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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 Nos. 01-00209, 01-00210, 01-00211A,
) 01-00211B, 01-00212, 01-00213, 01-00214A,
) 01-00214B, 01-00217, 01-00218, 01-00219,
) 01-10187, 01-10188, 01-10192, and 01-10194
) (“Minidoka Return Flow Credit”)
)
) **STATE OF IDAHO’S POST-TRIAL BRIEF**
)

The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its post-trial brief in the above-entitled subcases in accordance with the *Order Setting Deadlines* entered on May 22, 2009.

I. STATEMENT OF THE CASE

A. NATURE OF THE PROCEEDINGS

This controversy relates to the Idaho Department of Water Resources (IDWR) Director’s

determination that the following provision is necessary for the definition, clarification, and/or administration of the above-captioned water rights:

The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American-Falls Reservoir District #2 and recorded in the Bonneville County Recorder's Office as Instrument No.

B. STATEMENT OF FACTS

The Minidoka Return Flow Credit is an allocation between the Twin Falls and North Side canal companies ("Milner canal companies") and the Minidoka and Burley irrigation districts ("Minidoka Project") of the return flows to the Snake River that are attributable to the creation of the Minidoka irrigation project. When the senior natural flow rights of the Milner canal companies are being delivered and the upstream Minidoka Project is utilizing its storage water, there are return flows to the Minidoka to Milner reach that are attributed, pursuant to the Minidoka Return Flow Credit, to the Minidoka Project's storage diversions. Tr. p. 26. That portion of the water being delivered to the Milner canal companies that is attributable to such return flows is treated as Minidoka Project storage rather than natural flow; as such, those return flows are credited back to the Minidoka Project's storage accounts and debited out of the Milner canal companies' accounts. Tr. p. 26. At the trial in this matter, Tony Olenichak, Water District No. 1 Program Manager, testified to how the Credit is accounted for by the water district:

MR. OLENICHAK: Typically in this reach from Minidoka to Milner when the Minidoka Project is using storage there is return flows that otherwise wouldn't be there without the project. The natural flow without the credit would be the sum of the breached [sic] gains in the upstream reaches that would be delivered to the senior right of Twin Falls and Northside Canal. But with the Minidoka credit calculation what that does is, if there is a gain between Minidoka and Milner, it credits that gain to the return flows from the Minidoka project, and instead of delivering that as a part of the

natural flow to senior rights, then its return flows are actually credited back upstream to the Minidoka canals.

Tr. p. 26.

The Minidoka Return Flow Credit arose out of the following provision of the 1913 Foster Decree, *Twin Falls Canal Co. v. Foster* (Idaho 4th Dist. Ct. June 20, 1913):

It is further ORDERED, ADJUDGED AND DECREED, until otherwise provided by Statute, the State Engineer of the State of Idaho, or his duly authorized deputy, shall determine what part of the water flowing in Snake River at the Minidoka and Milner Dams, is storage waters, and what part is natural flow, as provided by the Idaho Session Laws of 1909, entitled: "An act to provide for the safe-guarding of the Rights of those conserving Public Water in Reservoirs and Prohibiting Misappropriation of such waters by those having no Right to the use of the same, and declaring a Misdemeanor", the amount of the natural flow to be determined as such natural flow would be, if unaffected by the diversions or acts of the parties hereto or any or either of them or by the release of stored water, the natural flow to which the Twin Falls Project are entitled to be measured to them an Milner Dam.

IDWR Ex. 1 at 10–11, Foster Decree; Tr. pp. 29–30. The Credit, as part of the Foster Decree, continued to be recognized in subsequent Snake River basin water right decrees, including *Woodville Canal Co. v. Clark & Edwards Canal & Irr. Co.* (U.S. D. Idaho June 25, 1929), *Burley Irr. Dist. v. Eagle* (Idaho 5th Dist. Ct. July 10, 1968), and *Aberdeen-Springfield Canal Co. v. Eagle* (Idaho 7th Dist. Ct. Mar. 12, 1969).

The Minidoka Return Flow Credit has been recognized and administered by the water district since at least 1919. *See* IDWR Ex. 2, Minidoka Credit Calculations. Mr. Olenichak, Water District No. 1 Program Manager, testified that IDWR's records show a continued accounting of the Credit since that time:

MR. BAXTER: But for our purposes today this list reflects a showing that the Department has tallied the Minidoka credit since about 1919?

MR. OLENICHAK: That's correct.

...

MR. BAXTER: And this list goes through the year 2001. Does the credit continue to be calculated today?

MR. OLENICHAK: Yes, it does.

