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**
	)	**MOTION FOR RECONSIDERATION**
	)	**AND MOTION TO ALTER OR**
	)	**AMEND**

FINDINGS OF FACT

Order Denying and Special Master Report and Recommendation

On October 27, 2005, the Special Master entered an ***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***. The DeVenys' September 15, 2005 *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* was denied because the Special Master held that they effectively waived their right to participate as to springs or fountains on federal land. When the DeVenys filed their April 9, 2002 *Motion to Participate in Consolidated Subcase*, they objected only to springs or fountains claims on their own private land, **not** similar claims on federal land. This despite IDWR having mailed to them a *Notice of Filing of Federal Reserved Domestic and Stock Water Right Claims in Reporting Areas 19, 22 & 24, IDWR Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 & 86* on March 5, 1999, referencing **all** springs or fountains claims – on private, state and federal land.[1]

[1] See IDWR Adjudication Bureau Chief David R. Tuthill's *Affidavit of Service: Notice of Director's Report Reporting Area Reporting Areas 19, 22 & 24, IDWR Basins 67, 69, 77, 79, 81, 82, 83, 84, 85 & 86. Federal Reserved Domestic and Stock Water Rights*, filed May 21, 1999. Attachment A to the State of Idaho, United States

Having disposed of the only objection to the Nez Perce Tribe and United States *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*, filed August 31, 2005, the Special Master entered a ***Report and Recommendation*** concerning further proceedings before the Presiding Judge.

DeVeny Motion for Reconsideration and Motion to Alter or Amend

On November 10, 2005, the DeVenys filed a *Motion for Reconsideration* along with an *Affidavit of Willis D. DeVeny* and *Memorandum in Support of Motion for Reconsideration*. Later, on November 23, 2005, the DeVenys filed a *Motion to Alter or Amend*. In their two *Motions*, the DeVenys sought dismissal of all springs or fountains claims on the Cannonball Allotment (federal land in Basin 78) where the DeVenys have been awarded partial decrees for certain springs and where they hold a grazing permit for their cattle.

In the alternative, the DeVenys asked for modification of the proposed partial decrees to the United States as trustee for the benefit of the Nez Perce Tribe "to reflect applicable standards." The modifications they suggested are:

3. Quantity of right	Up to one-half of the natural flow, but not to exceed the minimum quantity, if any, the Tribe uses for a livelihood as of the date of this Partial Decree.
4. Priority date	~~Time immemorial~~ May 10, 1906.
. . .	
6. Purpose of use	Human consumption, livestock watering, ~~wildlife watering, cultural, and ceremonial purposes~~.
. . .	
9. Annual volume of consumptive use	Up to one-half of the natural flow, but not to exceed the minimum quantity, if any, the Tribe uses for a livelihood as of the date of this Partial Decree.

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and Nez Perce Tribe *Joint Response to Motion for Reconsideration and to Motion to Alter or Amend*, filed December 28, 2005. The *Notice of Filing* [*Id.*] mailed to the DeVenys referenced two director's reports filed the same date, one for Nez Perce Tribe federal reserved claims and the other for Forest Service federal reserved claims. The particular director's report relevant here, filed with the SRBA Court on March 9, 1999, is entitled: *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), IDWR Basins 77, 78 & 79 (Reporting Area 24).*

10. Other provisions necessary for definition or administration of this water right	a. This water right is held by the United States as trustee for the benefit of the Nez Perce Tribe pursuant to the terms of Article 8 of the Nez Perce Treaty of June 9, 1863, 14 Stat. 647, which provides that the subject spring is held by the United States as a "watering place[] for the use in common of both whites and Indians." ~~This water right as a reserved right under federal law and is not subject to loss for nonuse.~~ . . . d. The source spring for this water right is located on federal land. This water right shall not be used as the basis to preclude the federal land management agency from managing federal land in the vicinity of the spring or from permitting use of any water right that the land management agency may have for use of this source~~; provided that no such management or water use shall preclude or interfere with the Tribe's exercise of this water right~~. e. This water right shall not be implied to prohibit the issuance or confirmation of state-based water rights from this same source~~, provided that no such water right shall preclude or interfere with the exercise of this water right~~. <u>f. This Partial Decree is not a determination of the minimum quantity, if any, the Tribe uses for a livelihood.</u>

Joint Response

The State of Idaho, the United States and the Nez Perce Tribe filed a *Joint Response to Motion for Reconsideration and to Motion to Alter or Amend* on December 28, 2005. They argued that the DeVenys received timely notice of the springs or fountains claims on federal lands, like every other claimant in Basin 78, and in remarkably similar proceedings, the same SRBA notice procedures followed here were upheld. *LU Ranching v. United States*, 138 Idaho 606, 610, 67 P.3d 85, 89 (2003). Therefore, the *Motions* must be denied. Further, they urged that substantive arguments submitted by the DeVenys are not properly presented in the context of a motion to reconsider an order dismissing the DeVenys' *Objection* as untimely.

