



U.S. Department of Justice

Environment and Natural Resources Division

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90-6-2-63c

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February 26, 2008

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FEB 27 2008
DEPARTMENT OF
WATER RESOURCES

hand carried

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

Re: SRBA Case No. 39576
Subcase No. 63-03618

Dear Ms. Delaney:

Enclosed for filing in the above listed subcase is the following document:

1. **THE UNITED STATES' RESPONSE TO PIONEER AND SETTLERS
IRRIGATION DISTRICTS' MOTION TO STRIKE**

Sincerely,

David A. Jarvis
Paralegal

Enclosure

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FEB 27 2008

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WATER RESOURCES

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Counsel for the United States

**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 No. 63-03618
	)	
Case No. 39576	)	
	)	THE UNITED STATES' RESPONSE TO
	)	PIONEER AND SETTLERS IRRIGATION
	)	DISTRICTS' MOTION TO STRIKE

Introduction

Pioneer Irrigation District and Settlers Irrigation District ("Pioneer and Settlers") ask this Court to strike the Affidavit of Robert J. Sutter, the Third Affidavit of David A. Jarvis and all related argument in the United States' reply brief. Alternatively, Pioneer and Settlers seek an opportunity to depose Mr. Sutter and respond via a sur-reply brief.

Striking the affidavits is not warranted for three reasons. First, contrary to Pioneer and Settler's allegations, the affidavits were not filed in violation of the time limits of Idaho Rule of Civil Procedure 56(c). Second, and more importantly, neither affidavit introduced new issues. Mr. Sutter's affidavit addressed an issue inserted into this proceeding by Pioneer and Settlers. In doing

so, he supplemented testimony previously provided in the Affidavit of Mary Mellema. Indeed, he reviewed the same set of Watermaster records and expressly noted that he reached the same conclusion as Ms. Mellema. The Idaho Attorney General opinion provided by Mr. Jarvis and the related text responded directly to a point raised in Pioneer and Settlers' response brief.

Third, even if this Court were to determine that Mr. Sutter's affidavit introduced new material, the interests of justice generally favor full exploration of relevant facts. That is particularly the case here, where any prejudice to the Districts from this Court's consideration of Mr. Sutter's affidavit can be easily remedied by granting the alternative relief they seek. The United States' reply brief offered to make Mr. Sutter available for deposition and therefore the United States has no objection to the alternative relief sought by Pioneer and Settlers.

Background

Pioneer and Settlers ask this Court to strike the Affidavit of Robert J. Sutter and Third Affidavit of David A. Jarvis, both of which were filed in conjunction with the United States' reply brief. Mr. Sutter, a retired employee of the Idaho Department of Water Resources ("IDWR"), provided an affidavit which addressed an issue first raised by Pioneer and Settlers, the question of the United States' compliance with provisions of 1954 contracts between the United States and the two irrigation districts. Pioneer and Settlers have never introduced any evidence that the United States has ever delivered less water than the contracts require. Nonetheless, the United States submitted an Affidavit by Mary Mellema, a Reclamation hydrologist who reviewed Watermaster records maintained by IDWR and determined that those records demonstrated that the Anderson Ranch and Arrowrock contracts holders have in fact received all the water they are entitled to.

Pioneer and Settlers deposed Ms. Mellema and questioned her qualifications to address those records. While the United States asserts Ms. Mellema is more than qualified to

interpret spreadsheets recording the quantity of water various entities were entitled to and the quantity of water made available to them, the United States nonetheless contracted with Mr. Sutter to reviewed the same set of Watermaster records reviewed by Ms. Mellema. Mr. Sutter affirmed her conclusion and provided a discussion of IDWR's accounting process that was more detailed than that provided by Ms. Mellema.

