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DEPARTMENT OF
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	)	Subcases No. 01-209; 01-210;
	)	01-211A; 01-211B; 01-212; 01-213;
Case No. 39576	)	01-214A; 01-214B; 01-217; 01-218;
	)	01-219; 01-10187; 01-10188;
	)	01-10192; 01-10194
	)	(Minidoka Credit Remark)
	)	
	)	CLAIMANTS' PROPOSED
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	

These proposed Findings of Fact and Conclusions of Law are submitted by 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").

PROPOSED INTRODUCTION

Subcases 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, and 01-10194 came before the Court for

trial on May 20, 2009, on the limited issue of whether a remark concerning the “Minidoka Credit” should be included on the water rights. Present at the time of trial were Kent Fletcher on behalf of the Minidoka Irrigation District, Travis L. Thompson and John K. Simpson on behalf of Burley Irrigation District, Twin Falls Canal Company, and North Side Canal Company, Candice M. McHugh, Scott Smith, and Becky Harvey for the Ground Water Districts, David Gehlert on behalf of the United States, Department of Interior, Bureau of Reclamation, Garrick Baxter for the Idaho Department of Water Resources (IDWR), and David Stanish representing the State of Idaho.

The Court heard the testimony of Anthony Olenichak, Program Manager for Water District 01, Ron Carlson, former water master and expert witness for the Ground Water Districts, and Randy Bingham, Manger of the Burley Irrigation District.

The Court admitted into evidence the following exhibits:

IDWR Exhibit 1	Foster Decree
IDWR Exhibit 2	Minidoka Credit calculations
IDWR Exhibit 3	2006 Settlement Agreement
IDWR Exhibit 4	IDWR Recommendations
IDWR Exhibit 5	Large map
IDWR Exhibit 6	Smaller version of Exhibit 5
Claimants’ Exhibit 100	Letter to Lawrence Duffin, attorney from the then Watermaster, dated March 21, 1957

In addition, the Court admitted Ground Water Districts’ Exhibit 25, a position paper

written by Amy Chestnut, but reconsidered the admission of the Exhibit and agreed to reserve the admission of the Exhibit until the issue of whether the document is inadmissible as the product of settlement negotiations is resolved.

During the course of trial, the Court heard the argument of counsel. Post trial briefs and conclusions of law were to be submitted by the parties by July 31, 2009, and response briefs were filed by August 28, 2009, at which time all matters argued at trial were considered submitted for decision.

The issues, 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?

The Court having reviewed the foregoing, and for good cause appearing, the Court finds:

PROPOSED FINDINGS OF FACT

1. The water rights involved in this matter are:

Water Right No.	Claimant	Date of Priority	CFS	Status
01-209	TFCC	10/11/1900	3,000	Recommended
01-210	NSCC	10/11/1900	400	Recommended
01-211A	BOR for benefit of MID	3/26/1903	1,726	Recommended
01-211B	BID	3/26/1903	1,200	Recommended
01-212	NSCC	10/07/1905	2,250	Recommended
01-213	NSCC	6/16/1908	350	Recommended
01-214A	BOR for benefit of MID	8/06/1908	1,000	Recommended
01-214B	BID	8/06/1908	544	Recommended
01-217	BOR (power)	6/15/1909	2,500	Recommended
01-218	BOR (power)	7/01/1912	200	Recommended
01-219	BOR for the benefit of MID and BID (storage)	12/14/1909	41,700AF	Recommended
01-10187	MID (title issue)	3/26/1903	1,070	Disallowed
01-10188	MID (title issue)	8/06/1908	620	Disallowed
01-10192	MID	8/23/1906	1,550	Disallowed
01-10194	MID	6/16/1911	550.56	Disallowed

Tr. p. 54, IDWR Exhibit 4.

2. Although water rights 01-10187, 01-10188, 01-10192, and 01-10194 have been disallowed by IDWR, if those water rights are allowed in the future, the findings of this Court pertaining to the Minidoka Credit remark shall be applied to those water rights. Tr. pp. 54-55.

3. In the original recommendations, IDWR proposed the following language:

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 water 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. vs. Foster, Decree (4th Jud. Dist., Twin Falls Co., June 20, 1913). The natural flow to which the Twin Falls Company and the North Side Canal Company are entitled shall be measured at the Milner Dam. IDWR Exhibit 4.

