

**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 Springs or Fountains
Case No. 39576	)	Claims
)	
	)	ORDER GRANTING NEZ PERCE
	)	TRIBE'S MOTION FOR
	)	PERMISSION TO APPEAL, ORDER
	)	DENYING STAY OF
	)	PROCEEDINGS PENDING
	)	ACCEPTANCE BY SUPREME
_____	)	COURT

This matter having come before the Court pursuant to the *Motion for Permission to Appeal from Order Denying Nez Perce Tribe's Motion to Disqualify Presiding Judge R. Barry Wood, Motion to Stay Proceedings, and Memorandum in Support Thereof*, consolidated subcase 67-13701 (Nez Perce Tribe Springs or Fountains Claims) filed by the Nez Perce Tribe (Tribe) on July 28, 2000.

**I.
BRIEF PROCEDURAL BACKGROUND**

1. On July 14, 2000, this Court entered its *Order Denying Nez Perce Tribe's Motion to Disqualify Presiding Judge R. Barry Wood* in consolidated subcase 67-13701 involving the Nez Perce Tribe's springs and fountains claims. The procedural background leading up to the Tribe's motion is fully set forth in that *Order*.

2. On July 28, 2000, the Tribe filed its motion for permission to appeal from the Court's July 14, 2000, *Order*, and to stay any further proceedings in the matter.

3. On August 3, 2000, the State of Idaho filed *State of Idaho's Responses to Nez Perce Tribe's Motion for Permission to Appeal and Nez Perce Tribe's Motion to Stay Proceedings*. On August 4, 2000, Thompson Creek *et al.* filed *Thompson Creek et al.'s Notice of Joinder and Response to Nez Perce Tribe's Motion for Permission to Appeal and Motion to Stay Proceedings*. No other responses were filed to the Tribe's motion.

4. The matter was heard in open Court on August 17, 2000. The hearing was originally scheduled for September 6, 2000. The Tribe, however, contacted the Clerk of the Court regarding the scheduling and expressed concern over the time limits provided by I.R.C.P. 12(c). As a result, the hearing was reset.

II. MATTER DEEMED SUBMITTED

The parties were previously given time to file responses to the Tribe's motion. Pursuant to I.A.R. 12(c), the District Court is provided 21 days from the date of the filing of the motion to file permissive appeal to rule on the motion. The motion was filed on July 28, 2000. The 21-day period runs on August 18, 2000. Oral argument was held in open court on August 17, 2000. This matter is deemed fully submitted for decision on the next business day, or August 18, 2000.

III. STANDARD OF REVIEW

I.A.R. 12(a) provides in relevant part as follows:

(a) Criteria for permission to appeal. Permission may be granted by the Supreme Court to appeal from an interlocutory order or decree of a district court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, *but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation.*

(b) Motion to District Court or Administrative Agency -- Order. A Motion for permission to appeal from an interlocutory order or decree,

upon the grounds set forth in subdivision (a) of this rule, shall be filed with the district court or administrative agency within fourteen (14) days from date of entry of the order or decree. The motion shall be filed, served, noticed for hearing and processed in the same manner as any other motion, and hearing of the motion shall be expedited.

I.A.R. 12 (emphasis added).

In *Budell v. Todd*, 105 Idaho 2, 665 P.2d 701 (1993), the Idaho Supreme Court stated:

It was the intent of I.A.R. 12 to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved. The court also considers such factors as the impact of an immediate appeal upon the parties, the effect of the delay of the proceedings in the district court pending the appeal, the likelihood or possibility of a second appeal after judgment is finally entered by the district court, and the case workload of the appellate courts. No single factor is controlling in the Court's decision of acceptance or rejection of an appeal by certification, but the Court intends by Rule 12 to create an appeal in the exceptional case and does not intend by the rule to broaden the appeal which may be taken as a matter of right under I.A.R. 11.

Id. at 4, 665 P.2d at 703.

IV. FINDINGS, CONCLUSIONS AND ORDER ON PERMISSIVE APPEAL

1. The issues regarding the disqualification of the Presiding Judge involve controlling questions of law in the consolidated subcase. The issues raised are similar to the issues pertaining to the motion to disqualify the Presiding Judge in the instream flow claims, consolidated subcase 03-10022, which was previously accepted by the Supreme Court for permissive appeal, and is currently proceeding before the Supreme Court. Contrary however to the Tribe's assertion in open court, the instream flow claims are separate and distinct claims from the springs or fountains claims. To be clear, each individual subcase is separate and distinct, however, the instream flow claims were previously consolidated with one subcase designated as the lead case and the same procedure was followed in the springs or fountains subcases. The consolidation was for the purpose of deciding common issues of law.

