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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

Case No. 39576

Subcases: Subcases: 1-209, 1-210, 1-211A,
1-211B, 1-212, 1-213, 1-214A, 1-214B, 1-
217, 1-218, 1-219, 1-10187, 1-10188, 1-
10192, 1-10194
“Minidoka Credit Remark”

**GROUND WATER DISTRICTS’
POST-TRIAL BRIEF**

Pursuant to the Special Master’s request of May 20, 2009, Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Magic Valley Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District And North Snake Ground Water District for and on behalf of their members (collectively referred to herein as “Ground Water Districts” or “ground water users”) hereby submit this Post-Trial Brief in the above listed matter. The subcases¹ listed on Attachment A have been grouped together in the SRBA for trial on the limited issue of the “Minidoka Credit Remark.” *See* Amended Trial Scheduling Order of November 4, 2008.

¹ For ease of reference in this brief, the water right claimants will be referred to as the Surface Water Coalition or SWC although not all SWC entities have water rights that are subject to the Minidoka Credit.

INTRODUCTION

This case boils down to whether or not the ground water users should be subject to a surface water distribution agreement that now has the effect in the modern era of allowing Twin Falls Canal Company (“TFCC”) and North Side Canal Company (“NSCC”) to secure the amount of water they have historically traded in protest to the Burley Irrigation District and Minidoka Irrigation District (the “Minidoka Canals”) from the ground water users. It is interesting to note that TFCC and NSCC did the research for Exhibit 25 in an effort to support Ron Carlson’s decision (then Watermaster of Water District 01) to do away with the Minidoka Credit. However, shortly thereafter, once the Surface Water Coalition’s delivery call was made and the entities recognized that they could make up the amount of water they lose through the Minidoka Credit from the ground water users via mitigation, TFCC and NSCC were suddenly willing to enter into a deal with the Minidoka Canals and even add American Falls Reservoir District No. 2 to the arrangement. Clearly that is not in keeping with whatever historic practice surrounds the Minidoka Credit, is unjust and should not be condoned by the SRBA Court through the partial decrees.

Originally the language at issue in this case and found in the Foster Decree (Exh. 1) was to benefit TFCC and NSCC. The interpretation of the Minidoka Credit to reduce their natural flow supplies was an interpretation by the watermaster that TFCC and NSCC acquiesced to over decades. However, the Ground Water Districts are not inclined to acquiesce. The SRBA District Court should limit the application of the Minidoka Credit to those who bargained for it and not to the Ground Water Districts or their members who were never parties to the arrangement.

BACKGROUND

The Basin 01, Part 1 Director's Report for Irrigation and Other Water Rights was filed with the SRBA Court on May 11, 2006. The recommendations which are at issue in this proceeding initially did not have the Minidoka Credit remark in each water right recommendation. The Notice of Filing Director's Report for Basin 01, Part 1 stated as follows: *"...the Director anticipates filing a general provision concerning the Minidoka Credit and the calculation of evaporation loss on the reservoirs located in Basin 01 in a future Director's Report for Basin 01."* See Notice of Filing Director's Report for Basin 01, Part 1 on file with the SRBA Court.

When the Director filed the Basin 01, Part 2 Director's Report for Irrigation and Other Water Rights on or about December 21, 2006, the Notice of Filing Director's Report, stated: *"After further consideration, the Department has decided instead to address the issue by including language concerning the Minidoka Credit in eleven individual water rights in Basin 01."* Accordingly, nine of these recommendations were amended in the Part 2 report and two recommendations were reported for the first time with the Minidoka Credit language inserted. See Notice of Filing Director's Report for Basin 01, Part 2 on file with the SRBA Court.

The Minidoka Credit remark inserted into the water right recommendations stated:

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 Dam 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 Col., 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 parties filed objections and responses to this remark. At the commencement of trial on May 20, 1009, the Department offered a revised recommendation which deleted the remark specified above and inserted the following remark:

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.

The agreement referenced in this remark is referred to herein as the "2006 Agreement" and was admitted at trial as Exhibit 3; the proposed revised recommendations were admitted as Exhibit 4. Importantly, the Director has not signed the 2006 Agreement nor has the Director actually recommended that the Court "accept" the 2006 Agreement. The witness offered by the Department to explain the basis of the recommendations, Mr. Olenichak, testified that he does not work in the adjudication and did not make the recommendation on these water rights. Nor was he sure how IDWR came to change its recommendations to now reference the 2006 Agreement. (Tr. 61: 11- 62:8; 63:24- 64:15; 64: 25- 65:3). Instead, the Director essentially punted the issue of whether or not the 2006 Agreement should be referenced and whether there is truly a valid basis for continuing the practice of recognizing the Minidoka Credit. The Department has left that to the SRBA Court to decide.

The Ground Water Districts seek to have this Court decree that the Minidoka Credit is invalid and should not be included in any partial decree in the SRBA. However, if the Court is not inclined to invalidate the practice of the Minidoka Credit, then the Ground Water Districts request that any application of the provision of the 2006 Agreement or the Minidoka Credit not detrimentally impact Ground Water Districts or their members' water rights or obligations

arising under their water rights. The manner in which the Department has recommended this remark, how the Court decrees these water right recommendations and the way it is interpreted and applied will have (and has had) an impact on the amount of water that the Ground Water Districts and their members can use under their ground water rights by requiring additional mitigation water to TFCC and NSCC in the event of a material injury determination by the Department.

ARGUMENT

Evidence at trial established that the “Minidoka Credit” remark or any reference to the 2006 Agreement (Exh. 3) is not necessary for the administration of the SWC’s water rights at issue in this matter and that the water rights can be administered just fine without it. This was demonstrated through Mr. Olenichak who responded to questions asked by the Special Master during the trial.

SPECIAL MASTER DOLAN: Oh. And on a maybe even broader issue, if the court were to find there's really no basis for the Minidoka credit remark, as urged by the ground water appropriators, what will happen? What does that mean to administration, to use of the water, or whatever effect it may have?

THE WITNESS: We would continue to (inaudible) natural flow deliveries to the diversions like we do everywhere else. We wouldn't have this return flow credit calculation. We would modify that process.

SPECIAL MASTER DOLAN: Is it fair to say your calculations of return flows and net losses and all that, they're approximations at best, based on the best evidence you have?

THE WITNESS: It's based on the best data that we have.

(Tr. 59: 18 – 60:8).

Further, Mr. Olenichak stated that he really doesn’t know how to calculate the “Minidoka Credit” and as evidenced by Exh. 6, the Department has struggled with how to calculate the credit ever since the entry of the Foster Decree.

Q. If the court agrees that there's a legal basis for the credit, what should that number be?

A. Well, I don't know. And we reached this impasse in 2001 when the water master initially wanted to stop calculating the credit. The director went back to essentially what was the method used prior to 1977 or '78, and he urged the canals to get their consultants together with the IDWR hydrology staff and come up with an agreed-upon amount of water that's returned from the project in that lower reach. The difficult thing about determining what that precise number is: First of all it's difficult to measure because your return flows come back to the river in several locations. It could be several drains. It could come back to the river subsurface and enter the reach. And as we've seen when we calculated in 2001 and 2002, by simply measuring the amount of water that starts at the reach at the Minidoka Dam and ends at the reach in the Milner Dam, we saw that that process no longer worked because now there's a net loss in that reach.