4. Claimants objected to this provision. In addition, the City of Pocatello and the Ground Water users objected to this provision and further alleged that there was no legal or factual basis for the Minidoka return flow credit. Subsequently, the City of Pocatello withdrew its objections.

5. Prior to hearing, the Claimants and IDWR agreed that the following language could be substituted for the quoted language of the recommendation:

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.

6. The agreement between the Claimants and IDWR to replace the original recommended remark with this alternate language resolves the Claimants' objection. As a result, the only remaining objectors at the time of trial were the Ground Water Districts.

7. The Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District No. 2 divert their Snake River irrigation water rights at the Milner Dam located near Murtaugh, Idaho. Tr. pp. 24, IDWR Exhibits 5 and 6.

8. Burley Irrigation District and Minidoka Irrigation District divert their Snake River irrigation water rights at the Minidoka Dam, located upstream from the Milner Dam, near Acequia, Idaho. Tr. pp. 23-24, IDWR Exhibits 5 and 6.

9. The earliest water rights of the Twin Falls Canal Company and North Side Canal Company, 1-209 and 1-210, have a October 11, 1900 priority date and predate the priority date of the water rights of the Minidoka Irrigation District and Burley Irrigation District, 1-211A, 1-211B, 1-214A, 1-214B. IDWR Exhibits 1 and 4.

10. Following completion of the Minidoka Dam and diversion of water into the Burley Irrigation and Minidoka Irrigation Districts, litigation was initiated by downstream water users claiming that the Minidoka Dam diversions were affecting the delivery of senior water rights to the downstream water users. The litigation concluded with what is commonly referred to as the “Foster Decree” (*Twin Falls Canal Co. v. Foster et al.*, Twin Falls County District Court, Fourth Jud. Dist., June 20, 1913). IDWR Exhibit 1.

11. 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.

12. This language in the Foster Decree is unusual and is not found in other decrees. Tr. p. 124, pp. 163-164.

13. Between 1919 and 1977, the IDWR administered the above language of the Foster Decree by calculating the net gains and losses in the Neeley to Minidoka and Minidoka to Milner reaches of the Snake River whenever Minidoka Irrigation District or Burley Irrigation District were using storage water. Between 1919 and 1977, there was a net gain in these reaches every year, with a low of 180 acre-feet (1927) and high of 115,900 acre-feet (1976). Tr. pp. 37-41, IDWR Exhibit 2. This was commonly referred to as the “Minidoka Credit.”

14. In 1978, the method of calculating the Minidoka Credit changed. The Water District accounting was computerized at that time and the credit was calculated if there was a daily gain in the Minidoka to Milner reach of the Snake River whenever Minidoka Irrigation District or Burley Irrigation District were using storage water. Tr. pp. 43-46. Even though the method of calculation changed, there was a net gain for each year between 1978 and 2000, with a low of 2,703 acre-feet (1980) and a high of 69,620 acre-feet (1985). IDWR Exhibit 2.

15. The result of administering the Minidoka Credit is that the amount of the credit is deducted from the natural flow of the Twin Falls Canal Company and North Side Canal

Company and credited to the storage accounts of the Burley Irrigation District and Minidoka Irrigation District. Tr. p. 26.

16. The GWD's expert, Ron Carlson, testified that while he was watermaster, he delivered or at least had the Minidoka Credit accounted for each year between 1978 and the year 2000. Tr. P. 162. In 2000, Mr. Carlson, made a decision to discontinue calculating the credit. Tr. p. 47. He was overruled by his superior, the Director of IDWR, Karl Dreher. Tr. p. 47.

17. The methodology for calculating the Minidoka Credit was then changed for 2001 and 2002 and that led to objections by the Burley Irrigation District and Minidoka Irrigation District. Tr. pp. 47-49.

18. The Claimants began negotiations concerning the Minidoka Credit and reached an interim agreement on how it should be calculated for the years 2003 through 2006. Tr. pp. 49-50. IDWR staff attended various parts of these negotiations and participated. Tr. pp. 161, 182-87.

19. In 2006, the Claimants reached settlement, memorialized by a written agreement. IDWR Exhibit 3.

20. Among other things, the Settlement Agreement resolves the dispute on how the Minidoka Credit should be calculated. Each year, Twin Falls Canal Company will provide 6,750 acre-feet of storage water and North Side Canal Company will provide 7,750 acre-feet of storage water that shall be credited as follows: Minidoka Irrigation District, 8,370 acre-feet; Burley Irrigation District, 5,130 acre-feet; and American Falls Reservoir District No. 2, 1,000 acre-feet. IDWR Exhibit 3.

