

to attempt to meet its burden of proposing an adequate mitigation plan while avoiding scrutiny by hearing intervenors. Twin Lakes also takes exception to the impacts its proposal will have to downstream water rights at PacifiCorp's Cutler Project and continues to imply that, because intervenors are participating in the FERC Licensing process and because TLCC has implemented FERC approved study plans, that it is satisfying those intervenors interests in the water rights proceeding. This implication is clearly wrong.

ARGUMENT

THE BRWUA AGREEMENT IS AN INSUFFICIENT AND UNTIMELY ATTEMPT TO SATISFY TLCC'S BURDEN.

Privity alone defines the reach of a contract, which binds no one but assenting parties. *Lewis v. CEDU Educational Services, Inc.*, 15 P.3d 1147 (Idaho 2000). "Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract." *Just's Inc. v. Arrington Const. Co.*, 583 P.2d 997, 1003 (Idaho 1978)(cite omitted). Strangers to a contract, meaning in this instance everyone but TLCC and BRWUA, have no enforceable rights. *Vickers v. Hanover Const. Co. Inc.*, 875 P.2d 929, 932 (Idaho 1994).

As competent parties, TLCC and BRWUA are free to fashion their own agreement. *See Toivo Pottala Logging, Inc., v. Boise Cascade Corp.*, 733 P.2d 710, 713 (Idaho 1987). That understanding, reached presumably voluntarily and based on self-interest, binds no one else. What one party is willing to agree to in order to get out of this proceeding is not even persuasive (as evidenced by the continued protest of others), let alone binding on IDWR.

For reasons it alone found sufficient, BRWUA was satisfied by TLCC's mitigation plan. Other intervenors, including PacifiCorp, which owns downstream water rights and owes contract

duties on the Bear River, find the plan wholly lacking. In the settlement, “BRWUA agrees, based upon the evaporative analysis set forth in the recitals . . . that the 1.4 cfs is a very conservative estimate of evaporative losses, and that the 1.4 cfs will fully mitigate for evaporative losses incurred by the water rights held by members of BRWUA.” (BRWUA Agreement at ¶2). TLCC then promises unspecified additional mitigation if this amount—which BRWUA already agrees is sufficient—is insufficient. *Id.* No one else agrees to those terms.

A. The BRWUA Agreement is not binding on IDWR.

TLCC's first complaint is that its agreement with BRWUA is not discussed or cited in the Order, and it chastises the hearing officer, either for not reading the agreement or for not giving it weight. (TLCC Exceptions at 11, 13). “The presiding officer is not bound by settlement agreements that are not unanimously accepted by all parties or that have significant implications for persons not parties.” IDAPA 37.01.01, Rule 614. TLCC's promise to BRWUA to do *something* if its Mink Creek release does not work (BRWUA Agreement ¶2) may have satisfied BRWUA, but it gives PacifiCorp no comfort and provides no one else, particularly IDWR, which must decide TLCC's application based on evidence, with a right to enforce the promise.

The BRWUA Agreement serves only its signatories. Accordingly, the agreement is suffused with recitals, facts and promises the two parties found sufficient. There are more interests on the Bear River than TLCC and BRWUA represent. What BRWUA finds as sufficient (BRWUA does not say what it did to satisfy itself that TLCC's promised Mink Creek releases will be sufficient) does not bind IDWR nor create an enforceable right in IDWR.¹

¹ For example, Twin Lakes agrees only to develop a “monitoring and accounting plan acceptable to BRWUA.” (TLCC Exceptions at 24). Such plan must also be acceptable to PacifiCorp, also a downstream water right owner, and most importantly to IDWR. TLCC cannot meet its burden on this

B. TLCC cannot use the BRWUA Agreement as a substitute for evidence on a required element of its application.

In satisfying the elements of a water rights application, TLCC's first hurdle is to demonstrate that its application will not "reduce the quantity of water under existing water rights." Idaho Code Ann. §42-203A(5)(a). The Mink Creek mitigation plan is at the heart of TLCC's effort to satisfy this element. The hearing officer determined that the mitigation plan was deficient in several respects, including public interest, (Order at 28, ¶¶46, 49), and specifically that "[e]vaporation from the proposed reservoir will reduce the quantity of Bear River natural flow available to fill these downstream water rights. *Id.* at 22, ¶9).

