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DEPARTMENT OF
WATER RESOURCES

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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) Subcase 45-2810A
Case No. 39576) USDI/BLM)
)
) ORDER DENYING UNITED STATES'
) MOTION FOR SUMMARY JUDGMENT
) AND SETTING SCHEDULING
) CONFERENCE
)

BACKGROUND

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Domestic & Stock, Reporting Area 10 (IDWR Basin 45)* on March 2, 1998. The Director recommended claim 45-2810 as "incomplete" and "disallowed" with three claimants:

1. United States of America, Department of Interior, Bureau of Land Management, Idaho State Office, 1387 S. Vinnell Way, Boise, Idaho, 83709-1657;
2. Bruce Bedke, 42 East, 1975 South (Basin Road), Oakley, Idaho, 83346; and
3. State of Idaho, Department of Lands, 1215 W. State Street, Boise, Idaho, 83720-7000.

Objections

United States

The United States filed an *Objection* on July 2, 1998, alleging the water right should have been recommended to the United States for .01 cfs from Worthington Spring for year-'round stockwater use in Cassia County with a priority date of August 16, 1963, based on a license issued to the United States in 1963.

State

The State of Idaho filed an *Objection* the same date and alleged:

This water right represents a joint project between the State of Idaho and the Bureau of Land Management. IDWR plans to split the water right into water right nos. 45-02810A and 45-02810B, while recommending the original water right no. 45-02810 be disallowed. However, as of this date, the State of Idaho's portion of the split right, water right no. 45-02810B has not been recommended, but should be recommended with the elements described above [.01 cfs from Worthington Springs for year-round stockwater use].

Bruce Bedke

Bruce Bedke wrote a letter to the SRBA Court on May 10, 1999, stating his claim for water in Basin 45 was assigned number 45-10491, but because his filing was not included in the March 2, 1998 *Director's Report*, "it has not been determined if any of the water in the area is unappropriated and whether the claim (45-02810) is valid." He then requested a stay of any action in subcase 45-2810 "until the joint resolution is addressed and the dispute over the unreported domestic and stockwater filings is resolved."

Joint Statement

The United States and the State of Idaho lodged a *Joint Statement of Respective Positions* on May 14, 1999. They wrote that the Worthington Springs Pipeline was constructed in cooperation between the United States, the State and seven "authorized permittees" to provide water for livestock and wildlife on lands owned by the United States (administered by the BLM) and the State. A *Notice of Change of Water Right Ownership* was filed with IDWR on September 27, 1993, stating: "BLM and Idaho Department of Lands will split the original amount of .01 cfs so that each controls half of the water. The place of use remains unchanged." *Joint Statement*, Exhibit 6.

The United States and the State then wrote: "Mr. Bedke's claim was improperly combined with Subcase 45-02810 because there is no description in Subcase 10492 of a point of use that matches the point of diversion or places of use described in Subcases 45-02810A and/or 45-02810B." *Joint Statement*, at 5. Bruce Bedke's May 10, 1999 letter to the SRBA Court was included with the *Joint Statement* as Attachment 1.

Bruce Bedke's Response to Joint Statement

Bruce Bedke lodged his *Response to Joint Statement of Respective Positions* on July 13, 1999. He pointed out that IDWR's bifurcation of reporting Basin 45 stockwater claims has resulted in competing or overlapping claims to the same stockwater being considered at different times. Mr. Bedke then raised the issues of 1) whether the water claimed under 45-2810 appropriated before the license was issued, 2) confusion over the name, location and flow of Worthington Spring, 3) his rights as a leaseholder of state-owned land and 4) his status as an objector in subcase 45-2810.

Supplemental Director's Report

On June 17, 1999, IDWR issued its *Supplemental Director's Report, Subcase 45-02810* "to clarify the relationship between claims to Worthington Spring made by the State of Idaho, Department of Lands (Lands), USDI Bureau of Land Management (BLM) and Mr. Bruce Bedke (Bedke)." *Supplemental Director's Report*, at 2.

IDWR reported that Worthington Spring is located on State owned land and was developed to deliver water to several stockwater troughs via an extensive pipeline. The troughs are located on both BLM and State owned lands. Bruce Bedke filed two beneficial use claims with Worthington Spring as a source (45-10491 and 45-10492). Pickett Ranch & Sheep Company also filed a claim to Worthington Spring (45-10836).

IDWR recommended that BLM's claim 45-2810 be disallowed because it described places of use not found in the original license and there was no evidence to support the development of new places of use.

State's Additional Briefing

The State lodged its *Additional Briefing Regarding Party Status of Bedke* on August 2, 1999. It concluded that Bruce Bedke is a proper party to subcase 45-2810 and noted:

IDWR's determination that Mr. Bedke's claim for water right no. 45-10492 was the same water right as water right no. 45-02810 is obviously incorrect. The claimed instream stockwatering for 45-10492 is in section 19; "Worthington Springs" the source of 45-02810 is in section 33.

State's *Additional Briefing*, at 4, fn 2.

Bruce Bedke's Response to Additional Briefing

Bruce Bedke lodged his *Response to State of Idaho's Additional Briefing Regarding Party Status of Bedke* on August 13, 1999. Mr. Bedke agreed with the State's conclusion that he is a proper party to subcase 45-2810, but disagreed that it was due solely to an error by IDWR:

When IDWR recommended my water right claim as 45-02810, I sought to object to the recommendation . . . I objected because I disagree with the validity of the State and BLM's claim to the water. My objection needs to be recognized in order to bring all of the facts surrounding this claim into the open and let the court determine ownership of the water based on the merits of the case.

Bedke's *Response*, at 2.

Stay Order

On August 17, 1999, the Special Master entered an *Order Staying Subcase* in subcase 45-2810 until the remaining stockwater claims in Basin 45 were reported by IDWR.¹

NCAP

IDWR filed a *Notice of Completed Administrative Proceeding* on October 8, 2004, splitting subcase 45-2810 into 45-2810A (USDI/BLM) and 45-2810B (State) and both recommended disallowed because "questions remain regarding the accuracy of the claimed place of use description." The *NCAP* also noted:

At the time the original recommendation for water right number 45-2810 was filed with the SRBA Court, it contained an additional clerical error: Mr. Bruce Bedke was incorrectly listed as a co-owner, along with the BLM, of the water right. The water right is a licensed water right with a 1963 priority date. It was licensed by IDWR in the name of the BLM

¹ IDWR filed its *Director's Report for Irrigation and Other, Reporting Area 10, IDWR Basin 45* on September 7, 2004:

This Director's Report includes claims for irrigation and other uses, including small domestic and stock water uses. The Director's Report for most small domestic and stockwater rights for IDWR Basin 45 was sent to the SRBA Court and individual water users on March 2, 1998. Some small domestic and stockwater claims were withheld from the earlier report. If a claim for small domestic and stockwater was withheld from the 1998 report, it is included in this Director's Report [emphasis added].

Notice of Filing of Director's Report for Basin 45 for Irrigation and Other Water Rights, at 1.

only. IDWR has no information in its records indicating that at any time the BLM conveyed any portion of the license to Mr. Bedke. Rather, IDWR's records indicate that Mr. Bruce Bedke has filed with IDWR water right claim number 45-10491. While this claim is to the same water source as the BLM's licensed right number 45-2810, it is a claim for a beneficial use right with an 1872 priority date. It is a claim for a different water right than licensed water right number 45-2810. Mr. Bedke's name as a co-owner of water right number 45-2810 was added erroneously to IDWR's recommendation of that water right. Therefore, this NCAP corrects that clerical error by removing Mr. Bedke's name from the water right as split.

NCAP, attachment 1.

Objections to NCAP

United States

The United States filed its *Objection* in subcase 45-2810A on November 26, 2004, objecting to the water right not being recommended.

State

The State of Idaho filed its *Objection* in subcase 45-2810B on November 29, 2004, objecting to the water right not being recommended.²

Jared Bedke

On January 7, 2005, Jared Bedke filed an *Objection* in subcase 45-2810A alleging the water right should not exist:³

This water right is filed on the basis of IC 42-501 which provides that the BLM may appropriate for the purposes of watering livestock and water not otherwise appropriated on the public domain. The diversion is capturing a live stream that is fully appropriated water. Furthermore this location of the water claim does not lie within the public domain.

² Only the State objected to the 45-2810B portion of IDWR's October 8, 2004 NCAP. On November 10, 2005, the State, with IDWR's concurrence, filed an *Amended Claim Standard Form 5* in subcase 45-2810B, no one objected and on January 5, 2006, the Special Master entered a *Report and Recommendation* recommending that claim 45-2810 be disallowed and water right 45-2810B be decreed to the State. From this point forward, the discussion concerns only subcase 45-02810A.

³ On November 1, 2005, the Special Master entered an *Orders Re: Bedke Objection* in 45-2810A deeming Jared K. Bedke's January 7, 2005 *Objection* to be a timely response to the BLM's November 26, 2004 *Objection*. For all purposes of party status, the parties have treated Bruce and Jared Bedke as interchangeable because of their stated co-ownership of family property.

United States' Motion for Summary Judgment

The United States filed its *Motion for Summary Judgment, Including Memorandum of Points and Authorities in Support* in subcase 45-2810A on January 4, 2006. The United States argued that Jared Bedke's response to the BLM's November 26, 2004 *Objection* failed to state a claim upon which relief can be granted; there are no genuine issues of material fact; and the United States is entitled to judgment as a matter of law. The core of the United States' argument is that Jared Bedke's response is an impermissible collateral attack on the BLM's previously issued stockwater license; therefore, the response must be dismissed.

Jared Bedke's Memorandum in Opposition

Jared Bedke lodged his *Memorandum in Opposition to United States' Motion for Summary Judgment* on February 8, 2006. Mr. Bedke argued that there are outstanding issues of material fact yet to be decided. For instance, he said that the license issued to the BLM was for a pipeline project

which consisted of headboxes at the two spring heads, a long stretch of 1 ¼ " poly pipe, and several water troughs. One of the spring heads was located on land owned by the State of Idaho. . . . Subsequent to the initial Director's Report for Basin 45, the BLM replaced the original installation with new sections of PVC pipe and moved the diversion from the underground springs to the live stream known as Granite Creek. Bedke's *Memorandum*, at 2-3.

Mr. Bedke pointed out that since the claim was recommended to be disallowed, there is no *prima facie* evidence associated with the claim. He said the licensed point of diversion and source were springs, but now the point of diversion has been changed to a fully appropriated live stream: "there is no attack on the license or stock water claim, merely a response of facts in opposition to the facts alleged in the objection filed by the United States." Bedke's *Memorandum*, at 4.

Summary Judgment Hearing

A hearing on the United States' *Motion for Summary Judgment* was held at the SRBA Courthouse in Twin Falls, Idaho. Larry A. Brown appeared for the United States; Jared Bedke appeared *pro se*; and Nicholas B. Spencer appeared for IDWR.

Mr. Brown characterized Mr. Bedke's *Response* as a collateral attack on a 40 year old license – essentially a late appeal of an administrative decision. Mr. Bedke argued that his *Response* is to a “new” water right that captures a live stream, not a licensed groundwater right; hence, there are genuine issues of material fact as well as a question of law not briefed by the parties – whether Idaho's accomplished transfer statute (I.C. § 42-1425) applies.

Mr. Spencer said that IDWR disallowed the claim as part of a “technical arrangement” with BLM to give the parties time to coordinate changes in the points of diversion and places of use. He said an *SF-5* would have been signed but for the pending *Motion for Summary Judgment* and an amended recommendation could then be filed. Mr. Spencer conceded there may now be some confusion about the facts, partly because the field agent who inspected the claim no longer works for IDWR.

