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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
TWIN FALLS CO. IDAHO
FILED 102

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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

Case No. 39576

) Subcase 91-65
) (Basin 65 General Provisions)
)
) Subcases 65-22616, 65-22617, 65-22589,
) and 65-22762
)
) Subcases 65-2513, 65-2916, 65-2934C, 65-
) 2943B, 65-2943J, 65-2943K, 65-2943L, 65-
) 2943P, 65-2943Q, 65-2943R, 65-2943X, 65-
) 2937A, 65-2937B, 65-5678, 65-8257A, 65-
) 8257B

ORDER DESIGNATING SUBCASE NUMBER;
ORDER SETTING DEADLINES;
ORDER REGARDING ADDITIONAL INVESTIGATION BY IDWR;
ORDER SETTING STATUS CONFERENCE

On March 7, 2006, a Status Conference was held before Special Master Booth regarding the General Provisions for Basin 65. Pursuant to the discussions held on the record at the Status Conference, the following are hereby ordered.

1: Designation of Subcase 91-65: The Clerk of the court shall create subcase number 91-65. All pleadings, correspondence, briefs, or other documents hereafter filed or lodged with the court generally regarding the Basin 65 General Provisions shall refer to subcase number 91-65.

2. Deadline to file motion seeking inclusion of certain water rights for separate administration:

A. Subcases 65-22616, 65-22617, 65-22762 and 65-22589. In a letter dated September 16, 2005, attorney Dana Hofstetter requested the following water rights be included on the list of water rights that are administered separately pursuant to Basin 65 General Provision No. 3: 65-22616, 65-22617, 65-22762 and 65-22589. At the March 7, 2006, status conference, Deputy Attorney General Susan Hamlin stated the position of Idaho Department of Water Resources to be that stockwater rights are not eligible for separate administration and accordingly IDWR will not concur with having these stockwater rights included on the list. Attorney David Gehlert for the United States Bureau of Reclamation took the same position.

Partial Decrees have heretofore been issued for water right nos. 65-22616, 65-22617 and 65-22589. The *Partial Decrees* state that the water rights "shall be administered as being from a separate source pursuant to Basin 65 General Provision No. 3." In this Special Master's opinion, this language definitively answers in the affirmative the question of whether these three water rights should be included in the list of water rights to be separately administered pursuant to General Provision No. 3. Accordingly, it is the intent of this Special Master to ultimately make this recommendation to the SRBA Presiding Judge.

Regarding water right claim 65-22762, a special master's report and recommendation has not been issued and the subcase is awaiting resolution of this issue. IDWR has not recommended this water right for separate administration. Accordingly, the deadline for the claimant to file a motion to file a late objection or other pleading regarding this issue will be **Friday, April 7, 2006**. In addition to any service required under *Administrative Order 1*, a copy of any such motion shall be served upon the United States Bureau of Reclamation.

B. Subcases 65-2513, 65-2916, 65-2934C, 65-2943B, 65-2943J, 65-2943K, 65-2943L, 65-2943P, 65-2943Q, 65-2943R, 65-2943X, 65-2937A, 65-2937B, 65-5678, 65-8257A, 65-8257B. In a letter from Deputy Attorney General for IDWR Susan Hamlin to Attorney Brian McMahan, dated February 14, 2006, and filed with the SRBA District Court in on March 7, 2006, the above-referenced sixteen water rights are identified as being diverted from sources that are tributary to tributaries to Boulder Creek, which is tributary to the Payette River. The letter goes on to state that IDWR would concur to add the identified water rights to the list of water

rights subject to separate administration pursuant to Basin 65 General Provision No. 3. At the March 7, 2006, status conference, the attorney for the United States Bureau of Reclamation stated that the Bureau would not oppose adding these irrigation water rights to the list so long as the respective partial decrees were amended to include the Bureau's "settlement language."¹ The deadline for the claimants of the above-referenced sixteen water rights to file a motion to have these rights included on the list of water rights under General Provision No. 3 will be **Friday, April 7, 2006**.