DeVeny Reply Memorandum

The DeVenys lodged a *Reply Memorandum in Support of Motion for Reconsideration and Motion to Alter or Amend* on January 11, 2006, the day before the hearing on their *Motions*. They stated that they were not contesting SRBA notification procedures approved by the Idaho

Supreme Court in *LU Ranching*. Instead, they argued that an October 31, 2001 letter they received from Idaho Deputy Attorney General Steven W. Strack, addressed to water right claimants on whose private property a springs or fountains claims may have been filed, was defective. The DeVenys said that the letter notified them "only of competing Nez Perce springs and fountains claims on their private ground and misled them to believe that there were no competing Nez Perce springs or fountains claims to their water rights on the Cannonball Allotment." DeVeny *Reply Memorandum*, at 2. Additionally, the DeVenys argued that "due process hearing requirements are violated if the DeVenys are denied an opportunity to be heard in connection with the proposed settlement." *Id*.

Hearing

A hearing on the DeVenys' *Motion for Reconsideration* and *Motion to Alter or Amend* was held at the SRBA Courthouse in Twin Falls, Idaho, on January 12, 2006. Dana L. Hofstetter appeared along with her clients, Willis and Betty DeVeny, dba Shingle Creek LLC, of Riggins, Idaho; Vanessa Boyd Willard and Frank S. Wilson appeared for the United States; K. Heidi Gudgell and Steven C. Moore appeared for the Nez Perce Tribe; Steven W. Strack appeared for the State of Idaho; Jeffrey C. Fereday appeared for Dr. Scott and Connie Harris; Josephine P. Beeman appeared for the City of Lewiston; and Candice M. McHugh appeared for IDWR.

CONCLUSIONS OF LAW

The DeVenys have not presented any evidence that would warrant reversal of the ***Order Denying DeVeny Objection*** or the ***Special Master Report and Recommendation***. Even though the DeVenys did not contest SRBA procedures in place to notify claimants of potentially competing claims, it's worth examining again the actual *Notice of Filing* IDWR mailed to them on March 5, 1999.[2]

The *Notice of Filing* clearly stated that: 1) the United States had filed federal reserved domestic and stock watering rights in the areas listed, including Basin 78 where the DeVenys own property (private land) and where they own stockwater rights on the Nez Perce National Forest (federal land); 2) copies of the claims were readily available for review and copying; 3)

[2] For the record, the DeVenys never denied they received IDWR's *Notice of Filing of Federal Reserved Domestic and Stock Water Right Claims in Reporting Areas 19, 22 & 24, IDWR Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 & 86*.

the deadline to file an objection was September 17, 1999; and 4) **"A notice will be mailed to you for court dates on those claims where you filed an objection or a response. You will not receive notice of court dates on any other claims to federal reserved rights** [emphasis added]."[3]

Despite having been notified that the United States had filed springs or fountains claims on private, state and federal land, the DeVenys filed their *Motion to Participate* on April 9, 2002, objecting only to those claims on their private land. Even if one were to consider the DeVenys' March 7, 2005, letter 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 still be over 4 years, 5 months late. For those reasons, and because 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 – the Special Master held that the DeVenys waived their right to object to springs or fountains claims on federal land.

With those facts in mind, it is time to consider the DeVenys' core argument – that a letter from the Idaho Attorney General's office, mailed to them over 2 years after the deadline to file objections had passed, "misled and affected the [DeVenys'] decisionmaking process . . . sufficient to cause a fatal due process defect." DeVeny *Reply Memorandum*, at 6.

The first weakness in the DeVenys' arguments is that the letter from the Idaho Attorney General's office could hardly have misled the DeVenys since the deadline for objections, clearly stated in IDWR's *Notice of Filing*, had already passed 2 years before. The time for them to decide which federal reserved claims they would contest was long past. Second, it is hardly plausible that the DeVenys would consider a generic form letter to supersede court-ordered notice from IDWR, even though the letter was from the Idaho Attorney General's office. That letter was in the nature of a broad request for information, while the much earlier *Notice of Filing* from IDWR was specific and mandatory. By the time the DeVenys received the letter, they must have reasonably known that springs or fountains claims had been filed on federal land, including the Cannonball Allotment, yet they moved to participate and objected only to springs or fountains claims on their private land.

[3] Based on the totality of the record, including their own averments, the DeVenys understood the federal reserved domestic and stock watering rights claimed by the United States in Basin 78 were made on behalf of the Forest Service (federal land) and the Nez Perce Tribe (private, state and federal land). See fn 5.

Even if one were to concede that the DeVenys were subjectively "misled" by the letter from the Idaho Attorney General's office, was that reasonable given the clear deadline specified in IDWR's *Notice of Filing* and the dire consequences the DeVenys now envision with the Nez Perce Tribe acquiring federal reserved water rights on the Cannonball Allotment? To consider that issue, it's worth reading the letter itself.

The letter began generally by explaining that the Nez Perce Tribe and the United States "may have filed a water right claim for a spring on your property." It said that the federal reserved springs or fountains claims were for 50% of the flow and that a list of claims for springs on private land – attached to the letter – was used to file duplicate federal reserved claims "on former tribal lands."[4] The letter continued: "If your claim number is on that list, then the United States and the Tribe claim ownership of the spring that is the source of your water right claim."

The letter suggested potential impacts if a federal reserved water right were decreed for a water source on the reader's property and reminded the reader that although the Attorney General cannot represent them and the time to file an objection has passed, they might want to consult an attorney and file a motion to participate. The letter closed by asking the reader to "assist the State in pursuing its [the State's] objections to the claims of the United States and the Tribe by filling out the attached questionnaire and returning it to [the Attorney General's office]."

The DeVenys argued that the letter was defective because it "notified the DeVenys only of competing Nez Perce springs and fountains claims on their private ground and misled them to believe that there were no competing Nez Perce springs or fountains claims to their water rights on the Cannonball Allotment." DeVeny *Reply Memorandum*, at 2. Therefore, the DeVenys argued, that is why they filed their *Motion to Participate* on April 9, 2002, and referred only to springs or fountains claims on the DeVenys' private property.

The DeVenys' arguments lack credibility. First, they already knew or should have known that springs or fountains claims were made on federal land from IDWR's *Notice of Filing* in 1999. Second, the DeVenys knew or should have known from even a casual reading of the

[4] The list attached to the Idaho Attorney General letter is entitled: "Springs and Fountains Claims on Behalf of the Nez Perce Tribe in Reporting Areas 19, 22, and 24, Private Claims Upon Which Federal Claims are Based." See attachment to DeVenys' *Motion to Participate in Consolidated Subcase and Memorandum in Support of Motion to Participate*, filed April 9, 2002, and Exhibit A to *State of Idaho's Brief in Support of Motion for Protective Order*, filed June 14, 2002.

Idaho Attorney General letter in 2001, that the Nez Perce Tribe and the United States claimed federal reserved water rights on both private and federal lands. The letter told them so:

> The Tribe and the United States claim ownership of federal reserved water rights in springs **on all lands that were part of the 1855 Nez Perce Reservation, but ceded by the Tribe in 1863. They assert that their claims apply to both federal and private lands**. . . .[5]

For the above reasons, and because it would be unfair to allow the DeVenys to effectively circumvent SRBA notice procedures based on an alleged defective form letter from the Idaho Attorney General office, the DeVenys' *Motion for Reconsideration* and *Motion to Alter or Amend* must be denied. There is no violation of any due process hearing requirement because the DeVenys waived their right to participate and object to springs or fountains claims on federal land. For those reasons, too, there is no reason to consider the DeVenys' substantive arguments concerning the Nez Perce Tribe and United States federal reserved springs or fountains claims on federal land.

ORDER

THEREFORE, IT IS ORDERED that the DeVenys' *Motion for Reconsideration* and *Motion to Alter or Amend* are **denied**.

DATED January 26, 2006.

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

[5] The DeVenys clearly understood all along that the Cannonball Allotment is on the Nez Perce National Forest (federal land) and was part of the 1855 Nez Perce Tribe Reservation. See DeVenys' April 28, 2005 letter to Deputy Attorney Steven W. Strack attached to their *objection to Joint Motion of the Nez Perce Tribe and the United States to decree claims on Federal Land on Cannonball Allotment on Nezperce National Forest*, filed September 15, 2005, and the *Affidavit of Willis D. DeVeny* attached to DeVeny *Motion for Reconsideration*, filed November 10, 2005.