But we still know that there is water returning to that reach from the Minidoka project. Precisely how much water that is, it's very difficult to determine. I don't know how to do it.

(Tr. 51:21 – 52:18). In addition, it was demonstrated at trial, that the actual language in the Foster Decree really did not create the “Minidoka Credit.” Rather, the “Minidoka Credit” occurred based on an interpretation of the Foster Decree once Lake Walcott sealed itself. Exh. 25 at 15, 46, and 50.

Exhibit 1 is a copy of the Foster Decree. The language at issue in this case is:

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 the 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 Waters 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 projects are entitled to be measured to them at Milner Dam.

Exh. 1 at 10. The facts show that the language in the Foster Decree can only reasonably be interpreted to go to the benefit of TFCC and NSCC; yet, the practice has been the exact opposite and has actually reduced the supply of water to TFCC and NSCC as testified to by Mr. Olenichak:

Q. Is it your understanding that when they refer to the Twin Falls projects, that's the Twin Falls Canal Company and Northside Canal Company?

A. Yes.

Q. And so this remark was to go to the benefit of Twin Falls Canal Company and Northside Canal Company, would you agree with that?

A. Yes.

(Tr. 10: 7-14).

A. 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 reached 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. 26:12-34).

Q. Does it effectively reduce the quantity of Twin Falls Canal Company under this water right? The 3000 cfs diversion?

A. Yes. The natural flow delivery to Twin Falls Canal Company and Northside Canal would increase without the Minidoka credit calculation.

(Tr. 118: 11-16).

Mr. Carlson also testified:

Q. And I wanted to get back to the more historical. Who are the intended beneficiaries of the language in the historic Foster Decree, do you know?

A. Well, it was Twin Falls and Northside.

(Tr. 146: 10-13; see also Tr. 139:16 – 143:12). Further, TFCC even agreed that the return flow credits was “beyond the original purpose of the Foster Decree to recognize a credit for flows returning to the river from irrigation practices upon the Project.” Exh. 25 ¶1 at 50 and 61.

This brief will first argue that the SRBA has jurisdiction to provide sufficient administrative instruction to the Director and the watermaster through its decrees and therefore, has jurisdiction to decide the issues in this case. Second, although provisions contained in a prior decree may be binding on the parties to the prior decree, those provisions are not binding on non-parties nor is the SRBA Court mandated to blindly accept all those provisions. Third, the need for the Minidoka Credit has ended and while the surface water users may contract to rotate, exchange or trade water amongst themselves, there is no valid legal or factual basis to require the private agreement be included in the decree issued by the SRBA Court and invoked in such a manner to injury junior ground water users. That being the case, the private agreement should not be included in the decree and therefore, should not bind the ground water users who are not parties to the private contract. Finally, the admissibility of the key Ground Water Districts Exhibit 25 will be addressed. There is simply no question that Exhibit 25 is admissible and the objection to its admission overruled.

I. THE SRBA COURT HAS JURISDICTION TO DECIDE THIS MATTER

The SWC argued that the SRBA Court lacks jurisdiction to provide administrative instruction to the Director. However, that argument is completely contrary to the purpose of the SRBA and the adjudication statutes themselves. Furthermore, this argument is entirely contrary to what the SWC is requesting the Court to decree. While the SWC appears to argue that it is okay for the SRBA District Court to decree agreements that specifically direct the Director to administer and distribute waters between and amongst themselves, they do not like the idea of

the SRBA District Court being able to limit that applicability to non-parties to the prior decree or the 2006 Agreement. The Court has clear statutory authority to consider the SWC's request and this in the proper forum for the Ground Water Districts to challenge the request.

The SWC is asking the Court in this matter is to blindly impose upon all water users in the Snake River Basin a private arrangement that has historically has had no effect upon non-parties to the arrangement.

A. The SRBA Court has jurisdiction to consider the administrative effect of including the Minidoka Credit in the SWC's SRBA decrees.

At the hearing, the SWC argued adamantly that the Court has no jurisdiction to consider the administrative impact of the Minidoka Credit, even though the SWC claims should be made an element or condition of their SRBA decrees. The SWC told the Court:

You don't have the ability today to tell the director how he administers water. You simply have the ability today to recommend the water right, recommend the condition or not, whatever you decide to do, and move on. It's not up to you, or any judge for that matter, to tell the director how he administers water unless that properly goes through the administrative process and goes up on appeal.

(Tr.91: 9-16). Apparently, the SWC believes the Court is legally obligated to decree whatever conditions the SWC requests, without considering the administrative effect of such conditions, as if SRBA decrees give no administrative guidance to the Director. The reality, however, is that the definition and the administration of a water right are not two totally separate spheres; they overlap significantly. In fact, the very reason the SWC wants the Court to include the Minidoka Credit in their SRBA decrees is so the Director is obligated to administer the Credit and to abide by the fixed number that the surface water users unilaterally agreed upon. If the Director were to do otherwise, the SWC would undoubtedly cry foul and accuse the Director of re-adjudicating their water rights.

Moreover, the SWC's position is flatly contradicted by the Court's clear statutory authority to decree "such remarks and other matters as are necessary ... for administration of the right by the director." Idaho Code § 42-1411.² The Court simply cannot determine whether a condition is or is not necessary for administration of a right without understanding the administrative effect of the condition.

It must be recognized that the Minidoka Credit is a private arrangement that has historically had no impact upon other water users. Now, however, the SWC wants to greatly expand the role of the Minidoka Credit by imposing the private arrangement upon the entire body of Snake River Basin water users. It is artifice for the SWC to argue that the Court is obligated to do that without considering the effect of such action. Clearly, the Court has jurisdiction and authority under Idaho Code § 42-1411 to determine whether it is necessary to include the Minidoka Credit as a condition of the SWC's SRBA decrees—a determination that cannot be made without considering the effect of including the condition.

B. The SRBA is the proper forum for the ground water users to challenge including the Minidoka Credit in the SWC's SRBA decrees.

In an effort to make the matter seem even more complicated and in an attempt to silence the Ground Water Districts, the SWC argued that the SRBA Court is the improper forum for challenging the Minidoka Credit. Aside from the obvious fact that the SWC is itself requesting that a reference to the 2006 Agreement that calculates the Minidoka Credit be decreed in its water rights in the SRBA, they argue that the Ground Water Districts were required to challenge the Minidoka Credit in the SWC delivery call case. Yet, parties to the SWC delivery call agreed that there were objections on the SWC water rights pending in the SRBA and entered the claims, recommendations and objections into the administrative record as exhibits but specifically stated

² Notably, the statute distinguishes between remarks necessary to define, clarify, and administer water rights.

that by so doing it did not preclude raising issues contained in the objections in other forums. (SWC Tr. 2948: 11-18; 2950: 20- 2951: 1). A copy of this portion of the transcript is provided for the Court's reference.³ It is unclear exactly what the Ground Water Districts were expected to challenge in the administrative case. The SWC's argument on this point is entirely disingenuous.

The fact is that the SWC's water rights are pending in the SRBA and there is a question about whether or not the Minidoka Credit remark should remain or should be discarded. The forum for challenging the SWC's water rights is in the SRBA. The relevancy of the administrative hearing, precipitated by the SWC delivery call against junior ground water users, is to demonstrate what's at stake here.

