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W. Kent Fletcher, ISB #2248

FLETCHER LAW OFFICE

P.O. Box 248

Burley, Idaho 83318-0248

Telephone: 208-678-3250

Facsimile: 208-878-2548

Attorney for Minidoka Irrigation District

DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB #4242

Travis L. Thompson, ISB #6168

BARKER ROSHOLT & SIMPSON LLP

P.O. Box 485

Twin Falls, Idaho 83303-0485

Telephone: (208) 733-0700

Facsimile: (208) 735-2444

*Attorneys for Burley Irrigation District,
North Side Canal Company and Twin
Falls Canal Company*

**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 No. 01-209; 01-210;
) 01-211A; 01-211B; 01-212; 01-213;
) 01-214A; 01-214B; 01-217; 01-218;
) 01-219; 01-10187; 01-10188;
) 01-10192; 01-10194
) (Minidoka Credit Remark)
)
) **CLAIMANTS' POST TRIAL**
) **BRIEF**
)
)
)

This Brief is submitted on behalf of the Minidoka Irrigation District (MID), Burley Irrigation District (BID), Twin Falls Canal Company (TFCC), and North Side Canal Company (NSCC) (hereinafter collectively referred to as "Claimants").

FACTS OF THE CASE

Claimants incorporate the Proposed Findings of Fact submitted by Claimants as though fully set forth herein.

ISSUES

The issues before the Court, as presented at trial, are:

1. Is there is a legal basis for a remark on the water rights pertaining to the Minidoka Credit?
2. If there is a legal basis for a remark pertaining to the Minidoka Credit, how should the credit be calculated? This issue was resolved early in the proceeding by the agreement of the Ground Water Districts that if the Court found that there is a legal basis for the Minidoka Credit, the Settlement Agreement, IDWR Exhibit 3, should be the basis for calculating the Minidoka Credit. Tr. pp. 7-8.
3. Is there any legal or factual basis for a special remark requested by the Ground Water Districts that would effectively subordinate the accounting for the Minidoka Credit to junior ground water rights?
4. Is the admission of Ground Water Districts' Exhibit 25 barred by the fact that it was a document produced and used in the course of settlement negotiations?

ARGUMENT

There is Clearly a Legal Basis for a Remark on the Water Rights Pertaining to the Minidoka Credit

The only objectors left in this litigation, the Ground Water Districts (GWD), argue that there is no legal basis for the Minidoka Credit. This assertion is contrary to the Foster Decree, the administrative practices of the Idaho Department of Water Resources (IDWR) for over eighty (80) years, and the testimony of the GWD's expert witness, former watermaster Ron Carlson.

The Foster Decree includes the following language:

It is further ordered, adjudged, and decreed until otherwise provided by statute, the state engineer of the State of Idaho or his duly authorized department, shall determine what part of the water flowing in the Snake River at the Minidoka and Milner Dams is storage water 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. Tr. pp. 29-30,

IDWR Exhibit 1.

It was undisputed that this language in the Foster Decree is unusual and not found in other decrees, as testified by Anthony Olenichak, Tr. p. 124, and Ron Carlson, Tr. pp. 163-164.

Although the method of calculating the Minidoka Credit changed over the years, there is no dispute that, as a result of the administration of the Foster Decree and the resulting Minidoka Credit, a credit was assigned to the Burley Irrigation District and the Minidoka Irrigation District for every year between 1919 and 2000. IDWR Exhibit 2.

GWD's expert, Ron Carlson, served as watermaster from 1978 through 2006. Mr. Carlson testified that it was the duty of the watermaster to administer water to the existing decrees and that the Foster Decree was the basis for administering the Minidoka Credit. Tr. p. 158. Further, Mr. Carlson testified that to his knowledge, when the Foster Decree was administered and the Minidoka Credit granted, it was done so lawfully. Tr. p. 158.

It is undisputed that the Foster Decree is the legal basis for the Minidoka Credit. The Foster Decree is a final court judgment of the Twin Falls County District Court that has provided the basis for the administration of the above-referenced water rights by Water District 01. It is further uncontroverted that the Minidoka Credit was recognized and administered by IDWR and that a credit was assigned for over eighty (80) years. It is also uncontroverted that the assignment of the credit was lawful.