2. The issues pertaining to the motion to disqualify are unique in the context of the SRBA and are of first impression for the State of Idaho.

3. Since the outcome of the appeal could determine how the consolidated subcase proceeds in the SRBA, as well as impact orders, judgments, etc. entered in the consolidated subcase, and because of the large number of subcases involved in the consolidated subcase (1,886 claims), an immediate appeal would materially advance the orderly resolution of the litigation, provided however, that the matter is not stayed for the discovery and fact-finding phases of the litigation before the Special Master. The Court, therefore, finds that the issues presented for appeal meet the criteria for recommending a permissive appeal pursuant to I.A.R. 12.

**V.
ORDER DENYING STAY OF PROCEEDINGS PENDING ACCEPTANCE OF
APPEAL BY SUPREME COURT**

I.A.R. 13(f) provides as follows:

Stay Upon Permissive Appeal. (1) Stay during processing of motion for permission to appeal. The filing of a motion for permission to appeal under Rule 12 shall not automatically stay the action or proceeding nor the enforcement of the interlocutory judgment, order or decree. After a motion for permission to appeal has been filed, the district court or administrative agency, or the Supreme Court, may grant a stay in the manner provided in this Rule for a stay during an appeal.

The Court finds that staying the proceedings pending the acceptance of the appeal by the Supreme Court would unduly delay the processing of the consolidated subcase and ultimately each of the 1,886 individual subcases. The Court finds that in the interest of materially advancing the litigation the parties should proceed with the discovery and fact-finding phases of the claims under Special Master Dolan. The Court finds further that any ruling on the disqualification made by the Supreme Court would not adversely affect the discovery and fact-finding phases of the proceedings, which need to be accomplished no matter which judge is presiding over the consolidated subcase. As such, any delay in

prosecuting the claims is unnecessary. Therefore, the Tribe's motion to stay proceedings pending acceptance of the appeal by the Supreme Court is hereby **denied**.

VI.
RECOMMENDATION AS TO DELEGATION OF JURISDICTION OF
DISTRICT COURT UPON ACCEPTANCE OF APPEAL. I.A.R. 13.4

The above-captioned consolidated subcase is currently proceeding before Special Master Dolan pursuant to an Order of Reference issued by the Presiding Judge. Because of the number of subcases involved in the consolidated subcase (1,886), in the event that the Supreme Court accepts the permissive appeal, this Court finds that staying the entire consolidated subcase would hinder the orderly advancement of the consolidated subcase. The Court strongly recommends that the Supreme Court delegate jurisdiction to the District Court for purposes of permitting Special Master Dolan to preside over the discovery and fact-finding phases of the litigation. The motion to disqualify goes to the Presiding Judge, not the Special Master. Although the Special Master's authority is derived from the District Judge, the Supreme Court nonetheless has the authority to delegate jurisdiction pending the processing of an appeal.

I.A.R. 13.4 provides as follows:

During a permissive appeal under Rule 12 I.A.R. or an appeal from a partial judgment certified as final under Rule 54(b) I.R.C.P., the Supreme Court may, by order, delegate jurisdiction to the district court to take specific actions and rule upon specific matters, which may include jurisdiction to conduct a trial of issues. A motion for an order under this rule may be filed with the Supreme Court by any party in the district court action or the administrative proceeding.

Allowing the discovery and fact-finding phases of the 1,886 subcases to continue will permit the subcases to proceed and will not be affected by the ruling on appeal, whatever the result. Therefore, it is strongly recommended that in the event a party to the consolidated subcase files a motion pursuant to I.A.R. 13.4, that the Supreme Court delegate jurisdiction to the District Court for purposes of continuing the fact-finding phase and allowing the matter to proceed before Special Master Dolan.

**VII.
CONCLUSION**

For the above-stated reasons, the Tribe's motion for permissive appeal is **granted**, the motion to stay proceedings is **denied**, and upon acceptance of appeal by the Supreme Court it is recommended upon motion of a party to the proceedings that the Supreme Court delegate jurisdiction to the District Court for purposes of completing the discovery and fact-finding phases of the consolidated subcase before Special Master Dolan.

IT IS SO ORDERED.

DATED: August 18, 2000.

BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication