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APR 22 2009

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
APR 21 2009	
By _____	Clerk
Deputy Clerk	

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	)	Subcases 74-50A, 74-380A, 74-381A and 74-10146
	)	(Carlson)
Case No. 39576	)	
	)	ORDER GRANTING MOTION TO
	)	PARTICIPATE AND SETTING DEADLINES
	)	AND STATUS CONFERENCE

Report and Recommendation

On September 24, 2008, the Special Master entered a *Report and Recommendation* in the above four subcases recommended that Evelyn and Thomas Carlson are entitled to a partial decree in subcase 74-10146.¹ The Special Master concluded as a matter of law that "it would not be fair to deny their claim in the SRBA based on *res judicata* given the possibilities that in the Lemhi Adjudication 1) the claim was deemed to be a high flow claim and therefore excluded and 2) the claimed source was not considered tributary to the Lemhi River and therefore excluded."

By way of background, IDWR filed a *Supplemental Director's Report* on July 11, 2008, finding that 74-10146 was not claimed in the Lemhi Adjudication commenced in 1970. Hence, "the legal doctrine of *res judicata* bars reconsideration of the nature and extent of all water rights previously adjudicated [citing I.C. §42-1420]." Most importantly, IDWR found that even though the Carlsons' predecessor-in-interest (Coleman) was a party to the Lemhi Adjudication, "Adams Creek, the source claimed for water right no. 74-10146, was not a listed or decreed source in the Lemhi Adjudication."

¹ IDWR identified subcases 74-50A, 74-380A and 74-381A as the Carlsons' uncontested overlapping claims.

IDWR concluded its *Supplemental Director's Report* by stating that, but for *res judicata*, it would recommend the claim for .4 cfs from Adams Creek, tributary to sinks, with a priority date of March 15, 1934, based on statements of witnesses to historic beneficial use of water on the Coleman Ranch.

Order of Recommitment

On January 12, 2009, SRBA Presiding Judge John M. Melanson entered an *Order of Recommitment to Special Master for Specific Findings* because the Special Master's *Report and Recommendation* was inconclusive in two respects:

[I]f the claim is in fact a high flow claim, then it needs to be definitively identified and claimed as such. Alternatively, if the source for the claim (Adams Creek) was outside the scope of the Lemhi Adjudication, then the claim would also be permissible in the SRBA. However, the Special Master must make a specific finding that the source was either outside the scope of the Lemhi Adjudication or was otherwise omitted from the adjudication, either appropriately or in error [footnote omitted].

Motion to Participate

The United States filed a *Motion to Participate* on April 1, 2009, because the Carlsons' contested claim implicates the issue of "high flow claims" which are currently before the Special Master in test cases in the Lemhi Basin.

Status Conference

To give the Carlsons and IDWR an opportunity to comment on the *Order of Recommitment* and to consider the United States' *Motion to Participate*, a telephone status conference was held on April 16, 2009. Gregory W. Moeller appeared for the Carlsons, along with Thomas H. Carlson; Fredric W. Price spoke for the United States of America, Department of Justice; K. Heidi Gudgell appeared for the Nez Perce Tribe; and Chris M. Bromley appeared for IDWR, along with Monica Van Bussum. The Carlsons did not oppose the United States' *Motion*.

Mr. Bromley reviewed IDWR's records and the audio tapes from the trial held July 24, 2008. He said the record shows Adams Creek was not part of the Lemhi Adjudication because then, IDWR considered it private water that rises on adjacent public lands and sinks on the Carlsons' property. Mr. Bromley said Adams Spring was included in the Lemhi Adjudication,

but not Adams Creek. Adams Spring is not connected to Adams Creek; Mr. Price verified the distant legal descriptions of the sources.

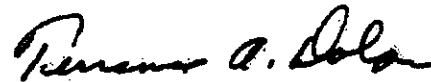
Mr. Bromley said the Carlsons' SRBA claim for Adams Creek water was not a high flow claim because the Carlsons claimed a 1908 priority date based on beneficial use, not the usual 1966 priority date based on high flows.

Because counsel for the United States was unable to attend the hearing, Ms. Gudgell asked that the record be left open for 30 days to give the United States the opportunity to supplement the record. Then, the Carlsons should have an additional 20 days to respond with a status conference to follow.

THEREFORE, IT IS ORDERED that:

1. The United States' *Motion to Participate* is **granted**;
2. The United States may supplement the record in writing no later than **Monday, May 18, 2009**;
3. The Carlsons may respond to the United States' supplementation no later than **Tuesday, June 9, 2009**; and
4. A status conference shall be held on **Thursday, June 18, 2009, 3:00 p.m.** The parties may participate by telephone by dialing 1-225-383-1099 and when prompted, entering the code 654400.

DATED April 21, 2009.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO PARTICIPATE AND SETTING DEADLINES AND STATUS CONFERENCE was mailed on April 21, 2009, with sufficient first-class postage to the following:

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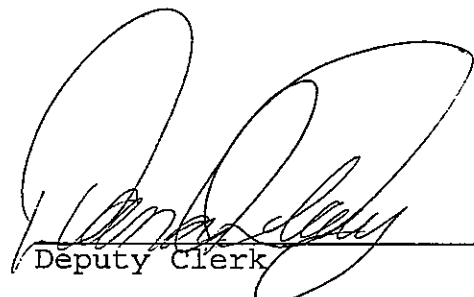
UNITED STATES OF AMERICA

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A large, stylized handwritten signature in black ink, likely belonging to the Deputy Clerk, is written over a horizontal line.