge and, if warranted, the Presiding Judge should then 1) enter an order dismissing all springs or fountains claims on private and state land and, 2) partially decree springs or fountains claims on federal land as part of "the final Consent Decree . . . resolving all of SRBA claims filed by the United States, as trustee for the [Nez Perce] Tribe, and by the Tribe on its own behalf."

[7] The issue of administration of federal reserved water rights is not now before the Court.

DATED October 27, 2005.

/s/Terrence A. Dolan
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication