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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	)	Subcase Nos: 01-00217, 01-00218,
	)	01-04024, and 01-04025 (Minidoka
Case No. 39576	)	Power Rights)
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR PROTECTIVE ORDER
_____	)	

Introduction

Almost two months after the United States moved this Court for summary judgment and weeks after deposing the only affiant supporting that motion, objectors to the United States' claim have belatedly served a notice of deposition on the Bureau of Reclamation pursuant to I.R.C.P. 30(b)(6). A protective order quashing that proposed deposition is warranted because the objectors have proceeded with utter disregard for the requirements of I.R.C.P. 56(f), which authorizes discovery necessary to defeat a motion for summary judgment only upon

petition to the Court. The parties now seeking discovery have not bothered to move the Court for permission to do so, much less made the showings required by the rule. To make matters worse, they have proposed inquiry upon subjects wholly unrelated to the pending motions. In such circumstances the Court's exercise of its discretion to enter a protective order is more than appropriate.

Factual Background

On August 18, 2009, the United States filed a Motion for Summary Judgment which asked this Court to enter summary judgment substituting proposed remarks for those remarks offered in the Director's Report. The United States asserted that summary judgment is appropriate because (1) the proposed remarks are "founded on, and consistent with" the federal contracts authorizing the use of water stored in Palisades Reservoir (Mem. in Support at 8-11); (2) the Idaho Supreme Court has affirmed the right of a claimant to agree to limitations on the exercise of a water right (*Id.* at 11); and (3) the proposed remarks are consistent with historic administration of the rights and thus will aid in their administration. *Id.* To support that last point, the United States referenced an Affidavit submitted by Tony Olenichak, Assistant Water Master for Water District 1. *Id.*

Counsel for the A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively, "Irrigation Interests") immediately sought -- and obtained -- the State's consent to depose Mr. Olenichack. State Mem. in Support of Motion for Protective Order at 5. This Court amended the summary judgment briefing schedule to allow Mr. Olenichack to be deposed. *See* 2nd Amended Trial Schedule Order.

At Mr. Olenichak's deposition, counsel for the Irrigation Interests asked for the opportunity to depose an IDWR policy-maker. The State offered to make former Director Tuthill available to be deposed regarding the proposed remarks. *See* Aff. of David I. Stannish (dated Oct. 1, 2009), Attachment I. Counsel for American Falls Reservoir District No.2 then expanded the scope of potential "policy" deponents to include an official from the State of Idaho and Lyle Swank, Water Master of Water District 1. Aff. of David I. Stanish, Attachment II. The list of potential deponents continued to grow when Counsel for the Irrigation Interests asked to depose the present Director. He took pains to explain his inquiry would not be limited to the proposed remarks that are the subject of the pending summary judgment motions; instead he proposed to venture into the Department's policy and potential legal constraints on the Director:

Let me see if I can state this clearly enough for you. I am not simply interested in the language in the presently recommended Director's report, but the present Director's policy of what is necessary for administration and what he may or may not be bound by.

Id. at Attachment III.

Despite the frequency with which additional potential deponents were being named, at no point in the exchange of e-mails regarding possible depositions did any party seek to depose an official of the Bureau of Reclamation ("Reclamation"). Counsel for the United States heard nothing further from any of the parties until October 1, 2009, when he received an e-mail from a Reclamation employee informing him the United States had been served with a Notice of Taking Deposition seeking to depose a Reclamation official pursuant to I.R.C.P. 30(b)(6).

The United States now moves this Court for a protective order. The Irrigation Interests' actions demonstrate a belief that they can avoid responding to the pending motions for

summary judgment by simply noticing an ever-expanding list of officials for deposition. The law is to the contrary. Rule 56(f) sets out explicit procedures for obtaining a continuance of a summary judgment motion in order to obtain discovery. The Irrigation Interests' complete disregard of the rule's requirements provides more than sufficient reason for the United States to obtain a protective order barring the deposition of Reclamation officials prior to this Court's ruling on the motions for summary judgment. Even if that were not the case, the lack of connection between the inquiries the Irrigation Interests seek to raise and the pending motions demonstrates that the proposed deposition would do little more than burden the United States. Indeed, the Irrigation Interests' long delay in seeking to depose a Reclamation official reiterates the unnecessary nature of their request and is itself is ample reason to grant the United States' motion for protective order.

I. ENTRY OF A PROTECTIVE ORDER IS APPROPRIATE.

A. This Court Has Discretion to Enter a Protective Order.

Idaho Rule of Civil Procedure Rule 26(c) grants this Court discretion to enter "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... that the discovery not be had ... [or] that the discovery be limited to certain matters...." *See Selkirk Seed Co. v. Forney*, 134 Idaho 98, 104, 996 P.2d 798, 804 (2000). A protective order will be affirmed unless it amounts to an abuse of the Court's discretion. *Bailey v. Sanford*, 139 Idaho 744, 86 P.3d 458 (2004).

B. A Protective Order is Appropriate Because the Irrigation Interests Have Failed to Comply With I.R.C.P. 56(f).

As this Court well knows, a motion for summary judgment may be defeated either by demonstrating that an issue of material fact exists or that the moving party is not entitled to judgment as a matter of law. I.R.C.P. 56(c); *Read v. Harvey*, 141 Idaho 497, 499, 112 P.3d 785, 787 (2005). When a party believes there is a genuine issue of material fact that will preclude summary judgment, the party “may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence to contradict the assertions of the moving party and establish a genuine issue of material fact.” *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). If that party believes that discovery is necessary to establish an issue of material fact, I.R.C.P. 56(f) provides the means through which the party may petition the Court for time to conduct discovery.

Rule 56(f) does not allow discovery to be obtained simply by serving it. Instead, the party seeking discovery must articulate to the court what additional discovery it believes is necessary and how the discovery is relevant to responding to the pending motion. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (Id. 2005) (citing I.R.C.P. Rule 56(f)). In particular, the rule requires an affidavit which makes two showings. First, it must “affirmatively demonstrat[e] why [the party] cannot respond to a movant's affidavits ... and how postponement of a ruling on the motion will enable [the party], by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.” *Id.* (citing *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797 (8th Cir.1996)). Second, the affidavit must carry the party’s “burden of setting out what further discovery would reveal that is essential to justify their opposition, making clear what information is sought and how it would preclude summary

judgment.” *Id.* (quoting *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir.2001) (internal quotations omitted).

Here the Irrigation Interests have acted in complete disregard of Rule 56(f)’s requirements and merely noticed depositions. The affidavit required by the Rule is not needless formality. Rather it “ensure[s] that the nonmoving party is invoking the protections of Rule 56(f) in good faith and [provides] the trial court the showing necessary to assess the merit of a party’s opposition.” *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1522 (10th Cir. 1992).

In light of those important purposes, Federal courts have routinely held that a failure to submit an affidavit pursuant to Rule 56(f) is adequate grounds to deny a request for discovery.^{1/} *E.g., Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir.1986) (“Failure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment.”); *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995). This Court should do the same.

^{1/} Despite the plain language of the rule, some Federal courts have allowed a party to obtain relief under Rule 56(f) when it makes the showings required by the rule through means other than an affidavit. *E.g., St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309, 1313 (3rd Cir. 1994). In contrast, the Irrigation Interests have not even tried to make the requisite showings. The Irrigation Interests’ failure to properly support their request for discovery not only prejudices the United States, it hinders the Court in exercising its obligation to ensure that any discovery that it may allow is narrowly tailored to that necessary to oppose the pending motions for summary judgment. *See Jenkins*, 141 Idaho at 239, 108 P.3d at 386; *First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 265 (1968) (Rule 56(f) allows discovery only for the comparatively limited “purpose of showing facts sufficient to withstand a summary judgment motion.”).

C. A Protective Order is Appropriate Because the Deposition of a Reclamation Official Would be Unduly Burdensome.

Not only have the Irrigation Interests failed to comply with Rule 56(f)'s requirement that they explain why the discovery they seek is necessary to oppose the pending motions for summary judgment; their Notice of Taking Deposition illustrates that the inquiry they seek has little connection to either those motions or Reclamation.