Excepting to those findings and the conclusion that TLCC failed on this required element, TLCC expects IDWR to agree to what BRWUA agreed to. The hearing officer is empowered with wide discretion concerning evidence. (IDAPA 37.01.01, Rule 600). He may exclude irrelevant evidence. He may admit other evidence "if it is of a type commonly relied upon by prudent persons in the conduct of their affairs." *Id.*

1. The Settlement Agreement by itself is not evidence of anything beyond an agreement between TLCC and BRWUA.

TLCC uses the BRWUA Agreement as though it contains indisputable facts. A contract is, of course, nothing of the sort. The agreement was a hearing exhibit, and as such it is evidence only of its existence—that BRWUA withdrew its protest based on terms *it* found acceptable. TLCC seems to think that by placing the agreement in evidence its terms also become self-evident, *substantive* and *conclusive* evidence for what is in it.

critical issue by merely pointing to a private agreement as though it is substantive evidence of an actual mitigation plan enforceable by IDWR.

Contract recitals are not facts to which those outside the contract must adhere. They can be overcome even by the parties to the agreement. *Vanoski v. Thomson*, 757 P.2d 244, 246 (Idaho App. 1988) (“recitals of fact purporting to evidence receipt or acknowledgement of payment . . . may be challenged as untrue and parol evidence is admissible for that purpose.”), *petition for review denied*, (1988).²

The hearing officer may very well have considered and rejected the BRWUA Agreement for the simple reasons that BRWUA's particular level of tolerance for river stability and evaporation losses is either (1) not relevant (and certainly not binding), or (2) not something on which a prudent water right owner would rely. A prudent water right owner on the Bear River may want more than TLCC's contract recital that its mitigation plan will actually work.

2. TLCC's proposed Mink Creek mitigation, as reflected in the BRWUA Agreement, conflicts with PacifiCorp's 2002 FERC approved Settlement Agreement and License.

Relicensing of PacifiCorp's Bear River hydro projects culminated in a settlement agreement in 2002 (2002 Agreement)³. The parties to the 2002 Agreement, including the State of Idaho (Order at 17, ¶117), accomplished a number of objectives in connection with the management of the sensitive Bear River system, including:

- a. Specific measures that will substantially improve environmental conditions in the Bear River watershed near the Project;
- b. measures providing important resource protection and restoration that will benefit fish and wildlife habitat, consistent with regional restoration planning;

² “The law uniformly allows the admission of parol evidence to prove that a recital of fact is untrue. *See* RESTATEMENT (SECOND) OF CONTRACTS §218(1) (1981).” *Vanoski*, 757 P.2d at 246.

³ Settlement Agreement Resolving the Relicensing of the Bear River Hydroelectric Projects. August 28, 2002. (Ex. PC205).

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- c. provisions for various interests and river uses, including irrigation, power production and natural resource values; and
 - d. establishment of a process for the Parties to collaborate to manage and enhance natural resources in the Bear River watershed near the project throughout the terms of the new license.

Bonneville Cutthroat Trout (BCT) enhancement is central to PacifiCorp's new license. (Ex. PC204 at 5). "The majority of the [fishery protection and enhancement measures] focus on restoration of [BCT]," a fact acknowledged by the hearing officer. (Order at ¶120). The hearing officer found specifically that the measures required under PacifiCorp's new license

include proposals designed to enhance fishery and wildlife resources, provide additional recreational opportunities, and provide for improved management of project lands." . . . The 2003 License balanced the benefits of dependable hydropower and its associated environmental consequences with the benefits arising from extensive mitigation adopted by PacifiCorp. (See Exhibit PC204, pages 20-23)

(Order at 18, ¶119).

PacifiCorp provides substantial funding for "the studies and implementation of the aquatic resources restoration measures." PacifiCorp is also required to prepare a comprehensive BCT Restoration Plan in consultation with the Environmental Coordination Committee ("ECC"), a group of representatives from the parties to the 2002 Agreement. *Id.* ¶121.⁴

The hearing officer also found, however, that TLCC's proposed Mink Creek mitigation provides no benefit to BCT:

⁴ TLCC issues this empty challenge: "If people really want to get serious about enhancing BCT populations, there should be widespread support of the Mink Creek reconnect and the Twin Lakes project." As PacifiCorp and others demonstrated at the hearing, "people" are very serious about BCT, which is why so many have joined in opposing TLCC's plan to dam the last, best stretch of the river where BCT have their last, best chance of survival.

The 10 cfs Mink Creek minimum flow proposed by TLCC would provide little or no benefit to the trout species in terms of spawning. "For rainbow and cutthroat trout, Mink Creek flows are normally well in excess of the 10 cfs during the April – June spawning window."

During the low flow time period on Mink Creek, when the TLCC release will provide flow for fish passage, BCT are least likely to be moving in or out of Mink Creek.

(*Id.* ¶89, quoting Exhibit A9, at 90; Order at ¶90).

The 10 cfs Mink Creek minimum flow may not even provide benefits to fish in terms of fish passage. Dr. Hardy testified during cross-examination that he believed fish could make it past the barriers in lower Mink Creek with a minimum flow of 10 cfs. However, the selection of 10 cfs as a bypass flow was not the result of a fish passage analysis. (*Id.*) No specific evidence was presented as to how the 10 cfs value was selected. Outside of Dr. Hardy's statement, there is no evidence in the record that 10 cfs is sufficient to allow passage across the TLCC diversion dam or across the rock waterfall. (See Exhibit A14, pages 12-17).

(Order ¶91).⁵

TLCC speculates at page 49 that, "[a]dditionally, it does not appear that significant provisions of the 2002 Agreement have been implemented to address BCT concerns." This is false. The BCT restoration plan has been completed. *See* PacifiCorp's Exceptions to Preliminary Order, at 5 (re: Finding #121). It is undisputed that PacifiCorp has complied with its agreement to the letter, and continues to do so.

Further, TLCC misreads a portion of the 2002 Agreement. At page 52 of its Exceptions, TLCC claims that the 2002 Agreement contemplates a new project. The 2002 Agreement does provide for ADR in the event of a conflict caused by a new project, but TLCC is not a party to that agreement and is not a beneficiary of its terms. Rather, the parties to that agreement remain

⁵ "The 10 cfs Mink Creek minimum flow would provide minimal benefits in terms of water temperatures in Mink Creek or the Bear River." (Order at ¶88).

bound to support it. (Ex. PC205 at 34, ¶5.4). The 2002 agreement is central to the operation of the Bear River, the public interest and PacifiCorp's customers. None of the parties to that agreement have broken ranks to support TLCC's application.

3. The BRWUA Agreement cannot substitute as expert testimony concerning TLCC's mitigation obligations -- the proposed mitigation does not mitigate PacifiCorp losses.

TLCC was required to demonstrate that its project would not impair downstream water rights. Because the project will undoubtedly impair those rights, TLCC needed to develop a mitigation plan acceptable to IDWR. To do that, TLCC hired experts to devise a plan. Evaporation and other mitigation requirements are technical matters. FERC criticized TLCC's Mink Creek mitigation plan on several technical counts, including how TLCC intends to monitor the flows. (Ex. A040 at 6). TLCC did not address those issues at the hearing. The BRWUA Agreement is not substantive evidence of the mitigation plan, and TLCC's post-hearing explanation of it is merely an effort to supplement the record.

In an attempt to address PacifiCorps' water rights, Twin Lakes suggests that, as the owner of irrigation rights delivered under contract to users, PacifiCorp could not be impacted by the reservoir evaporation losses, and that PacifiCorp presented no evidence that it actually irrigates land. (TLCC Exceptions at 12, n.8). Whether PacifiCorp irrigates is not the issue. The issue is whether PacifiCorp owns water rights that could be reduced in quantity by TLCC's project. PacifiCorp's Bear Lake storage rights and Bear River diversion rights under both the Dietrich and Kimball Decrees (Exs. PC257; 252a) will be reduced in quantity.

The Bear Lake storage rights are "for the development of power or generating electric energy in any power plant which it may now have, or hereafter construct or acquire in or along

Bear River, in the states of Idaho and Utah, and for irrigation purposes in what is generally known as Bear River Valley in said states.” (Dietrich Decree, at 14, Ex. 252a). PacifiCorp's water rights would be reduced in quantity by the exercise of TLCC's proposed water right, because the water right application proposes new depletions for which there is no adequate mitigation plan. (Order at 29, ¶56). The evidence concerning PacifiCorp's Bear Lake storage rights and irrigation contract obligations was undisputed.

