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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
OCT 13 2009	
By _____	Clerk
Deputy Clerk	

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:
	)	01-217, 01-218, 01-4024 & 01-4025
	)	[Minidoka Power Rights]
	)	and
	)	01-2068 & 01-4054
	)	[Palisades Power Rights]
Case No. 39576	)	(USDI / BUREC)
	)	
	)	
	)	ORDER ON MOTIONS FOR PROTECTIVE
	)	ORDERS

Background

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Reporting Area Basin 01, IDWR Part 2* on December 19, 2006. The Director recommended the following six claims for diversions from the Snake River to the United States of America acting through Regional Director PN Region, Bureau of Reclamation PN-3100, 1150 N. Curtis Road, Suite 100, Boise, Idaho, 83706-1234:

- 01-217 – 2,500 cfs, year-'round power, June 15, 1909, decree
- 01-218 – 200 cfs, year-'round power, July 1, 1912, decree
- 01-2068 – 1,200 afy (Palisades Reservoir), July 28, 1939, license:
 - year-'round power from storage, power storage and irrigation storage
 - March 15 – November 15, irrigation from storage
- 01-4024 – 825 cfs, year-'round power, June 16, 1927, beneficial use
- 01-4025 – 1,510 cfs, year-'round power, May 7, 1942, beneficial use
- 01-4054 – 8,560 cfs, year-'round power, May 6, 1958, beneficial use

Under the priority date element in all six claims, the Director recommended the following language:

The appropriator shall exercise this right in manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

Objections & Responses

Between April 18 and 20, 2007, Minidoka Irrigation District, Burley Irrigation District, Twin Falls Canal Company, City of Pocatello, Falls Irrigation District, Burley Irrigation District and A&B Irrigation District filed *Objections* objecting to source, quantity, priority date and other provisions. On April 19, 2007, the BUREC filed an *Objection* objecting to the historic practice remark and references to the 1968 and 1969 *Eagle Supplemental Decrees*.

Responses were filed by the State of Idaho, Idaho Ground Water Appropriators, Inc. (Aberdeen-American Falls Ground Water District, *et al.*) and Idaho Power Company between June 11 and 20, 2007.

Trial Schedule Orders

The first *Trial Schedule Order* was entered on February 4, 2009, in subcases 01-217, 01-218, 01-4024 and 01-4025 setting August 13, 2009 as the close of written discovery. An *Amended Trial Schedule Order* was entered July 1, 2009, moving the close of written discovery to October 27, 2009, and setting a summary judgment hearing date of November 12, 2009.

On September 18, 2009, the Special Master entered the 2nd *Amended Trial Schedule Order* with the same deadline for the close of written discovery (October 27, 2009) and with the same summary judgment hearing date (November 12, 2009).

Motions for Summary Judgment

1. The State of Idaho filed its *Motion for Partial Summary Judgment* on August 18, 2009, in all six subcases:

Minidoka Power Rights

Nos. 01-217, 01-218, 01-4024 and 01-4025 “[F]or entry of a summary judgment

order finding that the substitution of the following remarks for the ‘historic practices hydropower remark’ and the ‘winter power operation remark’ set forth in the Director’s Recommendations for the Minidoka power rights shall resolve all objections and/or responses related to the ‘historic practices hydropower remark’ and the ‘winter power operation remark.’” The State submitted proposed “priority date” and “other provisions necessary” remarks for 01-217 and 01-218, then 01-4024 and 01-4025.

Palisades Power Rights

Nos. 01-2068 and 01-4054 “[F]or entry of a summary judgment order finding that the substitution of the following remarks for the ‘historic practices hydropower remark’ set forth in the Director’s Recommendations for the Palisades power rights shall resolve all objections and/or responses related to the ‘historic practices hydropower remark’.” The State submitted proposed “priority date” and “other provisions necessary” remarks for 01-2068 and 01-4054.

2. The United States filed its *Motion for Summary Judgment* on August 19, 2009, in all six subcases it termed “Minidoka Power Rights” (01-217, 01-218, 01-4024 and 01-4025), “Palisades Storage Power Right” (01-2068) and “Palisades Natural Flow Power Right” (01-4054). It attached proposed remarks for:

Minidoka Powerplant

01-217 and 01-218
01-4024 and 01-4025

Palisades Powerplant

Storage Right (01-2068)
Natural Flow Right (01-4054)

In its conclusion, the United States wrote:

This Court should enter summary judgment substituting the proposed remarks for those offered by the Director because, unlike the Director’s “Historic Practice” remark, the proposed remarks are founded on, and consistent with, the limitations on operation of the Minidoka and Palisades hydropower water rights the Secretary agreed to in the Palisades contracts as a prerequisite to the conclusion of Palisades Reservoir. Further, the proposed remarks are fully consistent with Idaho water law and will aid in the administration of the water rights.

Motions for Protective Orders

The **State of Idaho** filed its *Motion for Protective Order and Motion to Lift Stay of Briefing Schedule* on October 1, 2009, “for a protective order against all further discovery related to the issues pending on summary judgment . . . [and] for an order lifting the stay on the briefing in the Minidoka Power Rights subcases and requiring briefs on the pending motions for summary judgment to be filed no later than the following: October 13, 2009, deadline for response briefs, and October 27, 2009, deadline for reply briefs.”

On October 2, 2009, the **United States** filed its *Motion for Protective Order* seeking to quash the “Irrigation Interests” proposed deposition of a BUREC official prior to the Court’s ruling on the motions for summary judgment.

Expedited Hearing

On *Motions for Expedited Hearing* filed by the State of Idaho and the United States, a hearing was held on October 6, 2009. David W. Gehlert appeared for the United States; Clive J. Strong appeared for the State of Idaho; C. Tom Arkoosh, W. Kent Fletcher and Roger D. Ling appeared for the “Irrigation Interests / Surface Water Coalition”; Josephine P. Beeman appeared for the City of Pocatello; Candice M. McHugh appeared for the Ground Water Districts; James S. Lochhead appeared for Idaho Power; Jerry R. Rigby appeared for the New Sweden and Fremont-Madison Irrigation Districts; and Garrick L. Baxter appeared for IDWR.

Decision

After considering the record to date and arguments of counsel, the two key dates to consider are October 27, 2009 (close of written discovery) and November 12, 2009 (summary judgment hearing date). Both dates were incorporated into the Court’s July 9 and September 18, 2009 *Trial Schedule Orders* based on agreement of the parties. But most compelling, the September 18, 2009 *2nd Amended Trial Schedule Order* was entered one month *after* the State of Idaho and the United States filed their *Motions for Summary Judgment*. No one suggested the two dates might need to be amended until September 23, 2009, when Mr. Arkoosh called the Court, but that was solely to request an extension of time to file response briefs. No mention was

made concerning extending the close of written discovery date or the summary judgment hearing date.

Arguments by the Irrigation Interests / Surface Water Coalition claiming surprise lack credibility because positions taken by the State of Idaho and the United States in their *Motions for Summary Judgment* are not inconsistent with their earlier filings.

In light of the Court's parties' agreements concerning discovery and the summary judgment hearing, plus the Court's limited calendar, several options are clear. First, the deadline to complete written discovery, considered by the Special Master a deadline to complete all discovery, should remain the same – October 27, 2009. All discovery now scheduled to be completed *no later than* October 27, 2009, should be allowed to go forward, including depositions of IDWR employees set for October 22 and 23, 2009.¹ Second, the date for the summary judgment hearing must remain unchanged – November 12, 2009, 1:30 p.m. And third, the deadlines to file response and reply briefs must be adjusted to accommodate the “expedited” nature of these proceedings.

The State of Idaho and the United States are entitled to argue whether substitution of their proposed remarks for that recommended by the IDWR Director is solely a question of law and whether the proposed remarks resolve all objections and responses.

Order

THEREFORE, IT IS ORDERED that:

1. All discovery shall be completed no later than **October 27, 2009**.
2. Response briefs shall be due no later than **October 30, 2009**.
3. Reply briefs shall be filed no later than **November 5, 2009**.
4. A hearing on motions for summary judgment shall be held on **November 12, 2009, 1:30 p.m.**:

SRBA Courthouse
253 3rd Avenue N.
Twin Falls, Idaho.

¹ During the expedited hearing, the Special Master understood the only depositions scheduled to be held before the discovery deadline are of IDWR employees Gary Spackman (October 22, 2009) and Lyle Swank (October 23, 2009).

5. All other settings in the Court's September 18, 2009 2nd *Amended Trial Schedule Order* remain unchanged.

DATED October 13, 2009.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTIONS FOR PROTECTIVE ORDER was mailed on October 13, 2009, with sufficient first-class postage to the following:

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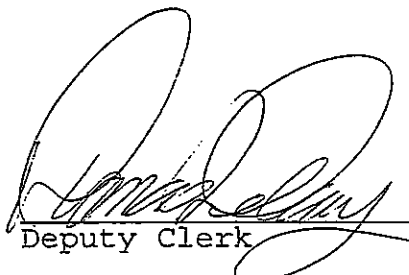
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