Tr. p. 32, 36. The objecting ground water districts' witness, Ron Carlson, former Water District No. 1 Watermaster and IDWR Regional Manager, confirmed that the water district has in fact historically recognized and administered the Minidoka Return Flow Credit:

MR. FLETCHER: And I guess you would acknowledge, based upon your testimony, that from at least 1919 to the year 2000 the Minidoka credit was accounted for by the water district?

MR. CARLSON: Yes.

Tr. p. 158. Mr. Olenichak and Mr. Carlson also agreed that the basis for the water district's administration of the Credit is the Foster Decree provision set forth above. *See* Tr. p. 29, 158, 174.

The Minidoka Return Flow Credit has not been free from criticism, however. Disagreements have arisen over the years as to the method by which the Credit is to be calculated. In 2006, the Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company, and American Falls Reservoir District #2 signed an agreement intended to resolve the disputes over the Minidoka Return Flow Credit methodology. Where in the past the water district evaluated and computed the return flows occurring for each particular water year, the parties agreed to fix the quantity of the Credit at 14,500 afa. *See* IDWR Ex. 3, 2006 Settlement Agreement.

C. COURSE OF PROCEEDINGS

The above-captioned water rights were claimed in the SRBA as follows:

<u>Water Right No.</u>	<u>Claimant</u>
01-00209	Twin Falls Canal Company
01-00210	North Side Canal Company

01-00211A	United States Bureau of Reclamation
01-00211B	Burley Irrigation District
01-00212	North Side Canal Company
01-00213	North Side Canal Company
01-00214A	United States Bureau of Reclamation
01-00214B	Burley Irrigation District
01-00217	United States Bureau of Reclamation
01-00218	United States Bureau of Reclamation
01-00219	United States Bureau of Reclamation
01-10187	Minidoka Irrigation District
01-10188	Minidoka Irrigation District
01-10192	Minidoka Irrigation District
01-10194	Minidoka Irrigation District

The Director's Recommendations for water right nos. 01-00209, 01-00210, 01-00211A, 01-00211B, 01-00212, 01-00213, 01-00214A, 01-00214B, 01-00217, 01-00218, and 01-00219 included the following provision in the Other Provisions Necessary section of the water rights:

The Director of the Idaho Department of Water Resources shall determine what part of the water flowing in the Snake River at the Minidoka and Milner Dams is storage waters and what part is natural flow. The amount of natural flow shall be determined as such natural flow would be, if unaffected by the diversions or acts of the parties to Twin Falls Canal Co v Foster, Decree (4th Jud. Dist., Twin Falls Co., June 20, 1913). The natural flow to which the Twin Falls Canal Company and the Northside Canal Company are entitled shall be measured at the Milner Dam.

Various objections were filed against these recommendations, including objections to the scope and/or application of the Minidoka Return Flow Credit provision.

Water right nos. 01-10187, 01-10188, and 01-10194 claimed in the name of the Minidoka Irrigation District were recommended to be disallowed, as being duplicative to the United States Bureau of Reclamation's water right nos. 01-00211A and 01-00214A. Water right no. 01-10192 was recommended to be disallowed, as failing to demonstrate beneficial use.

On May 20, 2009, a one-day trial was held before SRBA District Court to determine the applicability of the Minidoka Return Flow Credit provision. During the trial, IDWR submitted

amended recommendations that substituted the following provision for the Minidoka Return Flow Credit provision found in the original recommendations:

The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American-Falls Reservoir District #2 and recorded in the Bonneville County Recorder's Office as Instrument No.

See IDWR Ex. 4, Department Recommendations; Tr. pp. 53--56.

On May 22, 2009, the Court entered its *Order Setting Deadlines*, ordering post-trial briefs, proposed findings of fact and conclusions of law, and briefing on the admissibility of certain evidence be filed on July 31, 2009.

II. DISCUSSION

The following three issues were raised at the time of the commencement of the trial:

(A) whether there is a legal basis for the Minidoka Return Flow Credit provision; (B) provided there is a legal basis for the provision, whether the court can consider any mitigation or replacement requirements placed on the ground water districts; and (C) whether certain evidence related to a pending administrative appeal before the Fifth Judicial District Court was admissible in this trial.

Initially, a fourth issue was raised as to the appropriate means of calculating the Minidoka Return Flow Credit. However, counsel for the objecting ground water districts agreed that, in the event that the Court finds a legal basis for the inclusion of the Minidoka Return Flow Credit provision, the Credit should be calculated consistent with the 2006 Settlement Agreement:

MR. SMITH: As pointed out in the Ground Water District's pretrial brief, if there is a legal basis and if this Minidoka credit is going to go forward and continue in time, the Ground Water Districts would agree that the 2006 agreement should be used for purposes of calculating that particular Minidoka credit.