TLCC's proposed mitigation plan addresses only irrigation season evaporation losses and ignores the injury to PacifiCorp's undisputed year round water rights at Cutler Reservoir. TLCC proposed no mitigation for PacifiCorp's non-irrigation season water losses. Virtually all of the information provided at page 22 of TLCC's exceptions is new; it was not provided at the hearing. Similarly, the exchange anticipated by BRWUA has not been proposed and was not part of TLCC's application. (*See* TLCC Exceptions at 24).

At page 39, TLCC cites to the testimony of David Tuthill for the proposition that FERC can pick up any slack not covered in this proceeding. Regardless of Tuthill's opinion, which does not address PacifiCorp's losses at Cutler (or, for that matter, the US Fish and Wildlife rights at the Bear River bird refuge), as Director of IDWR in 1990, he did not defer everything to FERC and did not approve that previous application with conditions. Furthermore, TLCC's argument amounts to urging IDWR to abrogate its responsibility to perform a public interest determination on the TLCC application because FERC, in a wholly separate proceeding, is performing its own version of a public interest determination regarding the project, for a different purpose. FERC's public interest determination cannot replace IDWR's public interest determination.

BRWUA did not testify at the hearing. TLCC could have offered testimony and other evidence on the virtues of its proposed mitigation. Instead, it chose to rely in large part on its settlement with BRWUA without the benefit of any expert testimony on how it will operate. Against that, the hearing officer weighed, among other evidence, PacifiCorp's undisputed evidence of generation losses at Cutler Reservoir (C. Baldwin testimony) and overall water availability: "unallocated water may not be available to fill the proposed reservoir every year" as filling depends on whether there is available water past Cutler Reservoir. (Order at 19, ¶130). Because TLCC's mitigation plan, such as it is, does not address PacifiCorp's undisputed losses at Cutler, it is deficient, and approval violates the Bear River Compact.

The mitigation plan is deficient on at least two other points. First, Twin Lakes proposes to allow 1.4 cfs of Mink Creek water to remain in the Bear River the entire year to mitigate reservoir evaporation losses. But Twin Lakes made no effort to demonstrate whether in fact the entire 10 cfs released from Mink Creek will enter the Bear River. Rather, TLCC simply places that burden on the local watermaster to determine whether Mink Creek is a losing or gaining stream under various conditions and to determine how to calculate and measure the safe delivery of the 10 cfs from Mink Creek to the confluence of the Bear River. Twin Lakes failed to establish that the mitigation plan is adequate and workable; nor did it define what measuring devices are necessary to ensure delivery.

Second, TLCC believes that no new transfer application is required for the Mink Creek mitigation water. That water, however, is expressly provided to replace evaporation losses. At a bare minimum, there must be a water right for Twin Lakes to divert up to 8.6 cfs from the Bear River. Currently no application is filed that on its face seeks that right. Without an approved

transfer on the Mink Creek water right, Twin Lakes has no right to pump the 8.6 cfs from the Bear River.

4. The BRWUA Agreement is based on incorrect premises concerning the operation of Oneida Narrows dam.

The Oneida Narrows dam is not used as a peaking facility. The BRWUA Agreement recites that, “[i]n the past, PacifiCorp’s Oneida Narrows Dam has operated as a “peaking” reservoir whereby significant and variable releases are made at times when power demands are high, which has resulted in inconsistent water flows in the Bear River and subsequent variation of water delivery amounts to BRWUA’s irrigation facilities.” (BRWUA Agreement ¶H). At the hearing, TLCC claimed that its proposed dam would act to buffer PacifiCorp’s releases. That, too, is promised in the BRWUA Agreement. *Id.* ¶3a.ii.

It is not surprising that TLCC and BRWUA took it upon themselves to describe and then agree to address these alleged “peaking” releases, as well as new claims about timing damages. What is surprising is that TLCC endeavors now to bind PacifiCorp and IDWR to those terms. The issue of “peaking” is resolved. As a result of PacifiCorp’s coordinated relicensing efforts, “large, immediate fluctuations in flows below the Oneida facility are no longer a significant issue and the proposed project will have little value in buffering river fluctuations.” (Order at 19, ¶128).

5. TLCC mischaracterizes PacifiCorp’s water rights.

a. The Bear River Compact protects PacifiCorp’s senior rights.