C. The SRBA Court has the power and obligation to decide what should be included in the partial decree that can then be used to affect other water right holders

In *In re SRBA, Higginson v. United States*, the Idaho Supreme Court recognized that the SRBA Court had an important duty to review the contents of the Director's report in the SRBA and "apply the law to the facts as established in that report" and that the court's judicial power cannot be conferred upon IDWR. In that case, the Court emphasized the reason for this:

It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power couple with the order based on the findings made which would deprive a person of a property right. Such is the full exercise of judicial power, and such power in this stet can be exercised only by one of the enumerated courts.

128 Idaho 246, 259 (1995), *quoting* State v. Finch, 79 Idaho 275, 281 (1957). The SRBA is the first forum for the Ground Water Users to challenge the SWC's water rights and the provisions of the prior decrees.

³ It is requested that the Court take judicial notice of this transcript.

Likewise, this Special Master noted in his Special Master Report relating to subcase no. 43-10356 that parties to the SRBA who are not parties to prior, private adjudications (like the Foster Decree) are allowed to object to water rights contained in prior decrees and to IDWR's administration thereof. In a trial in Subcase No. 43-10356, the objectors were trying to set aside the prior decree's separate sources provision and IDWR's administrative practice based thereon. *In Re SRBA, Special Master Report, Subcase No. 43-10356* dated March 2, 2004. However, the Special Master found that because objectors' predecessors-in-interest were parties to the prior decree, they were estopped from collaterally attacking the decree, but non-parties were not: "this does not preclude parties to the SRBA with affected rights who were not parties to the *Jobe Adams* decree from attacking and potentially setting aside the separate streams provision in that decree, at least as to their rights." *Id.* at 11 fn. 13.

In this case, the Ground Water Districts and their members were not parties to the Foster Decree or the 2006 Agreement, yet their water rights will be harmed if the terms of that private arrangement is imposed upon non-parties to the prior decree and now the 2006 Agreement. As acknowledged by Mr. Olenichak, the impact of continuing with the Minidoka Credit is to reduce the natural flow supplies to TFCC and NSCC which is then passed on to the ground water users.

A. I don't know specifically whether it was addressed or not. What I can tell you is, similar to what Mr. Fletcher said, the entire water supply of Twin Falls and Northside is considered when mitigation is due from the junior Ground Water Users. In some years those two entities have a sufficient water supply and no mitigation is required. In those years we are calculating the Minidoka credit, so there's no need to address it in those years. In years when they are required to provide mitigation water, when Twin Falls or Northside are short of a water supply, if any of that short water supply is due to the Minidoka credit, in other words, they have to supply water back to the Minidoka canals that they otherwise wouldn't without the credit, then that is incorporated into their short supply.

Q. Thank you. And the Ground Water Users are required to make up the short supply; is that true?

A. That's correct.

(Tr. 107:25 – 108:17) Certainly the SRBA Court should not recommend administrative conditions on its partial decrees without knowing anything about the administrative implications of those conditions. If the SRBA Court determines that the Minidoka Credit is valid and should be part of the SWC's water rights, that means the ground water users, and all parties to the SRBA and all future water users are bound by that condition. In this case, what it means is that the ground water users and all other parties become bound to a private agreement that certain SWC entities have concocted.

D. It is not necessary for the administration of these water rights to include the Minidoka Credit in the SRBA decrees.

The IDWR would not normally recommend this type of contractual arrangement as a condition of a water right decree, but recommended the arrangement in this case because it has been in place for a long time:

MR. BAXTER: Well, Special Master, I think it's fair to say that if this scenario just arose today, if somebody came and said we want to administer in this particular way, the Department would say no. However, in this exact circumstance what we have here is an old decree that put in specific language, the Foster Decree. And we have a long history of historical practice of going through, as Mr. Olenichak has already testified to – going through and giving credit for the return flows. As Mr. Olenichak testified to, we don't do this for everybody, but we have the old decree and the historical practice out there.

(Tr. 85:17-86: 3) The problem, however, is that the history of the Minidoka Credit is far from settled. IDWR's witness Tony Olenichak demonstrated in Ex. 6 that there really isn't a settled interpretation of the Foster Decree language, nor has there been a settled historic practice. The Department does not even know how to calculate the Minidoka Credit. (Tr. 51:21 – 52:18).

An equally if not more serious problem is that the Minidoka Credit is a private arrangement that has historically had no effect outside the parties to the agreement. The voluntary nature of the arrangement is clearly manifest by the fact that one of the parties to the agreement (AFRD No. 2) did not even exist at the time the Foster Decree was entered and never received any benefit from the alleged “historic practice” that is claimed as the basis for the Minidoka Credit. In fact, Mr. Olenichak testified that he does not know why the IDWR is recommending an outside private contract between parties—that the parties to the agreement could change or terminate at any time—be made a condition of their water rights. (Tr. 64:25-65:3.)

At trial, Mr. Olenichak testified that Water District 1 could continue to administer water without the Minidoka Credit. (Tr. 59: 18-60:14.) Furthermore, Mr. Olenichak was not certain which element, if any, would be clarified or further defined by the Minidoka Credit remark. (Tr. 61:11-62:8; 63:24-64:15.) As to the proposed new condition that IDWR is now recommending that references the 2006 Agreement, Mr. Olenichak did not know why or how the Department reached that conclusion. (Tr. 64:25-65:3) Therefore, there is no basis in the record for the reference to the private 2006 Agreement. The Minidoka Credit is simply not necessary to administer any of the water rights affected by the Credit. It is a private arrangement that has no effect outside the parties to the agreement.

II. THE FOSTER DECREE IS A PRE-SRBA PRIVATE DECREE WHICH DOES NOT BIND NON-PARTIES TO ITS PROVISIONS. THUS, THE PROVISIONS OF THE FOSTER DECREE MAY BE REVIEWED IN THE SRBA IN ACCORDANCE WITH CURRENT IDAHO LAW.

The fact that the Minidoka Credit provision was contained in a prior decree to which the ground water users were not a party does not automatically make the ground water users subject to the current interpretation that has developed over time. Nor does it automatically require that

the SRBA Court blindly decree a provision that is contrary to Idaho law, unjust to the ground water users, and simply not necessary for the administration of the water rights at issue here.

The Foster Decree was a private summary supplemental adjudication. Private adjudications are only binding on parties thereto and are not conclusive proof of the nature and extent of current water use. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997). Thus, the Foster Decree is not binding on anyone who was not a party to the private Foster Decree adjudication. Since the Ground Water Districts were not parties to that private adjudication, they are not bound by the Foster Decree.

The Foster Decree does not meet the standards for an *in rem* general adjudication and is therefore not binding on non-parties or future water users. In the context of water rights, only a decree out of an *in rem* general adjudication can bind all water users, including future water users. “Except for that limited class of actions which are strictly *in rem*, a decree is not, and cannot be made, conclusive, as to parties who are strangers to it The contention that one’s rights can be affected by a decree to which he is a stranger is repugnant to the fundamental principle of our jurisprudence that no one will be judged until he has had a hearing.” *Mays v. District Court*, 34 Idaho 200, 207, 200 P. 115, 122 (1921). The rule that a decree binds all parties “does not apply to judgments in proceedings *quasi in rem* like suits to quiet title or to adjudicate water rights.” *Albion-Idaho Land Co., v. Naf Irr. Co.*, 97 F.2d 439, 444 (10th Cir. 1938) (underline added). Because the Foster Decree was not the product of an *in rem* general adjudication, it is not binding on the Ground Water Districts where not parties to that adjudication.

