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 No. 67-13701**
	)	**(Nez Perce Tribe and United States**
Case No. 39576	)	**"Springs or Fountains" Claims)**
	)	
	)	**MEMORANDUM DECISION and**
	)	**ORDER ON CHALLENGE**
	)	

Holding: The Special Master's ruling is affirmed.

I.
Procedural Background and Facts

1. In March of 1993, the United States as trustee on behalf of the Nez Perce Tribe ("United States") and the Nez Perce Tribe acting on its own behalf ("Tribe") filed identical or duplicate federal reserved water right claims to 4,360 springs or fountains located outside the present boundaries of the Nez Perce Indian Reservation. ("Springs or Fountains claims") or ("claims"). [1] In November 1997, the United States and the Tribe amended their respective claims reducing the number of claims to 1,888. Approximately, twelve hundred sixty-three (1,263) of the claims are to sources located on either private or state owned lands. The approximate remaining 625 of the claims are to sources located on federal public land, including lands subject to federal grazing allotments.

2. The Springs or Fountains claims are based on Article 8 of the Nez Perce Treaty of June 9, 1863, which ceded a portion of the Tribe's reservation but expressly provided:

[1] The Tribe filed claims on its own behalf identical to those filed by the United States on behalf of the Tribe in order to protect its ability to continue to pursue claims in the event the United States later declined to continue to pursue claims on behalf of the Tribe. *See, e.g.*, *Shoshone-Bannock Tribes v. Reno,* 56 F.3d 1476 (1995). However, it is understood by all parties that upon a successful showing only one set of claims ultimately will be decreed.

> 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.

Art. 8, Treaty of June 9, 1863, 12 Stat. 957.

The claims seek one-half (1/2) the natural flow of each claimed source with a priority date of "time immemorial" and purposes of use including stockwater, wildlife, cultural and ceremonial.

3. Six (6) of the Springs or Fountains claims are to three springs located on private land owned by the challengers to this action, Willis D. and Betty DeVeny, dba Single Creek Ranch LLC ("DeVenys").[2] The Devenys also hold partially decreed rights to these same springs. These 6 claims will ultimately be dismissed according to the terms of a negotiated settlement resolving all of the objections to all of the claims of the Nez Perce Tribe. Twenty-six (26) of the Springs or Fountains claims are to sources located on federal public land subject to a grazing allotment referred to as the "Cannonball Allotment" and for which the DeVenys hold the grazing rights.[3] The DeVenys also hold partially decreed stockwater rights to these same sources. According to the terms of the negotiated settlement, the Tribe will receive partially decreed rights to those sources. It is these 26 claims to the thirteen sources that are the subject of this challenge.

4. On March 9, 1999, and March 19, 1999, the Idaho Department of Water Resources ("IDWR"), pursuant to I.C. § 42-1411 and I.C. § 42-1411A, filed various director's reports containing recommendations for small domestic and stockwater rights based on state law. IDWR also filed notices of claims or abstracts which described small domestic and stockwater claims based on federal law filed by the United States.[4] Specifically, director's reports for

[2] These claims are: 78-11240, 78-11601, 78-11243, 78-11603, 78-12038 and 78-12073. Three of the claims were filed by the United States on behalf of the Tribe and three identical claims were filed by the Tribe.

[3] The thirteen claims filed by the United States on behalf of the Tribe are: 78-11275, 78-11278, 78-11282, 78-11282, 78-11283, 78-11286, 78-11287, 78-11295, 78-11296, 78-11297, 78-11298, 78-11299, 78-11300 and 78-12055. The thirteen identical claims filed by the Tribe are: 78-11636, 78-11639, 78-11643, 78-11644, 78-11647, 78-11648, 78-11656, 78-11657, 78-11658, 78-11659, 78-11660, 78-11661 and 78-12090.

[4] Director's reports are only prepared and filed for claims based on state law. Claims based on federal law are not investigated and recommended in director's reports. Instead IDWR files a notice with the Court containing descriptions or abstracts of the claimed elements for each federal-law based claim in a format similar to that of a director's report. Notice of the federal claims to other claimants in the same basins is completed in the same manner as for director's reports. Objection and response periods and proceedings on contested claims proceed in the same

reporting areas 19 and 24, IDWR administrative basins 67, 69, 77, 78 and 79, were filed for small domestic and stockwater claims based on state law. Notices of the filing of small domestic and stockwater claims based on federal law were also filed for reporting areas 19, 22 and 24, IDWR basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 and 86.[5]

5. Also filed on March 9, 1999, was a binder entitled *Notice of Filing of Nez Perce Federal Reserved Rights Claims and Maps, IDWR Basins 81, 82, 83, 84, 85 and 86 (Reporting Area 22), IDWR Basins 77, 78 and 79 (Reporting Area 24) Part II*, which included the descriptions or abstracts for the Springs or Fountains claims filed by the United States on behalf of the Nez Perce Tribe and the identical claims filed by the Tribe on its own behalf.

6. On March 18, 1999, IDWR served notice of the filing of the director's reports and federal claims on all claimants with claims reported in the various director's reports and notices of federal claims filed on March 9, 1999, and March 19, 1999. Claimants were served via first class mail with two separate notices, one pertaining to federal-law based domestic and stockwater claims and one for state-law based domestic and stockwater claims.

7. For federal-law based claims the *Notice of Filing of Federal Reserved Domestic and Stockwater Right Claims in Reporting Areas 19, 22 & 24, IDWR Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 and 86,* provided, *inter alia*:

> INTRODUCTION
>
> The United States of America (USA) has filed with the Snake River Basin Adjudication (SRBA) District Court claims to federal reserved domestic and stock watering rights in Reporting Areas 19, 22 & 24, IDWR Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 & 86.
>
> Complete copies of the claims to federal reserved rights in these areas are available at the SRBA courthouse in Twin Falls and the locations listed at the end of this notice. You may review the claims to federal reserved rights at those

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manner as for state-law based claims. The primary difference between the notice of the federal claims and the director's report in SRBA proceedings is the legal standards applied. Abstracts of federal-law based claims are not accorded *prima facie* weight as is the case for director's reports of state-law based claims.

[5] A small domestic and stockwater claim, also referred to as a "*de minimus*" claim, is a claim which falls within the statutory criteria of I.C. § 42-111 and I.C. § 42-113. In 1994, the Interim Legislative Committee on the SRBA recommended that small domestic and stockwater rights be reported independently of, and prior to, the larger irrigation and other purpose rights. Accordingly, small domestic and stockwater rights, including those based on federal law, were reported by basin in advance of the larger irrigation and other purpose rights within the same basin.

locations. Copies of the claims can be made, but you may be charged for copying and mailing.

INSTRUCTIONS FOR TAKING A CLAIM TO COURT

What do I do if I disagree with a federal reserved water right claim?

If you disagree with any element of the claims to federal reserved water rights in these areas and want to be heard in court, file an objection with the SRBA Court. Objections must be made on the standard objection form available from any IDWR office or from the SRBA Court. You may also download a copy of the objection form from the SRBA Web Site at www.srba.state.id.us.

Your objection to federal reserved water rights in these areas must be received by the SRBA Court on or before **September 17, 1999.**

What do I do if I want to participate in the court case on a claim to federal reserved right?

If you want to be involved in the court case on any of the claims to federal reserved rights, you must file an objection or a response by the dates provided in this notice.

Your responses must be received by the SRBA Court on or before **January 21, 2000**.

What happens if there are no objections to a federal reserved water right claim?

An evidentiary hearing on the uncontested federal reserved water rights will be held on **November 19, 1999**, at 10:00 **A.M.** at the Snake River Basin Adjudication Courthouse. Partial decrees will be issued following this hearing.

How will I know about the proceedings on claims to federal reserved water rights to which objections were filed?

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.

Additional information regarding federal reserved water right claims can be found on the SRBA Web Site at www.srba.state.id.us.

Note: The SRBA Court publishes a monthly Docket Sheet listing all objections and responses filed. It does not list court dates for individual water right cases, but provides general information helpful to all participants in the SRBA.

The Docket Sheet is available at your county courthouse and all IDWR offices, or you may subscribe by contacting the SRBA Court or IDWR. The annual subscription fee is $7.50. The Docket Sheet is also available on the SRBA Web Site at www.srba.state.id.us.

8. For state-law based domestic and stockwater claims the *Notice of Filing Director's Report for Small Domestic and Stockwater Rights in Reporting Areas 19 & 24, IDWR Basins 67, 69, 77, 78 & 79* the notice provided, *inter alia*:

INTRODUCTION

This is the Idaho Department of Water Resources' (IDWR) Director's Report for your small domestic and/or stock water right claimed in the Snake River Basin Adjudication (SRBA). The quantity allowed for each small domestic or stock water right is up to 13,000 gallons per day. An additional Director's Report for irrigation and all other state law based claims in your reporting area will be filed with the court at a later date.