TLCC disputes IDWR’s required recognition of PacifiCorp’s Bear River hydropower water rights at Cutler. TLCC claims that “PacifiCorp’s water rights in Utah at Cutler Dam are constrained by historical practice not to make a delivery call for hydropower generation on Idaho

irrigation water rights.” (TLCC Exceptions at 26, *quoting* October 1999 Agreement (Ex. P0225): “PacifiCorp’s water rights are constrained by the historic practice of not making a delivery call for hydropower generation”). (Ex. P0225 at 1, ¶1.a.).

What TLCC misses is that, in this proceeding, PacifiCorp is not making a delivery call for hydropower generation. PacifiCorp is asserting its right to the protections and remedies granted to all pre-1976 water rights located in one state when an application to appropriate Bear River water is filed in the other state.

Applications for appropriation . . . of Bear River water shall be considered and acted upon in accordance with the law of the state in which the point of diversion is located, *but no such application shall be approved if the effect thereof will be to deprive any water user in another state of water to which he is entitled . . .*”

(Bear River Compact, Article XI)(emphasis added).

PacifiCorp is a water user that will be deprived of water during the non-irrigation season when Twin Lakes diverts for storage. That is an undisputed fact. The Compact is definitive: “no such application shall be approved.”

b. The 1999 Agreement does not prohibit PacifiCorp from protecting its water rights.

Twin Lakes suggests that the 1999 Agreement Regarding the Bear River System ties PacifiCorp’s hands concerning its own water rights. In the agreement, PacifiCorp agreed *only* to not make a delivery call. The subsequent April 2000 Operations Agreement for PacifiCorp’s Bear River System (Ex. PC226) provides that “[n]othing in this Agreement or the October 5, 1999 Agreement shall be interpreted as limiting PacifiCorp's right or ability to protest water right applications or filings in the Bear River Basin or from otherwise exercising and defending its

water rights” *Id.* at ¶3.C.⁶ PacifiCorp’s challenge to TLCC’s water right application is an appropriate defense of its water rights under both the 1999 Agreement and the 2000 Operations Agreement,

6. TLCC mischaracterizes the FERC process.

At page 7 of its Exceptions, TLCC implies that, within the FERC licensing process, approved study plans and completed studies means that FERC tacitly approves the project. TLCC further implies that because it has implemented the FERC approved study plans it is addressing public interest concerns to the satisfaction of the intervenors. Involvement in the FERC process does not mean that any stakeholders also approve the study process or any study results. Moreover, TLCC claims an “exhaustive” FERC study plan and that it discussed local public interest concerns with the intervenors in the FERC process. Discussions do not mean agreement. Those opposing TLCC’s application have not been persuaded despite these discussions.

CONCLUSION

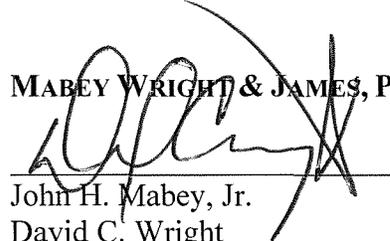
TLCC insists that the hearing officer missed more than just the BRWUA Agreement and implies that the hearing officer missed the whole of the evidence on the proposed mitigation plan. TLCC perhaps assumed that the BRWUA Agreement would suffice as evidence of more than just an agreement between two private parties. It does not. It does not qualify as an expert report, and it does not bind IDWR. Unfortunately, TLCC uses its exceptions to reargue with

⁶ Twin Lakes’ mitigation plan may have considered existing irrigators, but it erroneously ignored the impact on PacifiCorp because of a parochial concern with the Idaho-Utah state line. The Compact dissolves the border and prohibits applications that interfere with senior rights. The evidence was undisputed that the TLCC project *will* deprive PacifiCorp of water at Cutler Reservoir. The hearing officer appropriately cited and relied on the Compact.

greater detail than during the hearing a plan the hearing officer determined was deficient. The time for offering evidence has passed. The mitigation plan remains deficient for the reasons the hearing officer cited, including the undisputed and un-remedied impact on PacifiCorp's water rights at Cutler.

August 23, 2012.

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CERTIFICATE OF SERVICE

I certify that on August ____ 2012, a copy of the foregoing PacifiCorp's Response to TLCC's Exceptions to Preliminary Order was filed via Email with the Idaho Department of Water Resources and delivered to the following by:

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