GWD provided no law or facts to support their claim that there is no legal or factual basis for the Minidoka Credit. As such, since the Minidoka Credit is unusual and unique to these water rights and since these water rights have been administered pursuant to the Foster Decree for over 80-years, the Minidoka Credit comment is necessary for the “efficient administration of the water rights.” Idaho Code § 42-1411(6).

**The Settlement Agreement should be used
for the Purposes of Administering the Minidoka Credit**

As demonstrated at trial, prior to the time of trial, the Claimants and IDWR reached agreement concerning the wording of a recommendation that includes reference to the Settlement Agreement:

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 No. 2 and recorded in the Bonneville County Recorder’s office as Instrument No.

_____.

IDWR Exhibit 4.

The City of Pocatello withdrew its objections prior to the time of trial. The only remaining objector, GWD, stated at the time of trial:

As pointed out in the Ground Water Districts' pre-trial 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 l. 1-6.

The legal basis for the Minidoka Credit having been established, it is uncontroverted that the Settlement Agreement should be the basis for administering the Minidoka Credit.

There is no Legal or Factual Basis for the Special Remarks Requested by the GWD

The GWD argued at the time of trial and in their pre-trial brief that there is no legal or factual basis for IDWR's determination that the Minidoka Credit directly increases the mitigation liability of junior ground water users. The GWD did not provide any factual basis for the argument at the time of trial, nor has it presented any legal support for this argument.

At the time of trial, GWD's expert witness, former watermaster Ron Carlson, acknowledged that when a junior water right holder obtains a water right, its water right is subject to prior existing licenses and decrees. Tr. p. 170. Here, the Foster Decree dates back to 1913. The Minidoka Credit has been administered by IDWR since at least 1919. It is undisputed that the GWD have never objected to the Water District 1 accounting for administration of the Minidoka Credit. Tr. pp. 130-131, 164-165.

The Minidoka Credit results from the administration of a decree that significantly predates any ground water rights held by GWD's members. Although the GWD argue that there is no legal basis for the Director to include the Minidoka Credit adjustment in the mitigation

liability of junior ground water users, there are no facts or law in the record to support this assertion. Moreover, GWD erroneously asks this Court to predetermine questions regarding conjunctive administration to which the Idaho Supreme Court has held need not be decided in the SRBA. *See AFRD #2 v. IDWR*, 143 Idaho 862, 876 (2007) (“the water rights adjudications neither address, nor answer, the questions presented in delivery calls;”).

As stated by the GWD expert, when the junior ground water users obtained their water rights, those water rights were subject to all senior rights and decrees. In addition, the Director is required to conjunctively administer senior surface water rights and junior ground water rights pursuant to Idaho law. Any dispute GWD has with the Director’s decisions regarding a delivery call must be presented in an administrative forum, not the SRBA. As such, there is no legal or factual basis before the Court to support the limitations requested by the GWD.

**The Provisions of Idaho Code § 42-1411 Support the Agreed upon Remark
Incorporating the Settlement Agreement**

Under Idaho water law, the Director “shall prepare a director’s report” for water rights that must include:

- (i) Conditions on the exercise of any water right included in any decree, license or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

Idaho Code § 42-1411(2); *see also* Idaho Code § 42-1412(6) (partial decrees determine the “nature and extent of the water right” and must include “an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the

efficient administration of the water rights”). Here, it is uncontroverted that, pursuant to his authority in section 42-1411(2), the Director has included the suggested remark incorporating the Settlement Agreement into the water rights. Tr. pp. 7, 52-53. The remark properly references the agreement which is a settlement of the Minidoka Credit calculation.

The evidence is uncontroverted that the Minidoka Credit has been part of the administration of the Foster Decree since at least 1919. Including the reference to the Settlement Agreement as a remark on the water rights sets forth conditions on the exercise of the water rights and provides guidance to the Director for administration of the rights, all as authorized by the provisions of Idaho Code § 42-1411.

The requested recommendation is proper under the law and should be included in the water rights.