In *Higginson v. U.S.*, 128 Idaho 246 (1995), the Idaho Supreme Court indicated that prior to the SRBA, there was no practical way under Idaho law to initiate an *in rem* general adjudication:

When the SRBA was authorized by statute in 1986, no reasonable method of initiating the proceeding, providing notice to potential claimants, examining the Snake River Basin or preparing a report of that system, or means of objecting to that report or claimed water rights within that system was provided by the existing Rules of Civil Procedure. In order for the Legislature to provide for adjudication, including the claims within the scope of the McCarran Amendment, and in light of the absence of applicable Rules of Civil Procedure, it was necessary for the Legislature to provide special procedural rules for the initiation of the SRBA.

Id. at 255.

The Foster Decree was entered pursuant to then-existing Idaho Code § 42-1405 which was subsequently amended and re-designated as Idaho Code § 42-1424. The then-existing Idaho Code § 42-1405 provided that any water right entered in a decree pursuant to the statute “shall not be deemed adjudicated, but prima facie evidence merely, and may be attacked by suit brought in a court of competent jurisdiction at any time by any person deeming himself aggrieved thereby.” (Emphasis added).⁴ Indeed, the Idaho Supreme Court held that this language, which was in place at the time of the Foster Decree in Idaho Code § 42-1405, “makes a decree thereunder merely *prima facie* evidence, and subject to collateral attack.” *Union Central Life Ins. Co. v. Albrethsen*, 50 Idaho 196, 200, 294 P. 842, 846 (1930) (emphasis added). Thus, it is clear that when entered the Foster Decree did not constitute the final word.⁵

⁴ For the Court’s convenience, a copy of the then-existing Idaho Code § 42-1405 is attached to this brief.

⁵ Notably, the Idaho legislature has repealed a provision that afforded prior decrees such a presumption. Former Idaho Code § 42-1416(3) provided that “a prior decree adjudicating a tributary stream or subbasin within the basin shall be presumed correct...” That provision was repealed in 1994 after the SRBA court found it unconstitutionally vague. Although the Legislature re-enacted certain provisions of Idaho Code § 42-1416, it did not reenact the presumption of validity for prior decrees found in the prior version.

The SRBA Court is governed by current statutes relating to general adjudications which are found in Idaho Code Title 42, Chapter 14. As the Supreme Court noted in the *Hagerman* case, nowhere in Title 42 is the Director or the SRBA Court obligated to accept a prior decree issued in a private adjudication. *Hagerman*, 130 Idaho 741, 740, 947 P.2d at 414. In other words, just because a claimant makes a claim for a water right, based on a prior decree, the Director must still make a recommendation to the SRBA Court and that recommendation must comport with current Idaho law.

However, in this case, the Director is not even certain what he should do. Instead of actually making a recommendation, the Director has represented to the Court that if the Court finds that the Minidoka Credit is valid, and if the Court finds that it is proper to include a reference to the private contract in the Decree, then the Director may sign the private contract. Just as the SRBA Court is not required to “rubberstamp” the Director’s recommendations without any analysis, the SRBA Court is not required to “rubberstamp” a prior decree provision, a pre-SRBA interpretation of that provision, or a private contract.

In summary, the Foster Decree is not binding upon the Ground Water Districts because they were not parties to the private Foster Decree adjudication and because that was not an *in rem* adjudication. Consequently, the Ground Water Districts are permitted by Idaho law to collaterally attack any implementation of the Foster Decree which causes them and their members’ injury. See *In re SRBA*, Special Master Report 43-10356 at 11. Likewise, the Special Master is empowered to reconsider the Foster Decree under current Idaho law in a manner that does not injure the Ground Water Districts who were not parties to the Foster Decree.

III. THE MINIDOKA CREDIT (AND CERTAINLY THE PRIVATE AGREEMENT NOW “RECOMMENDED”) AMOUNTS TO A PRIVATE AGREEMENT OR WATER RIGHT EXCHANGE AND IS NOT NECESSARY FOR THE ADMINISTRATION OF THE SWC WATER RIGHTS AND SHOULD NOT BE INCLUDED IN THE PARTIAL DECREE

The Minidoka Credit is an exchange of water. Essentially, TFCC and NSCC agreed to give up their right to certain storage in exchange to use return flow water claimed by the Minidoka Canals. The Idaho Supreme Court, in *Almo Water Co. v. Darrington*, 95 Idaho 16, 20 (1972), stated that “Water exchanges have been recognized in Idaho case law and recently have been authorized expressly by statute. Such exchanges are invalid only if they clearly infringe upon the rights of other water users.” *Id.* (footnotes omitted). In addition, in *Reno v. Richards*, 32 Idaho 1, 6 (1918), the Supreme Court of Idaho stated that “In the absence of detriment to other users of water from Birch Creek, there is no doubt of their right to make a diversion from Birch Creek, at their point of diversion, of the amount of water which they caused to flow therein for the use of other appropriators farther down the stream.” Thus, the taking of water was permitted out of a stream, above the place where an equal amount of salvaged water was returned through another stream, all above the points of diversion of lower appropriators.

Simply because the SWC members have acquiesced in this arrangement for decades does not mean that ground water users should be bound by that administrative practice through a partial decree in the SRBA. Essentially, by referring to the outside contract or to the historic interpretation of the Minidoka Credit through the partial decree, the ground water users are now going to be made unwilling parties to that interpretation and/or private agreement. If the parties to the 1913 stipulated decree and now the 2006 Agreement want to trade water, exchange their water or fix the amount of water they give away, that’s their prerogative as contracting parties. However, the parties should not be able to bootstrap a private agreement into a decree and make

its provisions binding on all water users. Further, the Department should be estopped from administering the agreement as if it applies to all water users and apply the provisions as between the parties to the contract only. The SRBA Court should provide such instruction to IDWR in its order of partial decree on the water rights at issue in this case.

IV. THERE IS NO FACTUAL OR LEGAL BASIS FOR THE MINIDOKA RETURN FLOW CREDIT AND ALLOWING IT INJURES GROUND WATER USERS

There is no doubt that the Minidoka return flow credit is an aberration in water distribution in Idaho. However, contrary to the Surface Water Coalition's argument that that somehow makes it more valid, it actually should make it more suspect. The SWC is asking that the court decree and accept the language of the prior decree without exploring whether or not that language was ever actually administrable in the first place or whether it is necessary for the administration the water rights today or even legally supportable. As the SRBA Court is aware, decrees entered decades ago may not comport with current Idaho law or be equitable to all water users involved in the SRBA. There is no basis in Idaho law to give an appropriator a credit for water that returns to the stream system after use.⁶ Testimony at trial revealed that return flow is not recognized anywhere else in Water District 01 (Tr. 124: 16-18) and it should not be recognized here. There is no basis in Idaho law and no reading of the Foster Decree that supports a return flow credit for claimants, and the Court should reject this claim. Indeed, the Foster Decree does not mention "return flow" or a credit of any kind. (Exh. 1)

Not only is the Minidoka return flow credit without any basis in law, it is without any factual support either. Because Lake Walcott has sealed, continued administration of the Minidoka return flow credit results in a windfall to MID and BID at the expense of junior ground