21. American Falls Reservoir District No. 2 was included in the Settlement Agreement due to the fact that it was objecting to changes in evaporation rate calculations made by Water District No. 01., Tr. pp. 184-186, and agreed to accept the 1,000 acre-feet allotment to offset any injury from the change in evaporation calculation. Tr. pp. 184-186.

22. The Ground Water Districts never objected to the Water Districts' accounting for the Minidoka Credit and did not, in any year, appeal the watermaster's annual decision that granted the Minidoka Credit. Tr. pp. 130-131, 164-165.

23. IDWR participated in the negotiations and supports the Settlement Agreement and believes it is a good solution to the problem of how to calculate the Minidoka Credit. Tr. pp. 52-53, 161, 182-87.

24. Anthony Olenichak testified that the proposed remark is necessary for administration of the water right. Tr. p. 132.

25. Former watermaster Ron Carlson testified that one of the watermaster's duties is to administer to the existing decrees and that the Foster Decree was the basis for administering the Minidoka Credit. Tr. p. 158. Further, former watermaster Ron Carlson testified that to his knowledge, when the Foster Decree was administered, it was done so lawfully. Tr. p. 158.

26. Former watermaster Ron Carlson testified that assigning water into storage is a beneficial use of water recognized by Idaho law. Tr. pp. 159-160.

27. Former watermaster Ron Carlson testified 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.

28. Ground Water Districts' Exhibit 25 was originally submitted to IDWR as part of settlement negotiations pertaining to the Minidoka Credit. Tr. pp. 189-190.

PROPOSED CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court concludes:

1. Idaho Code section 42-1411(2)(i) and (j) entitle the Director to include, to the extent the Director deems appropriate and proper to define and administer water rights, conditions on the exercise of any water right and 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. The requested remark and the Settlement Agreement are conditions on the water rights and are necessary for definition of the right, for clarification of the right and for administration of the right by the Director.

2. Based upon the wording of the Foster Decree and the fact that Water District 01 has calculated a credit in administering the Decree since 1919, there is a legal basis for the Minidoka Credit. IDWR Exhibits 1 and 2.

3. Rights acquired subsequent to the Foster Decree or administration of the provisions of the Foster Decree are precluded from objecting to the administration of the provisions of the Foster Decree by reason that subsequent rights are bound by prior decrees and rights from connected sources of water. Tr. p. 170; *See also, Connected Sources General Provision (Conjunctive Management) Memorandum Decision and Order of Partial Decree* (Subcase No. 91-00005) (Basin Wide Issue No. 5).

3. All parties agreed that, if there is a legal basis for the Foster Decree, the best method of administering the Minidoka Credit is set forth in the Settlement Agreement. Tr. pp. 7-8, IDWR Exhibit 3.

4. The language of the proposed recommendation set forth in paragraph 5 of the Findings of Fact should be included on each of the water rights.

5. There is no legal basis for the Court to predetermine injury and/or mitigation requirements or to subordinate senior surface water rights and storage rights to junior ground water rights, as requested by the Ground Water Districts for purposes of conjunctive administration.

6. Evidence of conduct or statements made in compromise negotiations are not admissible. IRE 408. There was no showing that Ground Water Districts' Exhibit 25 was offered to prove bias, prejudice, to negate a contention of undue delay or provide an effort to obstruct a criminal investigation or prosecution. As such, Exhibit 25 is inadmissible. The admission of Ground Water Districts' Exhibit 25 into evidence is reversed and admission of that Exhibit is denied on the grounds that it evidences conduct and statements made in compromise negotiations.

7. The Court shall issue an order and judgment pursuant to these Findings and Conclusions.

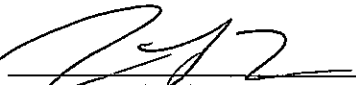
DATED this _____ day of _____, 2009.

Terrence A. Dolan, Special Master
Snake River Basin Adjudication

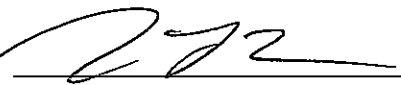
Submitted this 31st day of July, 2009.

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CERTIFICATE OF SERVICE

I certify that on this 31st day of July, 2009, I served a true and correct copy of the foregoing **CLAIMANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** as indicated below:

By Personal Delivery:

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

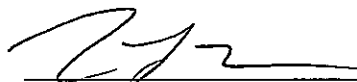
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