**GWD’s Exhibit 25 is inadmissible into Evidence
Pursuant to the Provisions of IRE 408**

The GWD offered GWD’s Exhibit 25 into evidence. GWD’s Exhibit 25 is a position paper written by Amy Chestnut, then counsel representing Twin Falls Canal Company and North Side Canal Company, that was prepared in the course of negotiations dealing with the Minidoka Credit. During the course of the trial, the Court struggled with the admission of GWD’s Exhibit 25, at one point admitting the Exhibit over the objection of the Claimants, Tr. p. 153, but then following the testimony of Randy Bingham, reconsidering the admission of the Exhibit with the understanding that the parties would brief the issue. Tr. p. 194.

At the time of trial, the GWD argued that “it’s typically only the offer to settle that is not admissible”. Tr. p. 194 l. 6-7. That was a misstatement of IRE 408, which states:

Rule 408. Compromise and offers to compromise. 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. (Emphasis added)

The rule is clear, evidence of conduct or statements made in compromise negotiations is not admissible. The rule does have exceptions. Exclusion is not required 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 object a criminal investigation or prosecution.

Randy Bingham testified that as part of the negotiations between the parties, he received a copy of what was admitted into evidence as GWD's Exhibit 25, Tr. p. 189, during the time the settlement negotiations were occurring. Tr. p. 190. This evidence is uncontroverted.

The GWD did not establish any evidence of the exceptions under IRE 408 – they did not offer any evidence that GWD's Exhibit 25 was used to prove the bias or prejudice of a witness, to negate a contention of undue delay, or to prove an effort to obstruct a criminal investigation or prosecution. GWD's Exhibit 25 is clearly evidence of statements made during compromise negotiations and, pursuant to IRE Rule 408, is not admissible.

CONCLUSION

It is uncontroverted that the Foster Decree is the legal basis for the granting of the Minidoka Credit, and that the Minidoka Credit has been administered for over 80 years. It is also uncontroverted that the parties have agreed that the Settlement Agreement entered into by the Claimants provides the manner in which the Minidoka Credit should be administered once the legal basis is established. It is also uncontroverted that the Director, pursuant to the authority contained in Idaho Code § 42-1411, deemed it appropriate and proper to include a remark concerning the Settlement Agreement in the water rights.

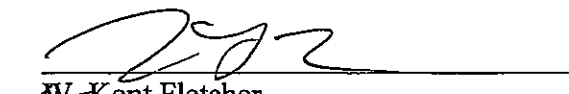
The GWD did not offer any factual or legal basis for any type of remark that would authorize the Court to some how limit the effect of the administration of the Minidoka Credit when the Director is calculating injury and mitigation requirements.

Finally, GWD's Exhibit 25 violates the provisions of IRE 408 and should not be admitted into evidence.

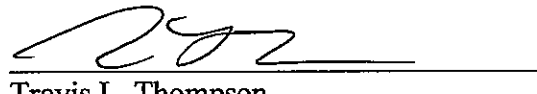
The Court should authorize the inclusion of the agreed upon remark in the water rights, deny the relief requested by the GWD, and deny admission of GWD's Exhibit 25 into the record.

DATED this 31st day of July, 2009.

FLETCHER LAW OFFICES


W. Kent Fletcher
P.O. Box 248
Burley, Idaho 83318
Attorney for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson
P.O. Box 485
Twin Falls, Idaho 83303-0485
Attorneys for BID, TFCC, and NSCC

CERTIFICATE OF SERVICE

I certify that on this 31st day of July, 2009, I served a true and correct copy of the foregoing **CLAIMANTS' POST TRIAL BRIEF** as indicated below:

By Personal Delivery:

CLERK OF THE SRBA COURT
253 3rd Ave. N.
Twin Falls, Idaho 83303-2707

By U.S. Mail, First Class, Postage Prepaid:

Chief, Natural Resources Division
State of Idaho
Office of the Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

Randall C. Budge
Candice M. McHugh
Scott J. Smith
Racine, Olson, Nye, Budge & Bailey, Chtd.
101 Capitol Blvd. Suite 208
Boise, Idaho 83702

United States of America
U.S.D.I. Bureau of Reclamation
U.S. Department of Justice
Environmental and Natural Resources Div.
550 W. Fort St., MSC 033
Boise, Idaho 83724

Document Repository
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098



Travis L. Thompson