⁶ The Ground Water Districts refer the Special Master to their Pre-Trial Brief additional argument on that point. Also, Exh. 25 provides further authority for this point.

water users. Exh. 25 at ¶4, p. 16, ¶1, p. 17, ¶1, p. 39 and (Tr.143: 13-144.: 5, 145: 6-10, 157: 4-14.) Not only must there be a legal basis for the Minidoka return flow credit in order for the remark to be included in the partial decrees, the proposed remark must also comply with the requirements of Idaho Code § 42-1411. First, the proposed remark has no nexus with any element of the water right. Subsections (i) or (j) of Idaho Code § 42-1411, which allows for conditions or remarks, do not provide a basis either. Subsection (i) allows the Director to include in his Director's Report, "conditions on the exercise of any water right included in any decree, license or approved transfer application." (Emphasis added) Subsection (j) provides that the Director may include "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." (Emphasis added). The claimants are free to exercise their water rights and are equally free to transfer water from one claimant's storage water account to another claimant's storage water account without the remark. In fact, Mr. Olenichak testified that there would be no administrative problem if the Minidoka Credit practice ceased. (Tr. 59: 18 – 60:8)

V. THE GROUND WATER DISTRICTS' EXHIBIT 25 IS ADMISSIBLE

A. Background

During trial, the Ground Water Districts sought admission of their Exhibit 25. (Tr. 147:21 to 153:9). Of all the parties involved with the trial, only the Minidoka Irrigation District ("MID") represented by Kent Fletcher objected to the admission of Exhibit 25 on the basis that it was allegedly prepared in 2003 by legal counsel for Twin Falls Canal Company for purposes of settlement negotiations concerning the Minidoka Credit. (Tr. 3:19-20; 150:16 to 151:24).

After considering the arguments made by MID and IGWA, the Special Master initially admitted Exhibit 25. (Tr. 153:10-11). In reliance upon the Special Master's admission of that

exhibit and in the interest of economy, IGWA did not elicit verbal testimony duplicating the information contained within the Exhibit 25 during the presentation of its case-in-chief.

MID renewed its objection to Exhibit 25 after IGWA had completed its case-in-chief. (Tr. 190:16-19). MID's renewed objection was based upon the same grounds as previously argued. (*Id.*) Following argument by MID and IGWA, the Special Master determined to reserve his ruling on MID's renewed objection and allow the two parties to fully brief the issue following trial with particular emphasis upon the application of Idaho Rule of Procedure 408. (Tr. 194:2-24; 200:7-11).

Accordingly, it appears that Exhibit 25 has already been admitted and the Special Master has simply requested briefing and argument as to whether he should reconsider that determination.

B. Description of Exhibit 25

The document submitted as Exhibit 25 consists of the following four parts: (1) a one-page coversheet showing a title of "Water Accounting for the Snake River, Neeley to Milner – Minidoka Project Credit" (hereinafter "Coversheet"); (2) a four-page letter to the IDWR Director dated June 11, 2003 (hereinafter "June 11th Letter"); (3) a two-page letter to the IDWR Director dated July 27, 2003 (hereinafter "July 27th Letter"); and (4) a 64-page article entitled "Foster Decree Submittal."

The Foster Decree Submittal is itself divided into four sections. The first and second sections are respectively entitled "Historical accounting, development of the Foster Decree" and "Hydrology" (hereinafter "First Half of the Foster Decree Submittal") and collectively consist of a forty-five page summary of factual information concerning the development of the Foster Decree, the implementation of the Minidoka Credit, and the hydrological conditions present at

the time. The First Half of the Foster Decree Submittal contains a footer showing a date of “6/11/2003” which directly corresponds to the June 11th Letter. That letter indicates that the factual information summarized in the First Half of the Foster Decree Submittal was wholly derived from publically available documents and records located in the University of Idaho archives, the State of Idaho archives, and Bureau of Reclamation documents. Indeed, the meticulous footnotes in the First Half of the Foster Decree Submittal clearly identify the publically available documents and records from where the summarized factual information was derived.

The third and fourth sections of the Foster Decree Submittal are respectively entitled “Legal Issues” and “Conclusion and Overview of Parts I-III” (hereinafter “Second Half of the Foster Decree Submittal”) and collectively consists of a sixteen pages. The Second Half of the Foster Decree Submittal discusses the state of the law regarding the legal concepts of return-flow, recapture, and reuse of waste water. It also presents an additional summary of factual historical information concerning the interpretation and implementation of the Foster Decree and the Minidoka Credit. Lastly, it applies the discussed legal concepts to the Minidoka Credit and concludes that the Minidoka Credit as a return flow credit “is an anomaly in Idaho” and “arguably violates the prior appropriation doctrine.” (Exh. 25 at 60-64). The Second Half of the Foster Decree Submittal contains a footer showing a date of “7/17/2003” which directly corresponds to the July 17th Letter. That letter indicated that the Second Half of the Foster Decree Submittal was submitted as “a follow-up to our prior submittal.”

C. Idaho Rule of Evidence 408

The evidentiary significance of the Ground Water District’s Exhibit 25 cannot be overstated. It is by far the most complete and comprehensive factual summary presented at trial

with regard to the history surrounding the Foster Decree and the implementation of the Minidoka Credit.

The sole question presented to the Special Master is whether Exhibit 25 is excludable based upon MID's objection that it was allegedly part of a settlement negotiation. MID did not cite a statute or rule when making this objection at trial. However, the only statute or rule referencing the admissibility of evidence with regard to settlement negotiations is Idaho Rule of Evidence 408 (hereinafter "Rule 408"), which provides the following:

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass mediation.

Contrary to MID's suggestion, Rule 408 provides no basis for excluding Exhibit 25 from admission at trial. In order to be excluded under Rule 408, an exhibit must as a preliminary matter consist of "statements made in compromise negotiations." However, a careful review of the trial transcript and Exhibit 25 reveals that there is no evidence that Exhibit 25 was ever part of a compromise negotiation. First, there is no mention in Exhibit 25 of a compromise negotiation. Indeed, Exhibit 25 gives no indication that it is part of a settlement negotiation. Had it been part of a settlement negotiation, one would think that it would indicate as much somewhere in its sixty-four (64) pages. Second, there is no trial testimony indicating that Exhibit 25 was part of a settlement negotiation. Only two witnesses testified with regard to Exhibit 25. Those witnesses were Ron Carlson and Randy Bingham. Ron Carlson did not

mention a settlement negotiation. *See* Tr. 147:21 to 152:25. Randy Bingham did testify that Exhibit 25 was presented to IDWR “during the time” of previous settlement negotiations (Tr. 190:13-15), but explained that Exhibit 25 was prepared for purposes of a litigation battle and *not* for purposes of a compromise negotiations (Tr. 191:10-13). In response to the Special Master’s own questing, Randy Bingham further testified that he didn’t believe that Exhibit 25 was used by anybody and that nobody “really referred to it” during the settlement negotiations. (Tr. 191:14-23).

Given the testimony at trial and the contents of Exhibit 25, it is clear that it was not presented as part of compromise negotiations. Instead, it was prepared and presented to the IDWR Director merely for informational purposes to be made available to the public at large. (*See also* Tr. 152:12-15). Because Exhibit 25 was not part of a compromise negotiation, it is not excludable under Rule 408. Therefore, MID’s objection to its admission must be denied.