Tr. p. 8. As such, if the Court finds that the Director's recognition of the Minidoka Return Flow Credit is appropriate, there is no dispute that the effected water right descriptions should include the amended remark language set forth in IDWR Exhibit No. 4 (as opposed to the language set forth in the original Director's recommendations).

A. IT IS NECESSARY TO INCLUDE A REFERENCE TO THE MINIDOKA RETURN FLOW CREDIT IN ORDER TO CONTINUE HISTORICAL ADMINISTRATION CONSISTENT WITH THE FOSTER DECREE.

i. STANDARD OF REVIEW

Pursuant to his authority under Idaho Code § 42-1411(2)(j), the IDWR Director determined that it was necessary to include a reference to the Minidoka Return Flow Credit in the water right descriptions at issue in this proceeding in order to recognize the historical administration of the Credit. Having been included in the Director's amended recommendations, the Minidoka Return Flow Credit references are to be considered "prima facie evidence of the nature and extent of the water rights under state law," *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002); *see also* I.C. § 42-1411(4), leaving the objecting parties with "the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." I.C. § 42-1411(5); *see also State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 746, 947 P.2d 409, 419 (1997) ("The director's report is presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption.").

ii. THE MINIDOKA RETURN FLOW CREDIT REFERENCE IS NECESSARY FOR THE DEFINITION, CLARIFICATION, AND ADMINISTRATION OF THE EFFECTED WATER RIGHTS

In order to continue administration as has occurred historically, it is necessary that the partial decrees for the water rights at issue in this proceeding include a reference to the Minidoka Return Flow Credit. The water district is required by statute to give preference to rights of

record when distributing water in times of scarcity. Idaho Code § 42-607; *see also R.T. Nahas Co. v. Hulet*, 114 Idaho 23, 27, 752 P.2d 625, 629 (Ct. App. 1988). Acting pursuant to that authority, the water district historically has recognized and administered the Foster Decree and has applied the Minidoka Return Flow Credit provision of that decree since at least 1919. *See* Ex. 2, Minidoka Credit Calculations; Tr. p. 32, 36, 158. There is no dispute that the water district was acting within its legal authority in doing so:

MR. FLETCHER: When administering the Minidoka credit at least to your knowledge was it ever administered unlawfully?

MR. OLENICHAK: To my knowledge it was never administered unlawfully.

...

MR. FLETCHER: So to your knowledge when the Minidoka credit was distributed and accounted for, it was done so lawfully?

MR. CARLSON: So far as I know.

Tr. p. 124, 158.

In order to recognize the historical administration of the Minidoka Return Flow Credit, it is a necessary that the effected water rights include a reference thereto.

B. THE ISSUES OF WHETHER THE MINIDOKA RETURN FLOW CREDIT APPLIES TO THE OBJECTING GROUND WATER DISTRICTS, AND WHETHER CERTAIN EVIDENCE RELATED TO A PENDING ADMINISTRATIVE APPEAL IS ADMISSABLE, ARE PRIVATE DISPUTES UPON WHICH THE STATE TAKES NO POSITION.

The State's interest in this litigation is to have the resulting water right decrees memorialize the historical administration of the Minidoka Return Flow Credit as it has been applied to the parties to the Foster Decree and supplemental decrees thereto. The State recognizes, however, that the objecting ground water districts have raised an issue as to whether the Credit should be applied to their detriment, given that they were not parties to the prior

decrees. The State takes no position at this time as to the extent to which the Credit should apply in the objecting ground water districts' circumstances.

The State similarly takes no position at this time as to the admissibility of certain evidence offered by the ground water districts related to the pending administrative appeal before Judge Melanson.

III. CONCLUSION

In order to recognize the historical administration of the Minidoka Return Flow Credit, it is a necessary that the following provision be included in the effected water right decrees:

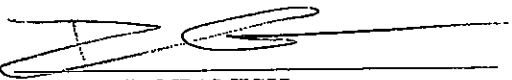
The operation, use and administration of this water right is subject to the terms and conditions of the Settlement Agreement signed on February 14, 2006 with Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company and American-Falls Reservoir District #2 and recorded in the Bonneville County Recorder's Office as Instrument No.

See IDWR Ex. 4, Department Recommendations.

DATED this 30th day of July 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July 2009, I caused to be served a true and correct copy of the **STATE OF IDAHO'S POST-TRIAL BRIEF** to the following parties by the indicated methods:

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UNITED STATES OF AMERICA

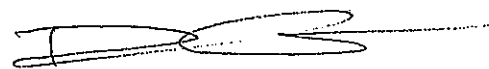
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