IDWR is providing individual reports like this one to all claimants of small domestic and stock water rights in your area. A complete copy of the Director's Report, listing all of these small domestic and stock water rights claimed under both state and federal law, is available at the SRBA courthouse in Twin Falls and the locations listed on the third page of this notice. Copies of the report can be made, but you may be charged for copying and mailing.

The following instructions and definitions are designed to help you understand this report.

INSTRUCTIONS FOR REVIEWING YOUR OWN WATER RIGHT

The description of your right which is enclosed is only the Director's recommendation to the SRBA Court on your water right. The Court will decide how it will decree you water right. You are free to agree or disagree with the Director's recommendation. If you agree with the Director's recommendation you do not need to do anything, pending further notice as described below. If you disagree with the Director's recommendation, you need to file an objection as described below.

INSTRUCTIONS FOR REVIEWING THE WATER RIGHTS OF OTHERS

The complete Director's Report contains recommendations to the SRBA Court on your water right and all other small domestic and stock water rights in your area. The Court will decide how it will decree all water rights. The

Director's recommendations in the full report are listed in two sections of the report:

1) List of Recommended Water Rights – Water right recommendations are listed alphabetically by source and then chronologically by priority date within each source.

2) List of Claims Recommended to Be Disallowed – Water rights recommended to be disallowed are listed numerically by water right number. A short statement of the reason for IDWR's recommendation for disallowance is provided.

Also included in the complete Director's Report are descriptions of the United States' claims for domestic and stockwater under federal law, when the United States claims one right under both federal and state law. These are called "dual based" claims. The Director does not investigate the federal law portion of these claims and makes no recommendation whether they should be granted or not.

If you want to review someone else's water right you need to look at the complete Director's Report, which is available at the SRBA courthouse in Twin Falls and the locations listed on the third page of this notice. Copies of the report can be made, but you may be charged for copying and mailing.

INSTRUCTIONS FOR TAKING A WATER RIGHT CLAIM TO COURT

What do I do if I disagree with a recommendation or a federal water right claim?

If you disagree with any element of the recommendation for your water right or anyone else's water right and want to be heard in court, file an objection with the SRBA Court. Objections must be made on the standard objection form available from any IDWR office or from the SRBA Court.

Your objection must be received by the SRBA Court on or before **September 17, 1999.**

What do I do if someone else objects to my water right recommendation?

If someone files an objection to your water right, or anyone else's water right, you may file a response to that objection. Responses to objections must be made on the standard response form available from any IDWR office or from the SRBA Court.

Your response must be received by the SRBA Court on or before **January 21, 2000.**

> *What do I do if I want to participate in the court case on someone else's water right?*
>
> If you want to be involved in the court case on any water right in the Director's Report, you must file either an objection or a response by the dates listed above.

9. Because the DeVenys had their stockwater claims also reported in the director's report, they received by mail copies of both notices together with the director's recommendations for each of their claims. The DeVenys do not contend that they did not receive such notice.

10. On May 21, 1999, IDWR filed with the SRBA Court the *Affidavit of Service Notice of Filing of Director's Report, Reporting Areas 19, 22 & 24, IDWR Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 & 86, Federal Reserved Water Rights.* The *Affidavit of Service* listed DeVenys as recipients of the notice.

11. The United States, acting through the United States Department of Agriculture on behalf of the United States Forest Service, also filed claims to the 13 sources located on the Cannonball Allotment. These Forest Service claims were also included in the filings for which DeVenys received notice. The DeVenys timely filed objections to the 13 claims filed by the United States Forest Service, but did not object to the springs or fountains claims filed on the same sources by the United States and the Tribe.[6]

12. The State of Idaho timely filed objections to all Springs or Fountains claims.

13. On February 2, 2000, all subcases pertaining to the Springs or Fountains Claims were referred to Special Master Terrence Dolan for proceedings on the objections.

14. On April 21, 2000, in preparation for an initial status conference set by the Special Master, the United States and the Tribe filed a *Joint Report for Status Conference* explaining, among other things, that the issues involved could be segregated into two categories. The first category relating to issues of treaty interpretation and other legal issues pertaining to entitlement common to all Springs or Fountains claims. The second category being fact-specific issues pertaining to the individual claims and whether specific claims satisfied the criteria for establishing a Springs or Fountains claim. The Tribe and United States suggested that for purposes of judicial economy and case management all of the subcases be consolidated and the

[6] The DeVenys eventually settled their objections to the Forest Service claims through a global stipulation entered into between the United States and various ranching entities claiming water rights on public grazing lands.

proceedings bifurcated between the common legal issues and the case-specific factual issues. Further, that the case-specific issues be stayed pending resolution of the legal issues.

The Tribe and United States also explained in the *Joint Report for Status Conference* that most all other claimants who owned land on which the Springs or Fountains claims were located did not object to the Springs or Fountains claims. As such, the private landowners were not parties to the subcases. The Tribe and United States expressed concern that they would possibly require future access to the private lands on which the sources were located for purposes of conducting discovery including surveying the exact location of the claimed source.[7] If the private claims were decreed in advance of the Springs or Fountains claims the Tribe and United States explained that they may have difficulty gaining access over private lands. They proposed that all private claims to the same sources as the Springs or Fountains claims (overlapping with the Springs or Fountains claims) be identified so that any pending private claims could be stayed in order to retain the Special Master's jurisdiction over the claims and permit for discovery in the future, if necessary.[8]

15. On April 27, 2000, the State of Idaho filed a *Response to the Tribe's and United States Joint Report for Status Conference* agreeing that the subcases should be consolidated and that the overlapping private claimants be identified. However, the State asserted that the identification not be limited to private lands, but should also include claims on public land because the Forest Service and Bureau of Land Management also filed overlapping claims. In its response, the State also agreed with the proposal to stay the overlapping private claims. On that same date, the State of Idaho also filed a *Motion to Consolidate Nez Perce Springs or Fountains Claims*.

16. The State of Idaho, the United States and the Tribe also represented to the Special Master that the ongoing court-ordered settlement negotiations pertaining to the Nez Perce Tribe's instream flow claims also included discussions pertaining to the settlement of the Springs or Fountains claims as part of a comprehensive negotiated settlement; and therefore, the Springs or Fountains claims should not be ordered to a separate mediation.

[7] One of the issues to be decided was whether each particular spring or fountain claim was within a ¼ mile of a perennial stream.

[8] The concern was that if private claims were decreed then the United States and the Tribe would have no legal basis on which to enter the property.

17. On May 8, 2000, the Special Master granted the State of Idaho's *Motion to Consolidate* and ordered that IDWR identify claims filed on both federal public land and private land that overlapped with the Springs or Fountains claims.

18. On August 29, 2000, pursuant to the Special Master's order, IDWR filed *IDWR's Report Identifying Competing Claims, Reporting Areas 19, 22 & 24, Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 & 86.* On October 27, 2000, following responses regarding concerns with IDWR's report filed by the State of Idaho, the United States and the Tribe, the Special Master ordered that the Tribe and the United States identify the claims filed by private parties on which they relied to identify existing springs or fountains for purposes of filing their claims.[9] In an effort to identify the overlapping claims, the United States contracted with Northwest Economic Associates to prepare a report. On February 20, 2001, following receipt of the report, IDWR filed *IDWR's Findings Re: United States' Nez Perce Tribe Report (Private claims upon which Federal Claims are based) Reporting Areas 19, 22 and 24, Basins 67, 69, 77, 78, 79, 81, 82, 83, 84, 85 & 86*, which responded to the information contained in the report prepared by Northwest Economic Associates.

19. On October 31, 2001, the State of Idaho sent a letter to all identified claimants with overlapping claims to sources on private land that were also claimed by the United States and Tribe, notifying them of the existence of the Springs or Fountains claims. A copy of the letter was not sent to claimants with claims on federal public land because the same access issues did not exist with respect to public lands. Included with the letter was a questionnaire for the claimant to fill out and return pertaining to the nature and use of the spring. The purpose of the questionnaire was to assist the State of Idaho with pursuing its objections.[10] Also included with the letter was a copy of the report prepared by Northwest Economic Associates. Because DeVenys had claims to three sources on their private land that overlapped with the Springs or Fountains claims, the DeVenys received copies of the letter, questionnaire and report.

20. The October 31, 2001, letter provided in relevant part:

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[9] Apparently the Tribe and United States identified the sources for the Springs or Fountains claims by evaluating claims to sources in the relevant geographic areas filed by other claimants.

[10] Pursuant to Idaho Code § 42-1411A(16) the attorney general is responsible for representing the State of Idaho in all matters pertaining to claims established under federal law. In some respects this presented a conundrum for the State because many of the claims were to isolated sources located on private land really only affecting the private land owner. As a result the State submitted the questionnaire to determine how it should proceed with its case and inform private claimants that it was not representing their individual interests.

Dear Water Right Claimant:

According to the records of the Idaho Department of Water Resources (IDWR) and the District Court overseeing the Snake River Basin Adjudication (SRBA), the Nez Perce Tribe, and the United States as trustee for the Nez Perce Tribe, may have filed a water right claim for a spring located on your property. The Tribe and the United States claim the right to the use of 50% of the flow of all springs on certain former tribal lands for stockwater, wildlife, cultural, and ceremonial purposes. The Tribe and the United States developed their claims on file with IDWR. Whenever they discovered a private water right claim on former tribal lands with a point of diversion listed as a "spring," they filed a duplicate claim. The private claims used by the United States and the Tribe as the basis for their claims are listed in the enclosed report: "Springs and Fountains Claims on Behalf of the Nez Perce Tribe in Reporting Areas 19, 22, and 24." 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 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 under the following provision in the Nez Perce Treaty of June 9, 1863….

….

If a federal reserved water right were decreed for a water source on your property, it is unclear what effect that may have on your water rights. Your use of up to 50% of the flow of the spring could be precluded if necessary for the purposes described in the Tribe's notice of claim namely stockwater, wildlife, cultural and ceremonial. Development of the spring, changes in use, or changes in the place of diversion may also be precluded. It is also unclear whether decree of the water right in the Tribe's name implies the existence of an easement across your property to allow tribal members and their livestock access to the claimed spring.

The Office of the Attorney General has objected to all spring and fountain claims of the United States. While the State's objections ultimately may defeat these claims, the Attorney General is precluded by statute from representing your individual interests in the SRBA. Thus, you may wish to consider whether you need to intervene and present any defenses you may have to these claims. Although the deadline for filing objections to the claims of the Tribe and the United States has passed, the rules of the SRBA district court do allow claimants, under certain circumstances, to file motions to participate in ongoing proceedings to resolve claims. SRBA Administrative Rule No. 1 § 10.k. Due to ethical guidelines, we cannot advise you as to whether you should consider such

participation, or whether the court would allow it. You may wish to consult an attorney for further guidelines.

Even if you choose not to participate directly in the SRBA proceedings, you can assist the State in pursuing its objections to the claims of the United States and the Tribe by filling out the attached questionnaire and returning it to the following ….

21. The report entitled *Springs or Fountains Claims on Behalf of the Nez Perce Tribe in Reporting Areas 19, 22 and 24, Private Claims upon which Federal Claims are Based*, prepared by Northwest Economic Associates which was also included with the October 31, 2001, letter provided in relevant part:

Purpose and Scope

….

This report identifies springs claims made by private claimants upon which the United States rely in developing springs and fountains claims on behalf of the Nez Perce Tribe. Those claims were filed by the United States with the Idaho Department of Water Resources (IDWR) in July and October, 1998. **For the purposes of this report and the springs claims herein, "private claims" are defined as those springs filed by private entities on private land.** [emphasis added].

Background

In 1999, the IDWR reported federal "domestic and stockwater" claims in Reporting Areas 19, 22, and 24. Those claims included "springs and fountains" claims filed by the United States and the Nez Perce Tribe pursuant to Article 8 of the Treaty of June 9, 1863, with the Nez Perce Tribe. 14 Stat. 647. **Claims were made for springs on both public and private land. For the purposes of this report, public land includes that owned by the U.S. Forest Service (USFS), Bureau of Land Management (BLM), United States in trust for the Nez Perce Tribe, U.S. Army Corps of Engineers, National Park Service, and the State of Idaho. Also for the purposes of this report, private land includes fee land not owned by a public entity and Nez Perce tribal fee land.** No claims within the external boundaries of the current Nez Perce Reservation have yet been reported to the SRBA Court; all such claims are scheduled to be reported to the Court contemporaneously with the "irrigation and other" claims for Reporting Area 22. [emphasis added.]

Land ownership was determined on the basis of a Geographic Information System (GIS) coverage acquired from the Nez Perce Tribe. The coverage was developed by the BLM in conjunction with the Interior Columbia Basin

> Ecosystem Management Project using 1992 information. The coverage scale is 1:100,000; as such, land ownership precision may not be reflected within a given 40-acre parcel area. **The coverage did not provide any specific information regarding privately owned land, other than that it was not in public ownership.** [emphasis added.]
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> **Categories of Claims by the United States**
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> **In Reporting Areas 19, 22, and 24, the United States filed a total of 1,886 springs or fountains claims. The 1,886 claims may be arranged in three categories of land ownership: public (603 claims), private (1,243 claims), and indeterminate or uncertain (40 claims). Claims to "springs and fountains" on public lands are beyond the scope of this report since they are not based upon springs claims filed by private claimants, but instead were developed from data obtained from federal land management agencies and sources other than private claims.** [emphasis added.]

22. On April 9, 2002, following receipt of the October 31, 2001 letter, report and questionnaire, the DeVenys, acting *pro se*, filed a *Motion to Participate* in the consolidated subcase together with a *Memorandum in Support*. The DeVenys sought to intervene in the consolidated subcases solely on the basis of the six Springs or Fountains claims to the three sources located on private land owned by the DeVenys. Included with the *Motion* were two *SRBA Standard Form 1 Objection* forms *(SF-1)*. One *SF-1* listed the three claims filed by the United States on behalf of the Tribe. The other *SF-1* listed the three claims filed by the Tribe on its own behalf.

23. On June 10, 2002, following a hearing on DeVenys' *Motion to Participate*, the Special Master granted the *Motion* finding: "The DeVenys attached to their motion two objection forms for their claims (78-11240, 78-11243, 78-11601, 78-11603, 78-12038 and 78-12073) where 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.'" No party to the consolidated subcase opposed DeVenys' *Motion*. The Devenys then became parties to the consolidated subcase.

24. On June 28, 2002, the DeVenys responded to discovery requests served by the United States and Tribe, one of which provided:

> Please state whether you intend to participate in the trial of the test claims in this consolidated subcase, presently set to begin on October 15, 2002, and if so, identify each and every person you intend to call as a fact witness in the trial, and state the substance of the facts upon which each fact witness is expected to testify.

Answer We plan to participate, but that may change depending on circumstances.

The DeVenys also served discovery requests on the Tribe and United States.

25. Prior to the DeVenys' participation, the parties to the consolidated subcase were ordered by the Special Master to select 20 subcases to be designated as test cases for litigating the issues encompassed by the Springs or Fountains claims. Five of the subcases related to sources located on federal land. On June 14, 2002, four days after the Special Master granted the DeVenys' *Motion to Participate*, the State of Idaho served on parties including the DeVenys a motion to exclude one of the test cases designated by the United States on the basis that it did not comply with Special Master's order that the test cases be for springs on federal lands. *See* State of Idaho *Motion to Exclude Test Case No. 78-11401 for Non-Compliance with Trial Schedule Order and Motion for Expedited Hearing* (June 14, 2002). On June 26, 2002, the DeVenys participated in the telephonic hearing on the motion.

26. On August 9, 2002, and shortly thereafter, various motions for summary judgment were filed with respect to the test cases. Accompanying the motions were affidavits, briefs and expert reports pertaining in part, to the springs located on national forest and BLM lands, including Rodger Spring located on the Cannonball Allotment. Rodger Spring was one of the springs designated as a test case and was discussed at length in various documents where it was identified by name, legal description, location on USGS maps and by photographs. The Devenys were served with copies of all of the filings pertaining to the summary judgment proceedings.

27. On March 31, 2003, nine months after DeVenys intervened, the United States and Tribe filed an *Unopposed Motion for Nez Perce Tribe and United States to Postpone March 27, 2003 Scheduling Conference*. The *Motion* informed the Special Master that the parties were involved in on-going settlement negotiations pertaining to "springs on private and public lands which are the subject of this consolidated subcase." On June 2, 2003, the United States' and Nez Perce Tribe filed a *Joint Motion to Vacate June 5, 2003 Hearing*, informing of "recent significant progress in the SRBA mediation which has resulted in a proposed term sheet." On October 16, 2003, the parties filed a *Joint Motion for Interim 90-Day Suspension of 2nd Trial Schedule Order* which gave notice that the parties had reached agreement on a term sheet. On May 15, 2004, the term sheet was publicly released. Among the things the term sheet provided: "The Tribe's treaty right of access to and use of water from springs and fountains on federal public lands

within the 1863 Nez Perce Treaty ceded area shall be recognized and established under the agreement." On July 15, 2004, the parties filed a *Joint Motion to Vacate 3rd Trial Schedule Order and Stay Litigation* which specified that "the term sheet if approved and implemented, would settle all of the Nez Perce "springs or fountains' claims." At no time does the record show nor do the DeVenys argue that they sought to participate in any of these negotiations.