In the alternative, even if Exhibit 25 is found to have been part of a compromise negotiation, it is nevertheless not excludable. Rule 408 makes it clear that not all statements made in compromise negotiations are excludable.

1. “Otherwise Discoverable”

Rule 408 does not exclude such statements when the information contained therein is “otherwise discoverable.” In other words, Rule 408 only excludes information from settlement negotiations which would not have existed but for the settlement negotiations. If the information exists outside, or despite of, the settlement negotiations, Rule 408 does not exclude the statements.

There do not appear to be any Idaho cases discussing the “otherwise discoverable” exception in Rule 408. However, Rule 408 is substantially similar to Federal Rule of Evidence

408. It is therefore appropriate to look to federal precedent for purposes of interpreting Idaho Rule of Evidence 408. In *Agan v. Katzman & Korr, P.A.*, 328 F.Supp.2d 1363 (Dist. Ct. Fl. 2004), a dispute arose concerning the payment of attorney fees. The defendants sought to strike two exhibits from the complaint which consisted of worksheets summarizing fees and costs incurred by the defendants while attempting to collect the plaintiffs' delinquent condominium assessments. The defendants argued that these exhibits were inadmissible under Federal Rule of Evidence 408 because they were obtained by plaintiffs during settlement negotiations. The Court agreed that the exhibits constituted settlement documents for purposes of Rule 408. *Id.* at 1367-1369. However, that did not end the inquiry. The Court's analysis continued as follows:

Here, Defendants maintain that these pre-billed worksheets were produced solely for the purpose of a compromise settlement, and thus, are inadmissible under this federal rule. However, "Rule 408 is not an absolute ban on all evidence regarding settlement negotiations. ... Rather, an exception is explicitly stated for evidence that is otherwise discoverable, even though it was presented during compromise discussions. See *Fed.R.Evid. 408* Adv. Committee Notes ("A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."); *Bankcard*, 203 F.3d at 484 ("[Rule 408] permits evidence that is otherwise discoverable").

Defendants argue that these documents did not exist prior to the settlement negotiations and that these pre-billed worksheets, since they were never sent to the client, were not in final form. As such, Defendants contend that the exhibits do not fall within the rule's "otherwise discoverable" provision. However, Defendants' focus on the creation and packaging of the information is unavailing. It is undisputed that the Defendants constructed the pre-bill worksheets from information in their records, which they still possess in digital form inside their computer system, and which were created contemporaneously with the time records included in the worksheets. Here, the billing information thus still would have existed regardless of the settlement negotiations. Defendants have in their possession the data compilations comprising these pre-billing statements, which could be compelled pursuant to a Rule 34 request. These exhibits are otherwise discoverable, and therefore, not barred by Fed.R.Evid. 408.

...the Court may have compelled their production in this case. The information contained in the worksheets were in existence well before the settlement discussions transpired...The fact that the hardcopy form of the computerized information – the worksheets – did not come into existence until the settlement discussions ensued does not make a material difference. The hardcopy

worksheet was simply a paper reproduction of data that that came into existence well before those discussed occurred.

Id. at 1370. Based upon this analysis, the Court held that the exhibits were not excludable under Rule 408 because the information contained within them was “otherwise discoverable.” *Id.*

The analysis and holding in the *Agan* case is not unique. Other federal courts have also held that “historical, factual information” that is otherwise discoverable is always admissible under Rule 408 notwithstanding its insertion into documents used in settlement negotiations. *Rutgerswerke AG v. Abex Corp.*, 2002 U.S. Dist. LEXIS 9965 (US Dist. Ct. NY June 4, 2002).

The Ground Water Districts’ Exhibit 25 is admissible for the same reasons because the information contained within it constitutes “historical, factual information” that is “otherwise discoverable.” As discussed above, the information contained within Exhibit 25 consists primarily of historical, factual information derived from publically available documents and records located in the University of Idaho archives, the State of Idaho archives, and Bureau of Reclamation documents. This is made perfectly clear by all of the footnotes contained in Exhibit 25. There is no question that the historical, factual information contained in these archived documents is “otherwise discoverable” without regard to any alleged settlement negotiations. As discussed in the *Agan* case, the mere fact that this “otherwise discoverable” information was summarized and packaged for settlement negotiations is irrelevant. If the historical, factual information contained in the document is “otherwise discoverable,” it is admissible under Rule 408. Consequently, there can be no dispute that the historical, factual information contained in Exhibit 25 is admissible under Rule 408. Therefore, MID’s objection to its admission must be denied.

2. Offered for Purpose other than Liability

Rule 408 provides that evidence presented in settlement negotiations is generally not admissible if offered “to prove liability for, invalidity of, or amount of the claim or any other claim.” Rule 408 continues by stating that evidence presented in settlement negotiations is however not excludable if “offered for another purpose.” In other words, such evidence is admissible under Rule 408 is admissible if it is offered for a purpose other than “to prove liability for, invalidity of, or amount of the claim or any other claim.” *See, e.g., Jensen v. Westberg*, 115 Idaho 1021, 772 P.2d 228 (1988); *Davidson v. Beco Corp*, 114 Idaho 107, 753 P.2d 1253 (1987).

The Ground Water Districts did not offer Exhibit 25 to prove liability or invalidity of a claim. It was offered simply to provide the historical background of the Foster Decree, the Minidoka Credit, and the hydrology as it existed at the time. Because Exhibit 25 was offered for a purpose other than to prove liability or invalidity of a claim, it is admissible under Rule 25D.

3. Summary re: Exhibit 25

As discussed above, Exhibit 25 is not excludable under Rule 408 on three alternative grounds. First, the evidence presented at trial reveals that Exhibit 25 was not submitted as part of a settlement negotiation. Second, the information contained in Exhibit 25 is “otherwise discoverable”. Third, Exhibit 25 was offered for a purpose other than to prove liability. Therefore, Exhibit 25 should be found to be admissible and the Special Master should not reconsider his initial admission of Exhibit 25.

The Ground Water Districts have already relied upon the Special Master’s initial admission of Exhibit 25. After Exhibit 25 was admitted, the Ground Water Districts opted in the interest of judicial economy not to introduce testimony duplicative of the historical facts contained in Exhibit 25. If the Special Master now determines to reconsider that admission, the

Ground Water Districts will be severely prejudiced. In that event, the Ground Water Districts request that the Special Master accept Exhibit 25 as an offer of proof and allow the Ground Water Districts to supplement the record with the publically available historical documents which, as more fully discussed above, were merely summarized in Exhibit 25.

CONCLUSION

The fact that TFCC and NSCC have suddenly agreed to the Minidoka Credit in 2006 after having complained about the Minidoka Credit for years leading up to the delivery call and even went so far as to compile a voluminous history regarding the credit in Exhibit 25 should not be lost on the Court. The SWC delivery call was initiated in 2005. A material injury order was issued by the Director finding material injury to TFCC and NSCC and ordering junior ground water users to provide mitigation water to those entities. And, the junior ground water users' mitigation obligation to TFCC and NSCC increased by the amount of the Minidoka Credit that reduced their senior natural flow water rights. In other words, the Director was now seeking mitigation water from ground water users for the benefit of TFCC and NSCC. What TFCC and NSCC gave away through the Minidoka Credit to the Minidoka Canals, they now receive from ground water users in the form of mitigation water. Therefore, TFCC and NSCC were now free to give away water to the Minidoka Canals because they could seek to be reimbursed through the ground water users. This chain of events shows how inequitable it is to now bind the junior ground water users' to the Minidoka Credit provision and 2006 Agreement.