The Idaho Attorney General opinion provided by Mr. Jarvis and related text in the United States' reply brief responded directly to an argument made in Pioneer and Settlers's response brief. The Districts asserted that the United States' water right was procedurally deficient because it had not been subject to a concurrent resolution by the Idaho legislature, as would have been required if the water right had been established under I.C. § 42-1503, a provision of Idaho's instream flow statute. *See PIONEER AND SETTLERS' RESPONSE TO THE UNITED STATES BUREAU OF RECLAMATION'S MOTION FOR SUMMARY JUDGMENT* at 9-10. The United States' reply merely pointed out that the Idaho Supreme Court has repeatedly found such provisions unconstitutional and that the Idaho Attorney General had determined that I.C. § 42-1503 is unconstitutional.

Argument

I. THE MOTION TO STRIKE MUST BE DENIED.

This Court has discretion in determining whether to granting the Motion to Strike. *See Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 6, 981 P.2d 236, 241 (1999). Nonetheless, Motions to strike are generally disfavored. *Sun v. Board of Trustees*, 429 F.Supp.2d 1002, 1030 (C.D.Ill 2006), *aff'd* 473 F.3d 799 (7th Cir.), *cert. denied*, 127 S.Ct. 2941 (2007); *Western Pub. Co., Inc. v. MindGames, Inc.*, 944 F.Supp. 754, 755 n.1 (E.D.Wis. 1996) ("Motions to strike are generally disfavored and information will not be stricken unless it is evident that it has no bearing upon the subject matter of the litigation"). Of particular importance here, in reviewing trial

courts' exercise of that discretion, the Idaho Supreme Court has carefully distinguished between affidavits which introduce entirely new subject matter and those which merely supplement and expand on a prior showing. *E.g., Sun Valley Potatoes, Inc.*, 133 Idaho at 6, 981 P.2d at 241.

An initial reason to deny the motion to strike is that it is based on the incorrect premise that the challenged affidavits were submitted "in violation of the time limits set forth in Rule 56(c), Idaho Rule of Civil Procedure." MOTION TO STRIKE at 3. Rule 56(c) requires only that "opposing affidavits" be submitted "at least fourteen days prior to the date of the hearing." IRCP 56 (c); *Evans v. Twin Falls County*, 118 Idaho 210, 223, 796 P.2d 87, 100 (1990). Both challenged affidavits were served on February 14, 2008, well in advance of 14 days prior to the hearing. Even if that were not the case, there are more substantive reasons, discussed in subsections A and B below, to deny the motion. Further, as is demonstrated in Argument II below, denying the motion is particularly appropriate where any prejudice to Pioneer and Settlers can be easily remedied by granting the alternative relief sought by the Districts.

A. There is No Basis to Strike the Affidavit of Robert J. Sutter.

As noted above, the Idaho Supreme Court has carefully distinguished between affidavits which introduce entirely new subject matter and those which merely supplement and expand on a prior showing. *E.g., Sun Valley Potatoes, Inc.*, 133 Idaho at 6, 981 P.2d at 241. Mr. Sutter's affidavit should not be stricken because it did not introduce "new issues." *Cf.* MOTION TO STRIKE at 4. Instead, it merely supplemented and expanded on the prior showing made by Ms. Mellema. Mr. Sutter's affidavit relied on the same Watermaster records reviewed by Ms. Mellema; expressly affirmed the conclusion reached by Ms. Mellema and explained in far greater detail the process by which IDWR accounts for water stored in Arrowrock, Anderson Ranch and Lucky Peak Reservoirs. *See* AFFIDAVIT OF ROBERT J. SUTTER at ¶ 9 ("SUTTER AFF.").

Mr. Sutter's affidavit is relevant to the question of the United States compliance with a contractual water delivery obligation. That question was injected into this proceeding by Pioneer and Settlers, the only irrigation interests who appear to dispute that the United States has provided all water due under the 1954 contracts.^{1/} Pioneer and Settlers' opening brief claimed, without providing any supporting evidence, that the United States has "largely ignored or denied" Section 7(a) of the 1954 contracts. *Cf.* MEMORANDUM IN SUPPORT OF PIONEER AND SETTLERS' MOTION FOR SUMMARY JUDGMENT at 23 ("P & S MEM. IN SUPP."). As the United States has explained previously, that provision requires the United States to provide water from Lucky Peak to Anderson Ranch and Arrowrock contractors to make up for any shortfall in storage due to flood control operations.^{2/} *See* RESPONSE BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT at 11-15 ("U.S. RESP."). Whether or not the United States has made water available as required by the contracts has no direct relevance to whether the streamflow maintenance storage right has been established in accordance with Idaho law. Pioneer and Settlers, however, argue that the water right is contrary to Section 7(a) of the 1954 contracts.^{3/} *See* P & S MEM. IN SUPP. at 23.

^{1/} The Boise Project Board of Control, whose member districts have contracted for the vast majority of the storage space in Anderson Ranch and Arrowrock Reservoirs, does not argue that the United States has not fulfilled its contractual obligations to the Anderson Ranch and Arrowrock contract holders. Instead, the Board of Control argues that the water right must include irrigation as a purpose in order to "allow Reclamation to *continue* to comply" with its contractual obligations. *SEE* BOISE PROJECT BOARD OF CONTROL'S RESPONSE TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT at 2-4 (emphasis added).

^{2/} Those contract provisions are discussed in more detail in U.S. RESP. at 11-15; REPLY BRIEF IN SUPPORT OF UNITED STATES' MOTION FOR SUMMARY JUDGMENT at 10.

^{3/} Pioneer and Settlers also question the United States' compliance with the procedural aspects of the contracts both generally and as they relate to the adoption of the Water Control Manual in 1985. Those procedural issues have no relevance whatsoever to any issue properly before this Court. Indeed, this Court lacks jurisdiction to address them. *Orff v. United States*, 358 F.3d 1137, 1143 & n. 3 (9th Cir. 2004) (McCarran Amendment does not provide jurisdiction over suit to enforce rights allegedly arising from reclamation contract); 43 U.S.C § 390uu (waiving the United States' immunity to "any suit to adjudicate, confirm, validate, or decree the

The United States could have rested on Pioneer and Settlers failure to support their allegation, but instead asked Mary Mellema, a Bureau of Reclamation hydrologist, to review Watermaster records maintained by IDWR. Those records include spreadsheets which document (1) the quantity of stored each entity with an entitlement to stored water, including the irrigation contract holders, was entitled to; and (2) the quantity of water made available to those entities. *See* REPORTS ON CANAL DELIVERIES FROM BOISE RIVER AND DIFFERENT FEATURES AFFECTING THOSE DELIVERIES (“WATER MASTER REPORTS”), attached as Exhibit A to the AFFIDAVIT OF MARY MELLEMA. Ms. Mellema reviewed those records and concluded that the records demonstrated that all the water promised has been provided. AFFIDAVIT OF MARY MELLEMA at ¶ 5. Ms. Mellema’s affidavit also provided her understanding of IDWR’s accounting system to provide the Court and the parties information regarding how IDWR and the Watermaster allocate the water stored within the Boise Project reservoirs.^{4/} *See* Id. at ¶ 4.

Pioneer and Settlers requested an opportunity to depose Ms. Mellema and further requested that the United States designate a witness pursuant to Rule 30(b)(6) to testify regarding the United States’ compliance with the contracts. The United States cooperated fully in both requests. As Pioneer and Settlers have pointed out, Ms. Mellema admitted in deposition that she did not review the contracts themselves and has no direct experience with the accounting done by IDWR. Such knowledge was not necessary to Ms. Mellema’s analysis because the Watermaster records, provide both the quantity of an account holders’ entitlement to water and the amount of water

contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law” so long as that suit is “brought in any United States district court in the State in which the land involved is situated”).

^{4/} Reclamation provides IDWR with a list of account holders and their entitlements and IDWR implements the allocation of water to those entities. *See* SUTTER AFF. at ¶ 5.

actually made available. *See* WATERMASTER REPORTS, attached as Exhibit A to the AFFIDAVIT OF MARY MELLEMA.