3. Order regarding further investigation by IDWR: It is the understanding of this Special Master, based upon the contents of the February 14, 2006 letter from Deputy Attorney General Susan Hamlin, and further based upon the comments made on the record at the March 7, 2006, status conference, that there may exist other unlisted irrigation water rights diverted from sources that are tributary to the tributaries listed in General Provision No. 3; and that such water rights may have been subject to separate administration under the Payette River Basin Adjudication, but that because such rights are not listed in the current listing of water rights under General Provision No. 3, those unlisted rights will not be administered separately from the Payette River proper. At the status conference, there was some discussion of whether further investigation should be conducted by IDWR to identify those water rights, and whether additional notice should be provided to the owners of those rights regarding these General Provision No. 3 proceedings. As explained below, it is the opinion of this Special Master that adequate notice has heretofore been provided to those water rights owners, and that no further notice is necessary. That being said, if for purposes of the efficient administration of the water rights on these tributaries, should IDWR intend to conduct further investigation for the purpose of identifying such water rights, IDWR is asked to notify the Court of such intent no later than **Friday, April 7, 2006**.

¹ All of the *Partial Decrees* issued for water rights appearing on the Basin 65 General Provision No. 3 list contain the following language on the face of the decree: "Basin 65 General Provision No. 3, the Separate Streams General Provision, does not apply to appropriations of water after October 18, 1977. This water right shall be administered as being from a separate source pursuant to Basin 65 General Provision No. 3. If the holder of this right seeks to change the right pursuant to Idaho Code Section 42-222 or successor statute, nothing in this general provisions shall preclude any other person or entity from demonstrating that such change in use would cause injury to its water right or from receiving any relief provided by law in the event of injury."

Regarding the question of further notice of these proceedings being provided to a group of unidentified water right owners, it is the opinion of this Special Master that adequate notice regarding the Basin 65 General Provisions was provided in the *Notice of Filing of Director's Report* for parts I, II, and III in Basin 65. This Special Master has reviewed the *Affidavits of Service* filed for each of these *Directors Reports* (*Affidavit of Service* for Part I filed April 18, 2000; for Part II filed April 26, 2000; and for Part III filed October 31, 2001), and each of the notices, which were sent to all claimants with claims reported in the respective *Director's Report*, contain a copy of the recommended general provisions, together with a list of water rights subject to separate administration pursuant to General Provision No. 3. The onus was on the claimant to not only examine the individual elements of their respective rights, but also to review the recommended general provisions. Any claimant taking the position that their water right number was erroneously omitted from the list of water rights under General Provision No. 3 should have filed a timely objection with the SRBA Court. All of the necessary information was provided to the claimants in the *Notice of Filing of Director's Report*.

The objection periods for these *Director's Reports* has long expired. In issuing a partial decree for the General Provisions in Basin 65, it was not the intent of the SRBA Court to now create an opportunity for the filing of late objections to the *Director's Reports* or to open-up these proceedings anew. That being said, this Special Master is not adverse to recommending that the SRBA Court add water right numbers to the list in those situations where the omission has been brought to the Court's attention, and where IDWR and the Bureau of Reclamation do not object thereto.

4. Deadline to file briefing regarding language of General Provision 3: At the March 7, 2006 status conference, a discussion was held on the record regarding the language that should ultimately be decreed by the SRBA District Court for General Provision 3. For purposes of framing the issue, the following proposed language is postulated:

The following **surface** water rights from the following sources of water in Basin 65 shall be administered separately from all other **surface** water rights in Basin 65 in accordance with the prior appropriation doctrine as established by Idaho law.

[The words in **bold** have been added to the language found in the *Director's Report* for Basin 65 (Part III), filed September 18, 2001.]

[List of sources and water right numbers omitted.]

It is the understanding of this Special Master that Basin 65 General Provision No. 3 has origins in the historical practice of separate administration between surface water rights diverted from the main stem of the Payette River, and irrigation water rights diverted from certain surface water sources which are tributary to the Payette River. Because General Provision No. 3 is based upon historical practice rather than a factual determination that the separately-administered sources are not hydraulically connected, the scope of General Provision No. 3 may well be solely limited to separate administration of the subject surface water sources from each other, as opposed to the potential that General Provision No. 3 could arguably be used to provide for separate administration of the listed surface water rights and hydraulically connected ground water rights. Accordingly, and again for the purpose of framing the issue, any participant arguing against the addition of the word "surface" as set forth above shall lodge a brief on the issue no later than **Friday, April 7, 2006**. Any participant wishing to respond hereto shall lodge a response brief no later than **Monday, May 1, 2006**.

5. Order setting status conference: A status conference in all of the above-captioned subcases shall be held on **Tuesday, May 23, 2006 at 9:30 A.M. Mountain Time**. Telephone participation will be available by dialing 1-225-383-1099, and entering participation code 75342.

Dated March 17, 2006.


THEODORE R BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DESIGNATING SUBCASE NUMBER; ORDER SETTING DEADLINES was mailed March 17, 2006, with sufficient first class mail to the following:

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