

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

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| In Re SRBA |) | Consolidated Subcase No. 03-10022 |
| |) | |
| Case No. 39576 |) | ORDER VACATING HEARING ON MOTION |
| |) | FOR PERMISSIVE APPEAL; FINDING THAT |
| |) | NEZ PERCE TRIBE CAN APPEAL AS A |
| |) | MATTER OF RIGHT; GRANTING MOTION |
| |) | FOR PERMISSIVE APPEAL IN THE |
| <hr/> |) | ALTERNATIVE |

**I.
PROCEDURAL BACKGROUND**

1. On November 10, 1999, this Court entered its order on motions for summary judgment in consolidated subcase no. 03-10022. The judgment was certified as final under I.R.C.P. 54(b).
2. On November 17, 1999, the Nez Perce Tribe (“the Tribe”) filed a *Notice of Appeal* in consolidated subcase no. 03-10022.
3. On February 7, 2000, the Tribe filed a *Motion to Set Aside All Decisions, Judgments and Orders on Instream Flow Claims Entered in Consolidated Subcase 03-10022 By Judge R. Barry Wood and Motion to Disqualify Judge Wood*.
4. On March 23, 2000, this Court issued its ruling on the Tribe’s motion.

5. On April 6, 2000, the Tribe filed a motion for permission to appeal the Court's March 23, 2000 ruling pursuant to I.A.R. 12 together with a motion for an expedited hearing.

6. On April 10, 2000, the United States filed a response in agreement with the Tribe's motion. Also on that same date, the State of Idaho filed a response to the Tribe's motion and the United States' response which objected to the Tribe seeking a permissive appeal but agreeing that the Tribe could appeal as a matter of right. This Court entered an order setting an expedited hearing on the Tribe's motion.

II. RULING AND ORDER

Pursuant to I.A.R. 11, it appears that the Tribe can appeal from this Court's March 23, 2000 order as a matter of right. I.A.R. 11 provides in relevant part that in civil actions appeals may be taken as a matter of right from "any order made after final judgment." The Court's ruling on the motion for summary judgment in consolidated subcase no. 03-10022 was certified as final. The Tribe's motion to disqualify and set aside was filed solely in consolidated subcase no. 03-10022 as opposed to the entire main case (39576). The Court's order and the Tribe's motion was limited to consolidated subcase no. 03-10022 and entered after final judgment. Therefore, this Court holds that the Tribe can appeal as a matter of right pursuant to I.A.R. 11(a)(7).

That being said, this Court recognizes that the scope of the Tribe's motion to disqualify and set aside pertained to all water right claims within consolidated subcase no. 03-10022. However, the Court's entry of a final judgment was limited to the Tribe's off-reservation instream flow claims. The Court's order on summary judgment did not adjudicate on-reservation claims, nor did the order determine which claims are on-reservation and which claims are off-reservation. The Court also recognizes that its jurisdiction to entertain the Tribe's motion to disqualify was not entirely clear under the facts of this consolidated subcase.

Therefore, in the event this Court is incorrect that the Tribe can appeal as a matter of right, pursuant to I.A.R. 12 this Court finds that the issues raised by the Tribe involve controlling questions of law as to which there are substantial grounds for differences of opinion and which an immediate appeal will materially advance the orderly resolution of the litigation. Permission to appeal is hereby **granted**.

Therefore pursuant to I.R.C.P. 7(b)(3), in order to avoid unnecessary delay and cost, the expedited hearing on this matter previously scheduled for Thursday, April 27th is hereby **vacated**.

IT IS SO ORDERED.

DATED: April 17, 2000.

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