Historically TFCC and NSCC's natural flow water rights benefited from the Minidoka Credit up and until Lake Walcott sealed itself. At that time, a new practice ensued where TFCC and NSCC's natural flow water rights were reduced by the Minidoka Credit and given to the Minidoka Canals. That practice continued with several attempts at calculating and recalculating

the return flow credit over time. However, since the inception of the new practice, TFCC and NSCC's had to give water to the Minidoka Canals. Now, however, TFCC and NSCC will still be giving water to the Minidoka Canals, but they will actually suffer no reduction because ground water users will replace that water to them. This is not what was intended by the original Foster Decree language, has never been the historical practices, and should not be condoned through the SRBA Court by binding the junior ground water users to this practice.

For the foregoing reasons, the Ground Water Districts request that the Court invalidate any further application of the Minidoka Credit or, at the very least, limit its application to only the surface water users who have agreed to be bound by the arrangement.

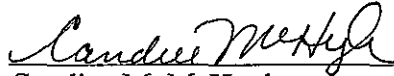
DATED this 31st day of July, 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: 
CANDICE M. McHUGH
Attorney for the Ground Water Districts

CERTIFICATE OF MAILING

I hereby certify that on this 31st day of July, 2009, a true and correct copy of the foregoing was served by email to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:


Candice M. McHugh

Clerk of SRBA Court via facsimile 253 3 rd Ave North Twin Falls ID 83303-2707 Phone 208-736-3011 Fax: 208-736-2121	IDWR Repository PO Box 83720 Boise ID 83720-0098
John A. Rosholt John K. Simpson Travis L. Thompson Barker Rosholt & Simpson LLP PO Box 485 Twin Falls ID 83303-0485 Facsimile 208-735-2444 jar@idahowaters.com jks@idahowaters.com tlr@idahowaters.com	Roger D. Ling Attorney at Law PO Box 623 Rupert ID 83350 Facsimile: 208-436-6804 rdl@idlawfirm.com
C. Thomas Arkoosh PO Box 32 Gooding ID 83330 Fax: 208-934-8873 alo@cableone.net	Natural Resources Division Chief State of Idaho Attorney's General Office PO Box 44449 Boise ID 83711-4449
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Robert L. Harris 1000 Riverwalk Dr Ste 200 PO Box 50130 Idaho Falls ID 83405 rharris@holdenlegal.com	

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)

WATER TO VARIOUS WATER RIGHTS)

HELD BY OR FOR THE BENEFIT OF A&B)

IRRIGATION DISTRICT, AMERICAN)

FALLS RESERVOIR #2, BURLEY) VOLUME I

IRRIGATION DISTRICT, MILNER)

IRRIGATION DISTRICT, MINIDOKA)

IRRIGATION DISTRICT, NORTH SIDE)

CANAL COMPANY, AND TWIN FALLS)

CANAL COMPANY.)

_____)

BEFORE

HEARING OFFICER: GERALD F. SCHROEDER

Date: January 16, 2008 - 9:17 A.M.

Location: Idaho Department of Water Resources

322 E. Front Street

Boise, Idaho.

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

Notary Public

1 THE HEARING OFFICER: 4614 is admitted.

2 (Exhibit 4614 admitted.)

3 MR. BUDGE: We next obtained copies of all
4 Surface Water Coalition and all Bureau of
5 Reclamation SRBA claims and all of the director's
6 report recommendations.

7 And we understand that the Surface Water
8 Coalition has provided copies of all of the
9 objections relative to their water rights. And I
10 think our intention was to simply stipulate that all
11 of the Surface Water Coalition claims, objections,
12 and recommendations for each right be admitted as
13 one exhibit.

14 MR. SIMPSON: Well, I don't think it matters
15 particularly whether they're one exhibit or not. I
16 think --

17 MR. BUDGE: One for each entity is fine.

18 MR. SIMPSON: Yeah. Candice?

19 MS. McHUGH: Yes.

20 MR. SIMPSON: You had input?

21 MS. McHUGH: I wanted to correct that you
22 didn't say anything about claims.

23 MR. SIMPSON: Right.

24 MS. McHUGH: Yeah, it was objections to
25 recommendations. That is to clarify, John.

1 MR. SIMPSON: Do you guys --

2 MR. BUDGE: So would you prefer to have a
3 separate --

4 MR. SIMPSON: You have the recommendations
5 and we have the objections?

6 MR. BUDGE: Correct. If you want us --

7 MR. SIMPSON: So I don't think it matters
8 whether it's one exhibit or two.

9 MR. BUDGE: Matters not to us. Why don't you
10 do it the way you want and give us the exhibit
11 number?

12 MR. SIMPSON: I think we've got -- we've got
13 exhibit numbers marked down so we can just hand
14 this. And I've given Candice the numbers. She has
15 a listing. So...

16 MR. FLETCHER: What we've done -- what did
17 you mark the claim?

18 MS. MCHUGH: Those are the recommendations?

19 MR. FLETCHER: Excuse me. The
20 recommendations.

21 MS. MCHUGH: 4001A.

22 MR. BUDGE: We have not marked them.

23 MR. FLETCHER: 4001A?

24 MS. MCHUGH: Yes.

25 MR. FLETCHER: And then the objections to --

1 for A & B that are filed would be marked 9723.
2 AFRD 2 is 9724. Burley Irrigation District, 9725.
3 Milner, 9726. Minidoka Irrigation District, 9727.
4 North Side Canal Company, 9728. And Twin Falls
5 Canal Company, 9729.

6 THE HEARING OFFICER: And the -- what was
7 this one that you had? What's the number on it?

8 MR. BUDGE: 4000A.

9 MS. KLAHN: 4001A.

10 MS. McHUGH: 4001A.

11 MR. BUDGE: 4001A.

12 THE HEARING OFFICER: 4001A.

13 Any objection to the admission of 4001A,
14 9723, 9724, 9725, 9726, 9727, and 9728?

15 MS. CARR: And I just needed a clarification
16 for a second.

17 Now, did that include the Bureau of
18 Reclamation claims and objections, or not?

19 MS. McHUGH: No.

20 MS. CARR: Was that coming?

21 MS. McHUGH: 4001A includes all of the
22 recommendations of the Surface Water Coalition and
23 the Bureau of Reclamation water rights.

24 MS. CARR: Okay.

25 THE WITNESS: Just the recommendations?

1 MS. McHUGH: Correct. 4001A does.

2 MS. CARR: Okay.

3 THE HEARING OFFICER: The exhibits are
4 admitted.

5 (Exhibits 4001A and 9723 through 9728
6 admitted.)

7 MR. BUDGE: The third item is we also
8 compiled the SRBA claims and recommendations for the
9 Bureau of Reclamation's water rights. And I
10 understand now the Bureau, through Ms. Carr,
11 intended to object to attaching any of the
12 objections to the Bureau's water rights or their
13 responses to objections.

14 MS. CARR: Well -- and let me clarify.

15 We're not opposed to the SRBA claims
16 coming in. We're not opposed to the recommendations
17 coming in. It's just once you start going beyond
18 that, there's a whole lot of issues that have been
19 objected to in regards to the Bureau of Reclamation
20 water rights.

21 And so you'll -- my concern is is that
22 there will be an incomplete picture because there's
23 a lot of outstanding issues. And so as long as you
24 understand that you're just getting that portion of
25 it, then -- and if it's decided in the future that

1 we can also cite to other records that may not have
2 necessarily come in, then you can take judicial
3 notice of those.

4 And I don't know that these will ever be
5 cited to. That's my -- I don't know what the
6 purpose it is. But that's my only concern is that
7 it may be an incomplete picture.

8 THE HEARING OFFICER: So no objection to
9 claims or recommendations?

10 MS. CARR: No.

11 THE HEARING OFFICER: And the objections, any
12 problem if it's noted as part of this record as it
13 would be now that this is not preclusive of other
14 matters being -- other issues being talked about and
15 litigated?

16 MS. CARR: And raised through judicial notice
17 of any actual documents, the responses that are
18 filed in the SRBA.

19 MR. BUDGE: Well, our position is we don't
20 care if there are no Bureau claims or
21 recommendations in the record at all, frankly. But
22 if they're going to come in, then we should have a
23 complete record with all of the objections, as the
24 Coalition rights have been handled.

25 And if we -- it's like we have come full

1 circle in the sense that we didn't think the Bureau
2 was a proper party or that any of what they did is
3 relevant. The Bureau argued otherwise and has been
4 able to participate.

5 And if they're a valid participant and
6 their water rights are relevant to this proceeding,
7 it would certainly seem that we should have a full
8 and complete record of their claims,
9 recommendations, and any objections, as we have done
10 for all other parties.

11 And I think the real genesis of their
12 objection lies with the fact that their own
13 objection to their own water rights asserts
14 positions inconsistent with what has been asserted
15 in this proceeding.

16 And that's argument, I realize. But
17 that's the reason we think it's important to have a
18 complete record of their water rights in this case.
19 And I guess we'll seek a ruling on that point.

20 MS. CARR: And I guess I'm confused. Maybe
21 he can -- and Mr. Budge can express to me where you
22 see our position being inconsistent.

23 Is it as to the title issue? Is that
24 what you're talking about?

25 MR. BUDGE: Yes. You've filed objections to

1 the recommendations on your right claiming a right
2 to a second refill of the reservoirs. And we think
3 that's a position inconsistent with some of the
4 positions asserted by the Bureau in this case.

5 So if you're going to put your water
6 rights in like everyone else has, we think they
7 should -- we should have a complete record based on
8 what's public information and a public document in
9 the SRBA court, which is your --

10 MS. CARR: And if it was denied -- okay? So
11 if we said claims --

12 MR. BUDGE: If I could finish.

13 MS. CARR: -- and we said denials, you know,
14 recommendations, which would be a denial, does that
15 not cover your concerns?

16 MR. BUDGE: No, it doesn't.

17 MS. CARR: You want our objections to come
18 in?

19 MR. BUDGE: Right.

20 THE HEARING OFFICER: No foundation issues?
21 Okay. Do you have -- I'll admit the claims,
22 recommendations, and objections, noting that we now
23 have a record, the position of the Bureau,
24 concerning the objections that can be used in
25 further proceedings if there's an attempt to create

1 more out of them than may be appropriate.

2 Do you have a number for that exhibit?

3 MR. BUDGE: I assume the Bureau would want to
4 use their own exhibit. If not, we will -- well, we
5 have all of our objections to the Bureau's rights,
6 which we would number as 4615. It would seem -- it
7 would better that we package everything up with the
8 Bureau's. We have their claims and recommendations.

9 Are these all objections?

10 MS. McHUGH: Just the objections.

11 MR. FLETCHER: I'm a little unclear what 4615
12 is.

13 MS. KLAHN: Maybe Candice could tell us.

14 MS. McHUGH: Your Honor, the objections to
15 all the Bureau's water rights listed in 4001A --

16 MR. FLETCHER: All objections.

17 MS. McHUGH: All objections.

18 -- to be consistent with all objections
19 to the Surface Water Coalition ones.

20 MR. FLETCHER: That's just fine. I
21 misunderstood.

22 THE HEARING OFFICER: So 4615 is simply the
23 objections.

24 Do we have the claims and
25 recommendations numbered?

1 MS. McHUGH: The recommendations are part of
2 4001A.

3 THE HEARING OFFICER: 4001A. Okay.

4 MS. McHUGH: It's all recommendations of all
5 surface and Bureau water rights.

6 THE HEARING OFFICER: Okay. So if we admit
7 4001A and 4615, we have everything that we're
8 talking about?

9 MR. BUDGE: Correct.

10 THE HEARING OFFICER: Okay. They're
11 admitted.

12 (Exhibit 4615 admitted.)

13 MR. ARKOOSH: I have one other issue, your
14 Honor.

15 THE HEARING OFFICER: Oh.

16 Do you have another housekeeping?

17 MS. CARR: I have my final housekeeping.

18 And you stated, your Honor, that
19 Reclamation -- well, 7011 and 7013 were
20 conditionally admitted if we came up with the
21 attachments.

22 And I would represent that the
23 attachment for 7011 is already in the record as
24 70110 (sic). So that one should be taken care of.

25 And then I handed out about a half hour

1 ago 7013. I labeled it 7013A. It is the -- it's
2 the letter to the IDWR, dated April 18th, 1968. And
3 it does contain the attachment. And the reason I
4 just designated it "A" is it looks a little bit
5 different than 7013, because 7013 was our
6 outgoing -- Bureau of Reclamation's -- or file copy,
7 rather, and this is the actual one that went to
8 IDWR.

9 THE HEARING OFFICER: Any objection to the
10 admission of 7011 and 7013A?

11 Okay. They're admitted.

12 (Exhibits 7011 and 7013A admitted.)

13 THE HEARING OFFICER: Are you going to
14 preempt, Mr. Arkoosh?

15 MR. ARKOOSH: Over lunch I went through
16 IGWA's exhibit list while they were gone, and I see
17 we don't agree on everything. I just --

18 MS. KLAHN: What else did you do on the
19 lunch?

20 MR. ARKOOSH: Well, well.

21 Your Honor, I just think we need
22 clarification.

23 Mr. Alberdi's exhibits, beginning with
24 the large map, 9707, -8, -9, -10, -11, -12, and -13
25 I recall covering, but Candice does not have those

1 marked as admitted.

2 MR. BUDGE: I show them as all being
3 admitted.

4 MR. ARKOOSH: Okay. How about, Counsel,
5 9717?

6 MR. BUDGE: I show that offered and admitted
7 through Alberdi.

8 MR. ARKOOSH: And how about 9000 --

9 MR. FLETCHER: No. It was offered through
10 Ron Carlson, 9717.

11 MR. BUDGE: Excuse me. That's right.
12 Carlson.

13 MR. ARKOOSH: And how about 9000 through
14 9702.

15 MS. KLAHN: 9000 through 9702?

16 MR. ARKOOSH: Yes.

17 MS. KLAHN: That's 702 exhibits.

18 MR. BUDGE: I don't show them offered or
19 admitted.

20 MR. FLETCHER: -01 and -02 were admitted.

21 MS. KLAHN: 9001 and 9002.

22 MR. FLETCHER: 9701 and 9702 were admitted.

23 MR. ARKOOSH: Okay. And then the others were
24 9000, 9100, 9103, 9200, 9300.

25 Do you recall those, Randy? Those were