28. On March 7, 2005, the DeVenys sent a "letter of inquiry" to the SRBA District Court notifying the court that they were parties to the Springs or Fountains claims and were unaware of the pending settlement. The letter inquired as to whether the DeVenys would have the opportunity to comment on the proposed settlement, as it pertained to claims on federal land. The correspondence was filed in the consolidated subcase. The Special Master thereafter scheduled a hearing on the correspondence. On March 31, 2005, the parties filed a *Joint Notice of Fulfillment of Settlement Agreement Conditions and Pending Submission of Consent Decree After Remand of Jurisdiction From Idaho Supreme Court*. On April 7, 2005, the Special Master held a hearing on DeVenys' letter of inquiry. On April 28, 2005, the DeVenys sent a letter to Steven W. Strack, counsel for the State of Idaho, setting forth with particularity the basis for their objection to the claims located on the Cannonball Allotment.

29. On August 31, 2005, the parties filed a *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 Orders Pending Entry of Consent Decree*. On September 15, 2005, the DeVenys filed their *Objection to Joint Motion of Nez Perce Tribe and the United States to Decree Claims on Federal Lands on Cannonball Allotment in Nez Perce National Forest*. The objection incorporated by reference the objections included in the April 28, 2005, letter to Steven Strack.

30. On October 27, 2005, following a hearing on DeVenys' objection, the Special Master denied Devenys' objection and issued 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, Decree Claims on Federal Land and Stay Entry of Orders Pending Entry of Consent Decree***. Relying on ***SRBA Administrative Order (AO1)*** 10.k, the Special Master held that the DeVenys waived their right to participate in the subcases pertaining to claims on federal land based on the limited scope of their participation.

31. On November 10, 2005, through counsel, DeVenys filed a *Motion for Reconsideration* and on November 23, 2005, a *Motion to Alter or Amend*. On January 26, 2006, the Special Master issued an ***Order Denying DeVeny Motion for Reconsideration and Motion to Alter or Amend***.

32. The instant Challenge was timely filed by DeVenys through counsel on February 9, 2006. Following this Court's review of the file, prior to addressing the merits of the Challenge this Court ordered the parties to participate in settlement negotiations in an attempt to address DeVenys' concerns. Settlement efforts were unsuccessful.

II.
Matter Deemed Fully Submitted for Decision

Oral argument was heard on the matter on June 1, 2006. At the close of the hearing, the Court took the matter under advisement. No party requested the opportunity to file additional briefing, nor does the Court require additional briefing. Therefore, this matter is deemed fully submitted for decision the next business day, or June 2, 2006.

III.
Issues Presented on Challenge

As stated by DeVenys' counsel, the issues presented on challenge are:

1. The DeVenys' April 9, 2002 Motion to Participate and the June 10, 2002 Order Granting the DeVenys' Motion to Participate.

a. Did the Special Master err by deciding that the DeVenys' April 9, 2002 Motion to Participate and the June 10, 2002 Order Granting DeVeny Motion to Participate limit the DeVenys to participation only in six specific subcases in the Consolidated Subcase?

b. Did the Special Master err by deciding that constitutional due process principles associated with the State's misleading October 31, 2001 notification letter do not require that the DeVenys' 2002 Motion to Participate and the 2002 Order Granting DeVeny Motion to Participate be deemed to include the Nez Perce Tribe's 13 claims to springs on the Cannonball Allotment?

2. The DeVenys' March 8, 2005 Letter Request to Participate in the SRBA Court Proceedings on the Proposed Settlement of the Nez Perce Springs Claims on Federal Land.

a. Did the Special Master err by deciding that the DeVenys' March 8, 2005 letter request to participate in the SRBA Court proceedings on the proposed settlement of the Nez Perce springs claims on federal land does not entitle them to be heard with respect to the proposed Partial Decrees for the 13 Nez Perce springs claims on the Cannonball Allotment?

3. 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.

a. Did the Special Master err by deciding that 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 is not an appropriate procedural method for the DeVenys to seek to have their substantive concerns heard on the settlement's proposed Partial Decrees for the 13 Nez Perce springs claims on the Cannonball Allotment?

b. Did the Special Master err by issuing a Report and Recommendation for the 13 Nez Perce springs claims on the Cannonball Allotment without affording the DeVenys a full opportunity to be heard on these claims?

4. The DeVenys' Motion to Alter or Amend.

Did the Special Master err by deciding that the DeVenys' substantive concerns on the settlement's proposed Partial Decrees for the Nez Perce Tribe's 13 claims on the Cannonball Allotment are not to be addressed in the context of a Motion to Alter or Amend?

5. Did the United States and the Nez Perce Tribe satisfy their burdens of proof (production and persuasion) with respect to the Nez Perce Tribe's proposed 13 Partial Decrees for springs on the Cannonball Allotment?

6. Are federal and/or State of Idaho Constitutional due process protections violated if the DeVenys are denied an opportunity to be heard on the Nez Perce Tribe's 13 proposed Partial Decrees for springs on the Cannonball Allotment?

7. Will the DeVenys suffer a taking violating the federal and/or State of Idaho Constitutions if the Nez Perce Tribe's 13 proposed Partial Decrees for springs on the Cannonball Allotment are decreed in the SRBA?

IV.
Standards of Review

1. **Special Master's Findings of Fact, Conclusions of Law**

The following standard of review of a special master's report and recommendation has been consistently applied throughout the course of the SRBA.

A. **Findings of fact of a special master.**

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App.1989); *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,[11] although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo.* Wright and Miller, *Federal Practice*

[11] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

and Procedure § 2614 (1995); *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra,* § 2585.

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied,* 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor D. Craig Lewis states that "[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the 'clearly erroneous' standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook." Lewis, Idaho Trial Handbook, § 35.14 (1995), (citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.).

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151,153, 922 P.2d 1077, 1079 (Ct. App. 1996).

B. **Conclusions of law of a special master.**

A special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120

Idaho at 378, 816 P.2d at 334; *Higley,* 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley,* 124 Idaho at 534, 861 P.2d at 104. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

In sum, findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

2. **Constitutional Due Process**

The Fifth Amendment to the United States Constitution prohibits the federal government from depriving any person of life, liberty or property without due process of law. U.S. CONST. amend. V. The 14th Amendment to the United States Constitution prohibits the states from depriving any person of life, liberty or property without due process of law. U.S. CONST. amend. XIV, § 1. The Idaho Constitution also provides that no person "be deprived of life, liberty or property without due process of law." IDAHO CONST. Art. I § 13. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted).

3. **Pro Se Litigants**

The general rule in Idaho is that *pro se* litigants are held to the same standards and rules as those litigants represented by attorneys. *Ade v. Batten*, 126 Idaho 114, 118, 878 P.2d 813, 817 (Ct. App. 1994) (citing *Golay v. Loomis*, 118 Idaho 387, 393, (1990); *Golden v. Condor, Inc. v. Bell*, 112 Idaho 1086, 739 P.2d 385 (1987)).

4. **Legal Standard for Participation/Intervention in Subcase**

SRBA Administrative Order 1 Rules of Procedure (Oct. 1997)("***AO1***") 10.k provides:

> 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.*

AO1 2.p. defines "party to a subcase" as:

> The claimant, any objector or respondent to a water right recommendation, any party to a subcase which has been consolidated with another subcase, any party to the adjudication granted leave to participate in a subcase by the Presiding Judge or Special Master, and any party to the adjudication filing a *Motion to Alter or Amend the* ***Special Master's Recommendation***.

I.R.C.P. 24(a) sets forth the standard for intervention of right.

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the state of Idaho confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant 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). The Idaho Supreme Court distinguished the timeliness standard for intervention of right in the context of the SRBA. *In re SRBA Case No. 39576, Minidoka Nat'l Wildlife Refuge, SRBA Subcase No. 36-15462,* 134 Idaho 106, 996 P.2d 806 (2000) (hereafter "*Smith Springs*"). The Supreme Court held that intervention of right in subcases to which a party has a generalized interest was timely in the context of the SRBA if filed within the response period. The Court rejected the argument that intervention of right was timely if filed prior to the date set for trial and held:

> Given the monumental scope of the SRBA, which is adjudicating the rights of all water rights holders in the Snake River Basin, we agree with the SRBA court that a "generalized interest is insufficient to intervene in a subcase as a matter of right because the requirements for filing timely objections or responses under I.C. § 42-1412 would become meaningless[,] depriving the court and all parties to the SRBA the structure necessary to administer the case."

Id. at 110, 996 P.2d at 810.

In *Smith Springs*, the Idaho Supreme Court also addressed the standard for permissive intervention. "I.R.C.P. 24(b) allows permissive intervention by a person '[u]pon timely application' and 'when an applicant's claim . . . and the main action have a question of law or fact in common.'" *Id*. at 110, 996 P.2d at 810. Further, "[t]he decision of whether to grant the motion to intervene is discretionary with the trial court. A court acts within its discretion if it perceives the issue as discretionary, acts within the outer boundaries of its discretion and consistently with applicable legal standards, and reaches its decision by exercise of reason." *Id*. at 110, 996 P.2d at 810; see *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co*., 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). Statutes providing for intervention should be liberally construed. *Herzog v. City of Pocatello*, 82 Idaho 505, 356 P.2d 54 (1960).

V.
DISCUSSION AND ANALYSIS

1. The Special Master did not err in finding that the scope of DeVenys' participation in the consolidated subcases was ultimately limited by the subcases to which the DeVenys sought to contest and the issues related to those subcases.

The DeVenys moved to participate in the consolidated subcases pursuant to ***AO1*** 10.k and I.R.C.P. 24(a) and (b). The DeVenys sought intervention as a matter of right alleging "the claims in question are used for stockwater by the DeVenys. The springs are on DeVenys private property. DeVenys have filed a claim and have a decreed water right to the springs in question." The DeVenys also moved for permissive intervention alleging "Willis D. and Betty G. DeVeny own land upon which these claim are located; thus Wills D. and Betty G. DeVeny have an interest in participating in subcases involving the adjudication of water rights for stockwater purposes because common issues of fact and law may be involved. We were informed of competing claims by the State of Idaho." The *Motion* goes on to state that "participation by Willis D and Betty G. DeVeny will not delay these proceedings." Attached to the *Motion* were two *SF-1 Objection* forms listing the six subcases to which the DeVenys were contesting. In

both *SF-1s*, the reason given in support of the objection was "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."

The Special Master's order granting the DeVenys' motion did not specifically discuss whether the motion was granted pursuant to I.R.C.P. 24(a) as a matter of right or I.R.C.P. 24(b) permissive intervention. However, the order acknowledged that the DeVenys attached to their motion two *Objection* forms objecting to the claims located on their private land (78-11240, 78-11243, 78-11601, 78-11603, 78-12038 and 78-12073) where 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." The order also acknowledged that no objections were filed to DeVenys' motion.

In the Special Master's ***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*** (***Master's Recommendation***), the Special Master made it clear that DeVenys intervention was granted as a matter of right solely based on the interests they represented to be the subject of the action.

> 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.

Master's Recommendation**,** at 8-9.

> This Court agrees.
>
> 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 y 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* waves the right to be a party to the subcase and to receive notice of further proceedings before the Special Mater, except for *Motions to Alter or Amend*.

AO1 10.k.

I.R.C.P. 24(a) provides in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impeded applicant's ability to protect that interest, unless the applicants interest is adequately represented by existing parties.

I.R.C.P. 24(a)(2). I.R.C.P. 24(c) requires that the "motion 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 set forth with particularity the basis for their intervention and listed the six subcases affecting their interest. All six subcases dealt with claims on private property. Claims

on private property raised a different set of issues not present with regard to the claims on federal land. The other parties to the consolidated subcase did not object to the DeVenys' *Motion*. The DeVenys were granted participation based on these representations, namely the six subcases affecting their interests, and the absence of objections by other parties. However, once the subcases to which DeVenys objected were dismissed, DeVenys no longer had an interest in the subject matter of the proceedings according to the interest that was represented to the Special Master as well as other parties for purposes of intervening.

Simply put, the determination of whether intervention is appropriate turns on the nature of the interest alleged to be the subject matter of the action. The DeVenys were permitted to intervene consistent with the interests requested.

Although DeVenys were permitted to intervene in the consolidated subcase, ultimately this does not make them parties to the individual subcases within the consolidation. Consolidated subcase 67-13701 consists of 3755 separate subcases.[12] Following objection and responses, the matter was consolidated for purposes of resolving issues common to all subcases in accordance with ***AO1*** 11. and I.R.C.P. 42. ***AO1*** 11. provides:

> A motion to consolidate subcases is appropriate in situations where common issues of law or fact present themselves in more than one subcase and can be most expeditiously and efficiently achieved through presentation to the Presiding Judge or Special Master in consolidated hearings.

AO1 11.

Consolidation does not make parties to individual subcases parties to every subcase within the consolidated matter, rather litigants are still only parties to the subcases to which they objected or responded as well as to the consolidated matter. However, participation in the consolidated proceedings ultimately stems from the litigant's party status in a particular subcase.

The Special Master granted DeVenys intervention as a matter of right and essentially treated their intervention as objections in the six subcases. This was appropriate given DeVenys' direct interest in the subject matter of the action. Accordingly, there was no need to expressly limit the scope of DeVenys' participation otherwise. However, had DeVenys only had a generalized interest in the proceedings and sought only to intervene generally in the consolidated

[12] The consolidated subcase is designated as 67-13701 because 67-13701 is numerically the first number in the sequence of claim numbers.

matter or in a particular subcase, the motion may have either been denied or the nature of their participation expressly limited to the interests asserted.

It is routine in matters of generalized interest to allow a party to intervene on a limited basis. In *State v. U.S ., In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge*, SRBA Subcase No. 36-15452 ("*Smith Springs*"), the Supreme Court upheld the Special Master's decision in limiting participation in conjunction with granting a motion for permissive intervention. *Id*. at 111.

In this case, DeVenys' participation was ultimately tied to the subcases to which they sought to object. When those subcases were sought to be dismissed without any conditions as concerned the interests of the DeVenys as those interests were represented in the *Motion to Participate*, the DeVenys no longer had an interest in the outcome of the proceedings. The Special Master did not err in ultimately limiting the DeVenys' participation to the subcases and issues represented for purposes of intervening in the consolidated subcase.

2. **The Special Master did not err in deciding that constitutional due process principles associated with the State's October 31, 2001, letter do not require that the DeVenys' 2002 Motion to Participate and the 2002 Order Granting DeVenys' Motion to Participate be deemed to include the Nez Perce Tribe's 13 claims to springs on the Cannonball Allotment?**

A. **The Court finds no constitutional due process concerns with the State's October 31, 2001, letter.**

The DeVenys assert that the State's letter was misleading because it only referred to Springs or Fountains claims located on private land. As such, in reliance on the letter the DeVenys only addressed the claims located on private land in their *Motion to Participate.* This argument that the letter was misleading is without merit. The purpose of the letter was not intended as an additional round of service for re-opening the Springs or Fountains claims for objections and responses. The letter was specifically directed to claimants with Springs or Fountains claims located on private property. The letter explained how the claims were identified on private property and that that if the claimant's claim number was on the list in the enclosed report that the Tribe was claiming ownership to a portion of that source. The relevant excerpt from the letter reads:

> Whenever [the United States and Tribe] discovered a private water right claim on former tribal lands with a point of diversion listed as a "spring," they filed a duplicate claim. The private claims used by the United States and the Tribe as the basis for their claims are listed in the enclosed report: "Springs and Fountains Claims on Behalf of the Nez Perce Tribe in Reporting Areas 19, 22, and 24." 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 goes on to explain the Tribe made claims to sources on both private and federal lands that were in the 1855 boundaries of the reservation. Specifically:

> 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 under the following provision in the Nez Perce Treaty of June 9, 1863. [**emphasis added].

Claimant's receiving the letter then had to refer to the report entitled *Springs or Fountains Claims on Behalf of the Nez Perce Tribe in Reporting Areas 19, 22 and 24, Private Claims upon which Federal Claims are Based*, prepared by Northwest Economic Associates ("report") included with the letter to identify if their claim number was on the list. The report explained that Springs or Fountains claims were filed on both private and public land:

> This report identifies springs claims made by private claimants upon which the United States rely in developing springs and fountains claims on behalf of the Nez Perce Tribe . . . **For the purposes of this report and the springs claims herein, "private claims" are defined as those springs filed by private entities on private land.**
>
> . . .
>
> **In 1999, the IDWR reported federal "domestic and stockwater" claims in Reporting Areas 19, 22, and 24. Those claims included "springs and fountains" claims filed by the United States and the Nez Perce Tribe pursuant to Article 8 of the Treaty of June 9, 1863, with the Nez Perce Tribe. 14 Stat. 647. Claims were made for springs on both public and private land. For the purposes of this report, public land includes that owned by the U.S. Forest Service (USFS), Bureau of Land Management (BLM), United States in trust for the Nez Perce Tribe, U.S. Army Corps of Engineers, National Park Service, and the State of Idaho. Also for the purposes of this report, private land**

> **includes fee land not owned by a public entity and Nez Perce tribal fee land.** [emphasis added].

The report further explained that its scope was limited to claims only located on private land because the United States and Tribe used a different process for identifying claims on public lands:

> **In Reporting Areas 19, 22, and 24, the United States filed a total of 1,886 springs or fountains claims. The 1,886 claims may be arranged in three categories of land ownership: public (603 claims), private (1,243 claims), and indeterminate or uncertain (40 claims). Claims to "springs and fountains" on public lands are beyond the scope of this report since they are not based upon springs claims filed by private claimants, but instead were developed from data obtained from federal land management agencies and sources other than private claims.** [emphasis added]

In summary, although the report did not take the additional step of specifically identifying overlapping claim numbers located on public land as was the case with those located on private land, it did provide notice that 603 of the Springs or Fountains claims were to sources located on public land and were included in the domestic and stockwater claims reported by IDWR in 1999. The DeVenys obviously previously referred to some of these domestic and stockwater reports when they filed objections to the overlapping claims filed by the Forest Service. Accordingly, the letter and included report were more than sufficient to alert DeVenys to consult the domestic and stockwater director's reports filed in 1999, regarding Springs or Fountains claims located on public land.

B. **Even if the letter were deemed to be misleading, any due process concerns were amply restored after the DeVenys were granted participation in the consolidated subcase.**

Finally, even if assuming for the sake of discussion that the State's letter was determined to be misleading, the DeVenys' *Motion to Participate* was nonetheless granted in the consolidated subcase, at least as to the subcases and related issues raised in their *Motion*. As part of that participation, the DeVenys received copies of all subsequent filings. The DeVenys had the opportunity to participate in discovery and did participate in discovery. The DeVenys were put on notice that the parties were actively negotiating the Springs or Fountains claims in

conjunction with off-reservation instream flow claims. The DeVenys had the requisite status to participate in settlement discussions but apparently did not take the opportunity. They received copies of all of the filings associated with the motion for summary judgment proceedings. One of the test cases actually involved one of the Springs located on the Cannonball Allotment which the DeVenys now seek to contest. Subsequently the parties filed numerous motions to continue the trial based on pending settlement negotiations. On May 15, 2004, the mediator's term sheet setting forth an outline for the terms of the settlement was made public. The term sheet specifically provided: "The Tribe's treaty right of access to and use of water from springs and fountains on federal public land within the 1863 Nez Perce treaty ceded area shall be recognized an established under the agreement." Despite this knowledge, the DeVenys did not move to amend their participation or intervene in the subcases pertaining to the Cannonball Allotment until March 7, 2005, when they sent a "letter of inquiry" to the Court. This is the first time the Special Master and other parties to the consolidated subcase even learned that the DeVeny's had issues with claims on public land. This is a period of almost 3 years after their *Motion to Participate* was granted and almost a year after the mediator's term sheet was made public. During this time the other parties were actively involved in settlement negotiations and operating under the premise that there were no outstanding objections to claims located on federal land.

DeVenys rely on two cases which address the effect of misleading notice, neither of which is applicable to the facts of this case. *Padilla-Agustin v. Immigration and Naturalization Service*, 21 F.3d 970 (9th Cir. 1994), dealt with a notice of appeal procedure determined to be misleading in an INS (immigration) proceeding. In finding the appeals process misleading the court noted that the process involved issues of exceeding importance-even life and death importance such as facing deportation and that the alien representing himself typically had language difficulties. As a result the court held that a high degree of clarity in the notice was required. *Id*. at 976. The case of *Gonzales v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990), dealt with a notice of an adverse decision in a disability benefits proceeding. The notice was determined to be misleading because it did not notify that failure to file a motion for reconsideration would result in summary dismissal of the claim.

The Court finds neither case to be applicable to facts of this case. This case does not involve the same type of proceeding or consideration as in *Padilla-Agustin v. Immigration and Naturalization Service*. There is no language barrier and although DeVenys were initially acting

pro se, as a general proposition *pro se* litigants are held to the same standards as that of an attorney. *Ade v. Batten*, 126 Idaho 114, 118, 878 P.2d 813, 817 (Ct. App. 1994) (citing *Golay v. Loomis*, 118 Idaho 387, 393, (1990); *Golden v. Condor, Inc. v. Bell*, 112 Idaho 1086, 739 P.2d 385 (1987)). The notice form at issue in *Gonzales* was a standardized form that was part of the process and held to be misleading by several other lower courts. The constitutionality of the standard notice procedures in the SRBA has already been upheld by the Idaho Supreme Court. *LU Ranching Co. v. U.S.,* 138 Idaho 606, 610, 67 P.3d 85, 89 (2003). As previously discussed, the letter sent by the State of Idaho was not part of the SRBA standard notice procedure and was not intended as another round of notice for purposes of re-opening subcases to objections. The DeVenys and other claimants had already previously received standard SRBA notice. Moreover, the information in the State's letter mailed to claimants did in fact discuss that claims were filed on federal land, it just did not provide specific overlapping claim numbers. However, even standard SRBA notice does not provide specific claim numbers filed by other parties. Rather, claimants are required to review the director's reports or abstracts filed by IDWR and then make the determination whether or not their claim may be affected. Finally, unlike the situation in *Padilla-Agustin* and *Gonzales,* the DeVenys were granted participation and had more than enough opportunity to learn of the Springs or Fountains claims filed on the Cannonball Allotment. As stated by the Idaho Supreme Court in the LU Ranches case "the difficulties arise from a lack of timely attention, not inadequacy of notice." *LU Ranches* at 610, 67 P.3d at 89.

3. **The Special Master did not err in finding that DeVenys' March 8, 2005, letter requesting to participate in the SRBA Court proceedings on the proposed settlement does not entitle them to be heard with respect to the proposed partial decrees issued for the thirteen Springs or Fountains claims to the sources on the Cannonball Allotment.**

The Special Master ruled that the DeVenys had waived their right to participate in the subcases pertaining to the thirteen claims on the Cannonball Allotment. The Special Master relied on ***AOI***10.K which provides in relevant part: "A party to the adjudication who does not file an objection, response or a timely *Motion to Participate* waives the right to be a party to a subcase and to receive notice of further proceedings before the Special Master, except *Motion to Alter or Amend*." The DeVenys did not file an objection or response to any of the original

twenty-six claims on the Cannonball Allotment. They did file a *Motion to Participate* with respect to the six claims located on their private land. The Special Master deemed the *Motion* timely and it was granted as a matter of right. The participation in the consolidated proceeding was ultimately limited to the subcases and interests represented in the *Motion,* which did not include claims located on federal land including those on the Cannonball Allotment. Accordingly, pursuant to ***AO1*** 10.k the only way the DeVenys could participate in the proceedings relating to the claim located on the Cannonball Allotment would be to move to participate in the proceedings or through the motion to alter or amend process (which is discussed below as a separate issue). The Special Master essentially treated the March 8, 2005, letter as a motion to participate in the subcases but found that it was not timely. This Court affirms the Special Master's ruling.

In *Duff v. Draper*, 96 Idaho 299, 527 P.2d 257 (1974), the Idaho Supreme Court set forth the test for timeliness with respect to invention as a matter of right under I.R.C.P. 24(a). In reversing the denial of a motion to intervene the day before date originally set for trial the Supreme Court held: "Whether or not the applicant has been dilatory is not the test of timeliness, but the extent of the prejudice which any delay resulting from the granting of the application will cause to existing parties." *Id*. at 302, 527 P.2d at 260 (citing 7A Wright and Miller Federal Practice and Procedure, § 1916). In the *Smith Springs* case, the Idaho Supreme Court somewhat modified the standard of timeliness as applied to the SRBA. In that case, the Special Master ruled that any motion to participate as a matter of right would be timely for the purpose of I.R.C.P. 24(a) if filed within the response period and further that such motions would be considered timely after the filing of a motion for summary judgment only in extraordinary circumstances. *Smith Springs*, 134 Idaho at 110, 996 P.2d at 810. On appeal the interveners argued that pursuant to the holding in *Duff* that a motion to intervene as matter of right was timely if filed anytime before the trial. In upholding the Special Master's ruling that the motion was untimely the Supreme Court held:

> A motion to participate is an alternative method to filing a response with no specific timetable. As an alternative it supplements the usual SRBA procedure of filing responses provided by I.C. § 42-1412(2) and AO1 § 4b. . . . *Duff* set a generous standard for the timeliness of intervention by a bankrupt person intervening in an action by the trustee in bankruptcy. . . . Duff's timeliness does not apply in the context of the SRBA litigation, where there is a standard mechanism-the response-for parties to join a subcase.

Id. (citations omitted).

Under either standard the Special Master's ruling is affirmed. The prejudice to the existing parties by the granting of the motion would have been monumental. By the time the DeVenys sent the March 8, 2005, letter regarding the claims on the Cannonball Allotment, the response period had expired by over five years, a summary judgment proceeding had already been conducted, the parties had already reached a settlement regarding all of the Springs or Fountains claims which involved considerable time and resources and the trial ultimately vacated. The delay associated with essentially re-opening the twenty-six subcases and having a trial and potential appeal would be significant. It is also important to note that the six Springs or Fountains claims located on DeVenys' private land were only dismissed as a condition of the settlement. Although DeVenys fail to address this issue, these subcases would also have to be re-opened in fairness to the Tribe and United States. Finally, there is the issue of the impact on the settlement. If the subcases were re-opened and the outcome of the proceedings varied from the settlement, the Tribe would be under no obligation to accept the settlement as to the other subcases.

4. **The Special Master did not err in holding DeVenys' September 15, 2005, Objection to the *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 Orders Pending Entry of the Consent Decree*, was not an appropriate procedural method to have their substantive concerns heard on the proposed partial decrees for the 13 Spring or Fountains claims on the Cannonball Allotment.**

Although resolution of the Nez Perce claims is proceeding through a process which may ultimately result in entry of a consent decree, the process has nonetheless been consistent with standard ***AO1*** procedure with respect to requiring parties to the adjudication to object to individual claims. In the Court's August 3, 2005, *Scheduling Order And Notices of Hearing, Re: Implementation of Nez Perce Settlement Agreement*, the Court directed the Special Master to resolve all remaining outstanding objections and motions to participate with respect to the Springs or Fountains claims and then issue a special master's report and recommendation. The DeVenys already had the opportunity to have their concerns, if any, addressed through the objection and response process. The Special Master ruled that DeVenys' had waived this

opportunity. The purpose of the *Joint Motion* was to implement the terms of the broader settlement agreement following the resolution of all outstanding objections. The purpose was not to give the parties a second attempt to object to individual claims. The Court must ultimately review and decide whether or not to approve the entry of the consent decree before the partial decrees are entered. The Court will conduct a hearing on the consent decree and DeVenys will have the opportunity to be heard in conjunction with these proceedings, subject to the limitations discussed below.

5. The Special Master did not err by issuing a special master's report and recommendation for the 13 Nez Perce claims on the Cannonball Allotment without affording the DeVenys the opportunity to be heard on these claims.

This argument is without merit. The DeVenys were afforded the opportunity to be heard on the claims. The Special Master ruled that the opportunity had been waived as discussed in section V.1. This Court affirmed that ruling.

6. **The Special Master did not err in determining that the DeVenys could not raise substantive issues regarding the claims on the Cannonball Allotment on a motion to alter or amend.**

The Special Master concluded that the DeVenys could not raise substantive issues regarding the claims on the Cannonball Allotment on a motion to alter or amend. This Court agrees. The resolution of the Springs or Fountains claims came about as a result of a negotiated settlement. Although the parties to the negotiated settlement have filed a *Joint Motion for Entry of Consent Decree*, the Court has still required that all the individual claims comprising the settlement be filed and parties to the adjudication afforded the opportunity to file objections. Ultimately, once all remaining objections have been resolved, the Court will have a hearing on the *Joint Motion* and parties will have the opportunity to be heard on the *Joint Motion* at that time. However, parties appearing to contest entry of the consent decree will be precluded from raising substantive issues pertaining to individual claims which should have been raised via the objection and response process. The DeVenys will have the opportunity to be heard on the *Joint Motion* subject to this limitation.

The DeVenys' argument with respect to the claims on the Cannonball Allotment is that the claims do not meet the factual criteria for establishing a treaty based Springs or Fountains claim. This is a factual issue which should have been appropriately raised through the filing of a timely objection or motion to participate. Although ***AO1*** is silent on the issue, it has long been established in the SRBA that a motion to alter or amend is not a substitute for filing a timely objection, response or motion to participate. *North Snake Groundwater Dist. v. Gisler*, 136 Idaho 747, 749, 40 P.3d 105, 107 (2002). The issue arises in the context of a subcase that is ultimately resolved through a *Standard Form 5* (*SF-5*) or other form of stipulation. Nonparties to the subcase then attempt to intervene raising issues with respect to the recommendation contained in the special master's findings of fact and conclusions of law. The problem is that the special master's report contains a recommendation based solely on the stipulation. In most cases there are no other findings of fact or conclusions of law as a trial or other hearing was not conducted. As such, there is no record from which to evaluate the merits of the issues raised on the motion to alter or amend without potentially conducting a trial. Ultimately, such a process not only undermines the entire settlement process set forth in ***AO1*** but it also allows parties to circumvent the objection and response process. In *Memorandum Decision and Order on Challenge (Gisler)*, Subcase 36-00077D (June 30, 2000), *affirmed* (*North Snake Groundwater Dist. v. Gisler*, 136 Idaho 747, 749, 40 P.3d 105, 107 (2002), Judge Wood, then presiding judge of the SRBA, explained the problem in detail in the context of a state-law based claim in holding that a motion to alter or amend was not the appropriate means for contesting a settlement.

> The ultimate effect of the SF5 is that all objections as between parties to the subcase are resolved and therefore there is no need for a trial or hearing on the matter unless IDWR does not concur with the settlement. Since a trial was not held in this subcase, the only 'evidence' supporting [the Special Master's] recommendation is IDWR's concurrence and the fact that the respective parties stipulated to the elements of the water right. There is no factual record for this Court to review the propriety of the underlying basis for the SF5 and whether the Special Master correctly concluded that the Claimant satisfied the burden of persuasion as to the elements of the claim.
>
> It is the opinion of this Court the [the Special master] appropriately based his recommendation on the stipulated elements contained in the SF5, and that IDWR's concurrence therewith constitutes sufficient evidence to meet the requirments of Idaho Code sections 42-220 and 1402. To hold otherwise and permit parties to enter a subcase after the fact finding stage of the process is completed and a special master's recommendation has been issued, and argue that

the basis for the SF5 is not supported by 'substantial evidence,' runs contrary to the entire purpose of the SF5 settlement procedure. Administrative Order 1 only requires a hearing on a SF5 when IDWR does not concur with the stipulated elements. **AO1 4.(d)(3)(c)**. In the instance where no trial was conducted, there are no facts in the record (other than IDWR's concurrence) of which to weigh the sufficiency. The SF5 could then always be subject to challenge on a 'sufficiency of evidence' argument. This creates several procedural problems. First, the SF5 procedure would be completely undermined. There would be little point in a having a policy and procedure directed towards encouraging parties to engage in settlement discussions because of the possibility that the SF5 would be attacked by parties that did not initially enter the subcase and participate in settlement efforts . The Court could also not expect parties to devote efforts and resources toward settlement if there would remain uncertainty as to the finality of the settlement. A hearing would always have to be conducted in order to alleviate this uncertainty.

Next, and equally important is that such an attack on the SF5 would allow a party who failed to timely enter the subcase and object to the elements of the claim, to wait until the matter has been resolved by the parties that did timely raise objections and then enter the subcase and raise new issues ans offer new evidence at that point. In essence a 'second bite of the apple.' Contesting an SF5 on the 'sufficiency of evidence' is really nothing more than a creative attempt to file an objection (or response) and then have a hearing on the objection (or response). In addition to accuracy, finality in the process is important. Permitting parties to enter the subcase after the fact finding stage has been completed and then raise new factual issues and further develop the record could potentially result in the subcase never being resolved.

….

This Court acknowledges that it has the duty to review a special master's recommendation and apply the appropriate standard of review. The court does not have to accept a special master's recommendation as a ministerial duty. In the event there is no factual record from which to review a special master's recommendation because of an SF5 stipulation, the Court can only look at the parameters defined by the elements claimed, the elements initially reported by the Director, and any objections or responses. If the quantity agreed upon is less than the quantity claimed but more than the quantity recommended in the director's report there is no basis for the Court to find clear error on a challenge to the "sufficiency of the evidence," or to find misconduct on the part of IDWR and reopen the case to litigation on the merits. To do so would not only undermine the SF5 process but also would allow parties to circumvent the procedural requirements of AO1.

Gisler at 16-18 and 25.