Nonetheless, because Pioneer and Settlers' deposition drew particular attention to the paragraph of Ms Mellema's affidavit addressing IDWR's accounting process, the United States' decided that further explanation of that process would be helpful to the Court's consideration of the contract issues raised by Pioneer & Settlers. Mr. Sutter was a logical choice to provide that explanation because he wrote the code for the accounting program and oversaw its implementation for almost two decades.

Mr. Sutter's affidavit did not introduce any new conclusions. Indeed, he reviewed the same set of Watermaster record books reviewed by Ms. Mellema and reached "[t]he same conclusion . . . reached by Mary Mellema in her Affidavit dated November 13, 2007." SUTTER AFFIDAVIT at ¶ 9. Mr. Sutter's affidavit merely provided supplemental support for that conclusion by explaining how IDWR's accounting process operates to ensure that Anderson Ranch and Arrowrock contract holders are not adversely affected by flood control operations.

Thus Mr. Sutter's Affidavit provided "a supplement to the earlier factual showing," as was endorsed in *Sun Valley Potatoes*. In somewhat different circumstances, the Idaho Supreme Court has held that a district court abused its discretion by refusing to consider an affidavit which provided a more detailed explanation of both material originally presented in an affidavit accompanying a response brief and the affiant's qualifications.⁵⁷ *State of Idaho v. Rubbermaid Inc.*, 129 Idaho 353, 358, 924 P.2d 615, 620 (1996). Likewise, this Court should consider Mr. Sutter's

⁵⁷ In *Rubbermaid*, the challenged affidavit accompanied a motion for reconsideration rather than a reply brief.

affidavit because it provides a more detailed explanation of the same material discussed by Ms. Mellema, by a person better qualified to address IDWR's procedures.

B. There is No Basis to Strike the Third Affidavit of David A. Jarvis.

Pioneer and Settlers' request to have the Third Affidavit of David Jarvis stricken must be denied because Mr. Jarvis' affidavit did no more than provide the Court with a courtesy copy of legal authority, an opinion by the Idaho Attorney General, that was directly responsive to an allegation made in Pioneer & Settlers' Response Brief.

Pioneer and Settlers' Response Brief argued that the United States' streamflow maintenance water right is procedurally defective because the right was not subject to approval by "concurrent resolution of Idaho legislature," as would have been required had the water right been established under the instream flow statute. PIONEER AND SETTLERS' RESPONSE TO THE UNITED STATES BUREAU OF RECLAMATION'S MOTION FOR SUMMARY JUDGMENT at 9-10. The United States made two points in reply. First it reiterated its position that the requirements of the instream flow statute are inapplicable because the streamflow maintenance water right is predicated on the diversion and storage of water. REPLY BRIEF IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT at 3 n.5 ("U.S REPLY"); *see also* U.S. OPEN. at 19-20; U.S RESP. at 16-17. Second, the United States explained that "the Idaho Supreme Court has repeatedly found that legislative actions taken by concurrent resolution violate the enactment and presentment provisions of the Idaho Constitution. *E.g., Idaho Power Co. v. State*, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983). Indeed, in light of that, the Idaho Attorney General has concluded that I.C. § 42-1503 is itself unconstitutional. Idaho Attorney General Opinion No. 87-6 (Exhibit MM to the THIRD AFFIDAVIT OF DAVID A. JARVIS)." *Id.*

Thus the Idaho Attorney General Opinion provided in the Third Affidavit of David Jarvis and the related text did no more than respond directly an assertion raised by Pioneer and Settlers in their response brief. Accordingly, there is no basis to strike either the Affidavit or the related argument. Moreover, the participating parties also addressed Pioneer and Settlers' assertion that legislative concurrence was required and also cited the Idaho Attorney General Opinion cited by the United States. REPLY MEMORANDUM IN SUPPORT OF PARTICIPATING PARTIES MOTION FOR SUMMARY JUDGMENT at 7, n.5.

II. ALLOWING PIONEER AND SETTLERS THE OPPORTUNITY TO DEPOSE MR. SUTTER AND RESPOND APPROPRIATELY IS APPROPRIATE AND WILL CURE ANY PREJUDICE THE DISTRICTS MAY HAVE SUFFERED.

Even if this Court were to determine that Mr. Sutter's affidavit presented new issues, it would not be appropriate to strike the affidavit because the interests of justices are generally served by a thorough exploration of relevant facts and any prejudice to the Districts can readily be cured by granting the alternative relief sought by Pioneer and Settlers. Courts have long recognized that it is in the interests of justice to allow for a full investigation of relevant facts. *E.g., Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 192 (1896) (the interests of justice are best served by a "full and fair investigation of the law and facts"); *Diaz v. Shalala*, 871 F.Supp. 180, 181 (S.D.N.Y. 1994) ("The interests of justice and the ultimate speedy and inexpensive resolution of the dispute (Fed.R.Civ.P. 1) are best served by obtaining the most complete insight into the available facts. . . Use of procedural arguments to constrict rather than advance analysis of the merits is disfavored").

Of course, courts have also recognized that fairness can require an ability to respond to material presented in a reply brief. *See e.g., Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). Consequently, the United States offered to make Mr. Sutter available for deposition. U.S. REPLY at 10, n.7. Having offered to make Mr. Sutter available for deposition, the United States

does not object to the alternative relief Pioneer and Settlers seek. Granting that relief would be in the best interests of justice because it allows for consideration of all relevant and probative material, does so in a way that is fair to all parties and would cure any prejudice suffered by Pioneer and Settlers.

Finally, the allowing an opportunity to depose Mr. Sutter need not require rescheduling the oral argument currently set for March 6th. Mr. Sutter's affidavit has no bearing on two potentially dispositive issues raised by the parties briefing: (1) whether the irrigation interests' challenges to the water right are an improper collateral attack; and (2) whether the water right should have been established under Idaho's instream flow program. Accordingly, the Court may find that judicial economy is furthered by going forward with argument limited to those two questions.

Conclusion

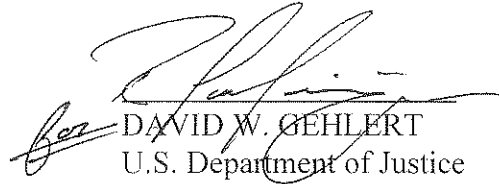
Pioneer and Settlers' efforts to strike the affidavits of Robert J. Sutter and David A. Jarvis are unwarranted because these affidavits were not filed in violation of I.R.C.P. 56(c) and do not raise new issues but merely further clarify issues previously raised by Pioneer and Settlers themselves. Moreover, the United States, in its Reply Brief, already offered Pioneer and Settlers the opportunity to depose Mr. Sutter and is not opposed to this Court granting the relief sought by Pioneer and Settlers.

Therefore the United States asks this Court to deny Pioneer and Settlers' Motion to Strike.

Dated this 26th day of February, 2008.

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General
Environment and Natural Resources Division

A handwritten signature in black ink, appearing to read "David W. Gehlert", is written over the printed name and title.

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ATTORNEYS FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I certify that on this 26th day of February 2008, I served a true and correct copies of the foregoing **THE UNITED STATES' RESPONSE TO PIONEER AND SETTLERS IRRIGATION DISTRICTS' MOTION TO STRIKE** as indicated below:

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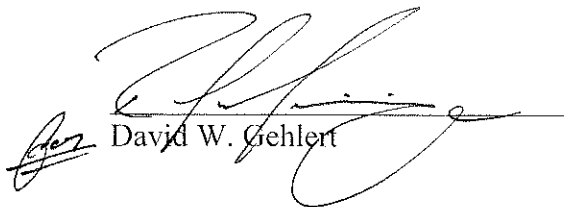
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