DISCUSSION

The United States correctly stated the current law of the SRBA case:

An objection to a licensed right cannot be a late substitute for an appeal of IDWR's administrative decision concerning the merits of the right created by the license. If a license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, *e.g.*, the SRBA, would constitute an impermissible collateral attack on the license.

United States' *Motion for Summary Judgment*, at 4, citing former SRBA Presiding Judge Barry Wood's March 23, 2000 *Response to United States' Motion for Status Conference and Order on Nez Perce Tribe's 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*, consolidated subcase no. 03-10022, at 33.

However, subcase 45-2810A is unique in several ways. First, there was confusion among the parties early in the proceedings concerning the source and the correct name of

the spring(s). This may have led to clerical errors over the proper claimant(s) and whether Bruce Bedke's claim (45-10491) was identical to the BLM's claim (45-2810). Then there is the matter of IDWR's recommendation that split-claims 45-2810A and 45-2810B both be disallowed. As the matter stands, the court is effectively left without its "independent expert and technical assistant," whose role is "to assure that claims to water rights acquired under state law are accurately reported" (I.C. § 42-1401B). Thus, as Jared J. Bedke correctly noted, claim 45-2810A is before the court with no *prima facie* evidence of the "nature and extent" of the claim (I.C. § 42-1411 (4)), even though the claim is based on a license.

The fact that the claim comes before the court without the customary *prima facie* evidence of the elements alone may be sufficient grounds to deny the United States' *Motion for Summary Judgment* because the court is left to determine elements that the parties and IDWR acknowledge have changed since the license was issued. For example, the record shows the source and point of diversion have changed, but the court is left to determine those elements before IDWR conclusively field examines and recommends the elements, or at least concurs on their descriptions.

We know IDWR conducted a field inspection, but it is not clear whether that was done after all the changes occurred. And since IDWR's field agent no longer works for IDWR, it is likely that another inspection will be required before all elements are settled. In fact, IDWR agreed more field work is required when it wrote: "IDWR will examine any evidence provided by the parties, determine whether the development of Worthington Spring exists, and if so, what the correct description of the development should be." *Supplemental Director's Report*, at 4.

Perhaps a more compelling example that there exist genuine issues of material fact concerns the places of use. In the *Joint Statement* lodged by the United States and the State, the parties said the places of use remain unchanged. Yet IDWR wrote:

Claim 45-02810 describes places of use not found on the original license. At the time it filed its recommendation, IDWR did not have evidence to support the development of these new places of use either before or after the date requiring an administrative transfer and therefore recommended the claim be disallowed.

Supplemental Director's Report, at 4.

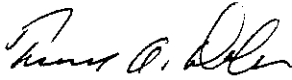
If claim 45-2810A were before the court as a simple split of licensed water right 45-2810, the law of the SRBA case would apply and the matter could be resolved without the necessity of a trial on the merits. But in these unique circumstances, the court is being asked to decree elements (source, point of diversion and places of use) which the record suggests have yet to be confirmed – sort of like painting the barn before it's built. There is no alternative but to deny the *Motion for Summary Judgment*.

ORDERS

THEREFORE, IT IS ORDERED that:

1. The United States' *Motion for Summary Judgment* is **denied**, and
2. A scheduling conference shall be held at the SRBA Courthouse, 253 3rd Avenue North, Twin Falls, Idaho, on **Thursday, June 8, 2006, 10:00 a.m.** Parties may participate by telephone conference by dialing 1-225-383-1099 and entering participant code 654400.

DATED May 24, 2006.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING UNITED STATES MOTION FOR SUMMARY JUDGMENT AND SETTING SCHEDULING CONFERENCE was mailed on May 24, 2006, with sufficient first-class postage to the following:

UNITED STATES OF AMERICA
USDI BLM

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