Although Judge Wood's opinion dealt with state-law based claim where either IDWR's concurrence is required or a hearing is necessary, the reasoning is equally

applicable to contested federal-law based claims that are ultimately resolved by stipulation. The bottom line is that a motion to alter or amend is not permitted as a means for a nonparty to a subcase to collaterally attack the factual basis of a settlement. The purpose of the motion to alter or amend is to raise issues concerning the evidentiary support for the special master's findings of fact and application of the law. In the case of a settlement the special master's findings of fact and conclusions of law are based on the settlement. A certain amount of compromise is implicit in the settlement process. Accordingly, it is accepted as part of the settlement process that the terms of the settlement may ultimately not accurately reflect the facts as they historically existed. Permitting a third party to file a motion to alter or amend asserting that the terms of the settlement do not comply with the historical facts simply undermines the entire purpose of the settlement process. Again, the Court or Special Master is not required to "rubber stamp" a settlement and has the duty to access whether there is some factual and legal basis supporting the claims, albeit with the acknowledgment that the factual and legal issues were never ultimately decided.

7. Did the United States and the Nez Perce tribe satisfy their burdens of proof (production or persuasion) with respect to the Nez Perce Tribe's proposed 13 Partial Decrees for springs on the Cannonball Allotment?

The DeVenys assert that the United States and the Nez Perce Tribe have failed to meet their burden of proof as to the elements of the 13 water rights proposed to be decreed on the Cannonball Allotment. Specifically they point to I.C. §42-1411A(12) which provides:

> Each claimant to a water right established under federal law has the ultimate burden of persuasion for each element of a water right. Since no independent review of the notice of claim has occurred as provided for water rights acquired under state law in a director's report , a claimant of a water right established under federal law has the burden of going forward with the evidence to establish a prima facie case for the water right established under federal law. All such proceedings shall be governed by the Idaho rules of civil procedure and the Idaho rules of evidence.

Here, objections were filed and summary judgment motions were briefed and argued. Ultimately, the parties reached a settlement.

AO1 provides that when parties reach a settlement on a contested water right recommendation they shall file either the stipulation or a SF-5. Here, the Tribe, the United States and the State have filed a *Joint Motion for Approval* o*f Consent Decree, Entry of Partial Final Decrees, and Entry of Scheduling Order.* These documents, when read together with the broader Snake River Water Rights Agreement of 2004, comprise the stipulation of the parties. Under ***AO1*** 4.d.(3)(b) parties may stipulate to the elements of federal reserved water rights. However, subpart (c) further provides:

> When IDWR does not concur with a proposed settlement, the Presiding Judge or Special Master shall conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right as stipulated in the Standard Form 5 or proposed settlement.

In the context of a state-law based right IDWR has conducted an investigation and issued a director's report containing a recommendation for the elements of the water right. The director's report carries *prima facie* weight. I.C. § 42-1411(5). Accordingly, if there is a settlement short of trial and the stipulated elements differ from the elements recommended the director's report and IDWR does not concur with the settlement, ***AO1*** requires a hearing to determine if there is a factual or legal basis for issuing a partial decree inconsistent with the director's report. ***AO1*** 4.d.(3)(c). However, if IDWR concurs with the settlement, IDWR is in effect amending its recommendation and there is no inconsistency.[13]

Also in the context of a federal-law based right, IDWR does not investigate the claim nor does it file a director's report carrying *prima facie* weight. I.C. § 42-1411A(12). Although not clearly spelled out in ***AO1,*** because IDWR does not investigate and report federal claims and abstracts of federal claims do not carry the same *prima facie* weight, IDWR's concurrence would not carry the same weight in a stipulation pertaining to a claim based on federal-law. [14]

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[13] In practice for purposes of notice the Court only requires the actual filing of an amended director's report if the settlement enlarges the right beyond that of the claim. It has long been established in the SRBA that it is reasonable for parties to the adjudication to expect that a settlement may result in a water right which is less than claimed but more than the director recommended. *See Gisler* at 25.

[14] Whether such concurrence would be meaningful in the case of a claim for a federal reserved water right need not be addressed in this case because this issue is decided on other grounds. The court notes that IDWR neither investigates nor recommends such claims. It follows that the concurrence of IDWR in such cases would not be

In the context of a federal claim the Idaho attorney general's office is required to represent the State of Idaho in all matter pertaining to claims based on federal law. I.C. § 42-1411A(16). Because IDWR does not investigate federal claims an evidentiary hearing for uncontested federal claims is required by statute. I.C. § 42-1411A. The claimant is required to demonstrate a *prima facie* case of the existence of a water right. However, the Idaho statutes on federal claims are silent as whether or not an evidentiary hearing is required with respect to contested claims ultimately resolved by stipulation. The claimant need only establish a *prima facie* case of the existence of the water right. Accordingly, it would be discretionary with Court based on a review of the file, the history of the proceedings, and the parties to the proceeding as to the weight to be accorded the stipulation and whether a further evidentiary hearing is necessary and the scope and nature of that hearing.[15] There is a significant difference between the situation where two parties to a federal claim meet for the first time at an initial hearing and sign a stipulation and a situation such as in this case where the claims are contested, a summary judgment proceeding has been completed, the parties have been in court ordered settlement negotiations for a number of years, the parties have periodically apprised the court of the progress of the settlement, the attorney generals office is a party to the proceedings as well a signatory to the stipulation, and the Governor of the State of Idaho and the Idaho legislature have both approved the agreement. Accordingly, in the case of a settlement involving a federal claim, subject to the Court's review and acceptance of the stipulation, the Court can rely on the evidentiary value of the stipulation in finding there is an adequate legal and factual basis supporting the claims.

Finally, the Court will nonetheless be conducting a hearing on the entry of the consent decree to determine whether there is a factual and legal basis supporting the settlement. Obviously, the scope of that hearing will not be the same as a trial on the

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entitled to the same weight accorded to a concurrence to a settlement involving state based claims which would be investigated.

[15] For example, evidentiary hearings for uncontested federal rights consist primarily of the claimant establishing a *prima facie* case through the filing of affidavits. In the case of a contested federal claim there may already be affidavits in the record filed pursuant to summary judgment motions etc. Accordingly, a very limited hearing may be all that is necessary.

merits and will not afford the opportunity for litigating issues which should have been raised through the filing of an objection.

8. **Federal and/or State of Idaho Constitutional due process protections are not violated if the DeVenys are denied an opportunity to be heard on the Nez Perce Tribe's 13 proposed *Partial Decrees* for springs on the Cannonball Allotment?**

The DeVenys assert they have been denied notice and opportunity to be heard. As discussed above, the DeVenys had notice of the filing of the claims within the Cannonball allotment both in conjunction with the filing of the notice of claims by IDWR in 1999, as well as after the DeVeny's *Motion to Participate* was granted. The Court set forth in detail in section I of this opinion the content of the notice that was served on the DeVenys and will not herein reiterate the content. The Court notes that based on the notice the DeVenys timely filed objections to the claims filed by the Forest Service. The adequacy of the SRBA notice procedures was upheld by the Idaho Supreme Court in *LU Ranching Co. v. U.S.,* 138 Idaho 606, 610, 67 P.3d 85, 89 (2003). Again, even if one were to assume that the initial notice was so defective that it did not meet minimum due process standards, it is plain that after the DeVenys were granted permission to participate they only chose to participate as to the cases in which claims were made on their private property. The Court, therefore, rules that no Constitutional due process violations occurred.

9. **The DeVenys will not suffer a taking in violation of the federal and/or state of Idaho Constitutions if the Nez Perce Tribe's 13 proposed Partial Decrees for springs on the Cannonball Allotment are decreed in the SRBA.**

> The just compensation clause of the Fifth Amendment of the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation." The Idaho Constitution also guarantees its citizens the right of due process if private property is taken for a public use, pursuant to Article I, § 13, and provides for just compensation for such a taking, pursuant to Article I, § 14.

Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 541, 96 P.3d 637, 642 (2004). The DeVenys' reliance on a "takings" argument is misplaced. The adjudication is a judicial determination of ownership of water rights after notice and an opportunity to be heard. The State

of Idaho commenced a general adjudication and joined the Tribes and United States as parties. The legal principle of how federal reserved water rights fit into the tabulation of state-based water rights is well established. The Court notes that if allowing the claims of the United States on behalf of the Tribe would amount to a taking without just compensation then any unsuccessful claimant in the SRBA who had a claim to a water right where a governmental entity successfully pursued a competing claim would have a "takings" argument. No unconstitutional taking occurred--only a judicial determination of water rights. Finally, this Court is charged with the duty of determining whether or not a water right exists and then decreeing the elements of that right. Whether or not the ultimate impact of the Court's decision arguably results in a taking is beyond the scope of the jurisdiction of this Court.

VI.
CONCLUSION

For the above-stated reasons, the Special Master's ruling is affirmed.

Dated: July 28, 2006

John M. Melanson
Snake River Basin Adjudication
Presiding Judge