The Irrigation Interests seek to depose a Reclamation official on such far afield topics as the basis of the Director's authority;^{2/} the basis for the remark initially proposed by the Director;^{3/} allocation of water under the Eagle Decree and the "effect" of that Decree;^{4/} and how Water District 1 incorporates prior decrees into its accounting program.^{5/} None of those subjects address the proposed remarks at issue in the summary judgment motions or are even subjects a Reclamation official would have direct knowledge of. Even the lines of inquiry which may have some relevance to the proposed remarks, have nothing to do with the issues before the Court on summary judgment. For instance, while the Irrigation Interests seek inquiry into the "effect" of the proposed remarks, "effect" is not one of the criteria for a remark. *Cf. Id.* at Examination

^{2/} Notice of Taking of Deposition at 3, Examination items 3 & 5 (attached as Exhibit A to the Second Affidavit of David Jarvis). As if the items listed for examination were not wide-ranging enough, the Irrigation Interests refuse to limit their inquiry to those subjects. Notice at 2 (matters on which examination is sought "include, but are not limited to" those listed). The Irrigation Interests have thus violated Rule 30(b)(6)'s requirement that all matters on which examination is requested be identified with reasonable particularity.

^{3/} *Id.* at Examination item 1.

^{4/} *Id.* at Examination items 7 & 9. Examination of Reclamation officials regarding the Eagle Decree is particularly unwarranted because the United States was not a party to those proceedings and is not bound by the Eagle Decrees.

^{5/} *Id.* at Examination item 6.

items 4 & 8. In short, none of the lines of inquiry proposed by the Irrigation Interests will produce “facts essential to justify their opposition” to the pending summary judgment motions – as is required to obtain discovery pursuant to IRCP 56(f) – and thus none can justify putting Reclamation through the burden and expense of a deposition. *See Jenkins*, 141 Idaho at 239, 108 P.3d at 386.

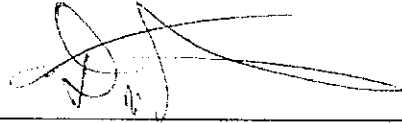
Perhaps the best evidence that the deposition the Irrigation Interests seek will do nothing but burden Reclamation is the Irrigation Interests’ long delay in seeking it. The United States’ moved for Summary Judgment close to two months ago. The Irrigation Interests immediately sought Mr. Olenichak’s deposition. They could have requested the deposition of a Reclamation official. They did not. Immediately after Mr. Olenichak’s deposition they sought to depose various State officials. Again, they could have requested an opportunity to depose a Reclamation official. Again, they did not. Only now, weeks after Mr. Olenichak’s deposition do the Irrigation Interests suddenly seek to depose a Reclamation official. That long delay is an implicit admission by the Irrigation Interests that deposition of a Reclamation official is not necessary to defend against the United States’ motion. More to the point, that long delay is unjustified and is itself ample reason to provide the United States with a protective order. *Bailey*, 139 Idaho at 749, 86 P.3d at 463.

Conclusion

The Irrigation Interests have noticed a deposition of a Reclamation official without complying with the requirements imposed by Rule 56(f). To make matters worse, they have proposed inquiry into a broad range of topics unrelated to opposing the pending motions for

summary judgment. The Irrigation Interests' flaunting of the purposes and procedures of Rule 56(f) warrants a protective order barring their belated request to depose a Reclamation official.

DATED this 2nd day of October, 2009.



David W. Gehlert

CERTIFICATE OF SERVICE

I certify that on October 2, 2009, I served true and correct copies of the foregoing MOTION FOR PROTECTIVE ORDER as follows:

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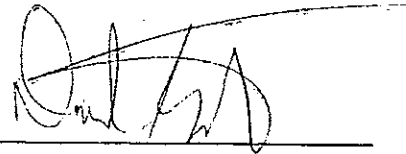
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A handwritten signature in black ink, appearing to read "David W. Gehlert", written over a horizontal line.

David W. Gehlert