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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
NOV 20 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 02-200, 02-201, 02-223, 02-224
	) (State of Idaho) and Basin 02 GP #4 (00-92002GP)
	)
Case No. 39576	) ORDER GRANTING PETITION TO APPEAR
	) AS AMICUS CURIAE, ORDER SETTING
	) DEADLINE FOR COMMENTS and SPECIAL
	) MASTER REPORT AND RECOMMENDATION

Findings of Fact

Director's Recommendations

The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, Reporting Area Basin 02* on December 29, 2006. The Director recommended claim 02-200 to the State of Idaho, Idaho Water Resource Board, 322 E. Front Street, P.O. Box 83720, Boise, Idaho, 83720-0098, for year-'round minimum stream flow with a priority date of December 29, 1976, based on a statute, § 42-1736B, Idaho Code, Policy 32. Under quantity, the Director recommended: "The quantity of this right is the average daily flow of zero (0) cfs measured by the Milner gauging station at river mile 638.7 downstream."

The same date, the Director recommended the following *Basin 02 General Provisions*, number 4:

The minimum daily flows at the Milner gauging station shall remain as zero cubic feet per second. The Milner gauging station is located at Latitude 42° 31'41", Longitude 114° 01'06"(revised), (NAD83), in the SW1/4 NE1/4 of section 29 in Township 10 South, Range 21 East, Boise Meridian, Twin Falls County Hydrologic Unit 17040212, on the left bank 200 ft downstream from the highway bridge at Milner, 0.4 mile downstream from Milner Dam, at mile 638.7.

Objections and Response

The Idaho Ground Water Appropriators, Inc., and the Ground Water Districts filed an *Objection* on December 5, 2007, in subcase 02-200 and “to the General Provisions in Basin 02” objecting to quantity and place of use. The same date, Idaho Power Company filed an *Objection* in subcase “[Basin 02] General Provision 4” alleging the General Provision should not be included in the Director’s Report or in any decree.

The Twin Falls and North Side Canal Companies (Canal Companies) were granted leave to file a late response in subcases 02-200 and Basin 02-General Provision #4 on February 4, 2009. Idaho Power was granted leave to file a late objection in subcases 02-200, 02-201, 02-223 and 02-224 on February 20, 2008, objecting to all the elements and alleging the water rights should not exist.

State’s Motion for Partial Summary Judgment

The State filed its *Motion for Partial Summary Re: Milner Zero Minimum Flow* in the above subcases on October 19, 2009, arguing the following language should be substituted for Basin 02 General Provision #4 and included under “other provisions” in subcase 02-200:

The flow of the Snake River at Milner Dam may be reduced to zero, and water rights using water downstream from Milner Dam have no right to call for the delivery, or seek administration, of the flow of the Snake River or surface and ground water tributary to the Snake River upstream from Milner Dam.

Joinder, Statement, Memoranda, Responses and Reply

The Ground Water Districts filed their *Joinder in the State of Idaho’s Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* on October 28, 2009, and their *Summary Judgment Reply Brief* on November 13, 2009. The United States Bureau of Reclamation filed its *Statement of Agreement with the Relief Sought by the State of Idaho’s Motion for [Partial] Summary Judgment Re: Milner Zero Minimum Flow* on November 4, 2009.

Idaho Power Company lodged its *Memorandum in Opposition to State of Idaho’s Motion for Partial Summary Judgment Re: Milner Zero Minimum Flow* on November 5, 2009, and the Canal Companies lodged their *Memorandum in Opposition* the same date. The City of Pocatello filed its *Response* on November 6, 2009, and the State filed its *Reply in Support* on November 12, 2009.

Petition to Appear as Amicus Curiae

The Fremont-Madison Irrigation District, Egin Bench Canal Company, Idaho Irrigation District and New Sweden Irrigation District filed their *Petition to Appear as Amicus Curiae* on November 12, 2009.

Hearing

A hearing on the State's *Motion* and the *Petition to Appear as Amicus Curiae* was held on November 19, 2009. Clive J. Strong and Michael C. Orr appeared for the State; James C. Tucker and James S. Lochhead appeared for Idaho Power; Thomas J. Budge appeared for the Ground Water Districts; David W. Gehlert appeared for the USDI/BOR; Travis L. Thompson and Shelley M. Davis appeared for the Canal Companies; Josephine P. Beeman appeared for the City of Pocatello; Robert L. Harris appeared for Fremont-Madison Irrigation District, *et al.*; and Michael B. Schwarzkopf appeared for Resource and Range and the Harpers.

Discussion

The first order of business was whether anyone opposed the *Petition to Appear as Amicus Curiae*. No one opposed the *Petition*.

The next matter was a concern over the authority of the Special Master to consider matters related to Basin 02 General Provisions, some portions of which are now before SRBA Presiding Judge John M. Melanson. To clarify the matter, it was proposed that Judge Melanson enter a *Supplemental Order of Reference Appointing Terrence A. Dolan to Preside over Recommended General Provision 00-92992GP and all Related Matters Pertaining to the General Provision on Flows at Milner Dam*. Because counsel attending the hearing did not have sufficient time to consider the proposed *Order*, the best solution is to provide notice to all parties by copy of the proposed *Order* and give them time to respond in writing.

To the merits of the State's *Motion for Partial Summary Judgment*, the parties in court had the opportunity to discuss possible settlement beforehand and they agreed on a possible solution. Two sentences from the 1996 Idaho State Water plan and from I.C. § 42-203B(2) would be combined into one paragraph which would then be substituted for Basin 02 General Provision #4 and included in the "other provisions" element of water right 02-200 if that claim is decreed. The language is as follows:

The exercise of water rights above Milner Dam has and may reduce flow at the dam to zero. For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered.

The Canal Companies suggested that it is superfluous to include such language but they did not oppose the resolution. That being said, the Canal Companies waived their objections and argument in opposition to the settlement. The remaining parties in court agreed. It was understood that the State thereby withdrew the language requested in its *Motion for Partial Summary Re: Milner Zero Minimum Flow*. It was further understood that only matters addressed herein are Basin 02 General Provision #4 and a remark to be included in the "other provisions" element of subcase 02-200 if that claim is valid.

Conclusions of Law

The State has shown good cause to have the settlement language entered as Basin 02 General Provision #4 and included in the "other provisions" element of subcase 02-200 if that claim is valid.

Order

THEREFORE, IT IS ORDERED that:

1. The *Petition to Appear as Amicus Curiae* filed by the Fremont-Madison Irrigation District, *et al.*, is **granted**;
2. Copies of the proposed *Supplemental Order of Reference* shall be served along with this *Order*. Parties may submit comments in writing to the SRBA Court **no later than Friday, December 4, 2009**, after which the proposed *Supplemental Order* and comments, if any, will be submitted to the Presiding Judge; and
3. The State's *Motion for Partial Summary Re: Milner Zero Minimum Flow* is **granted** to the extent that the language requested therein has been withdrawn and the settlement language should be substituted for Basin 02 General Provision #4 and included in the "other provisions" element of subcase 02-200 if that claim is valid.

Recommendation

THEREFORE, IT IS RECOMMENDED that:

1. The Presiding Judge order the above settlement language as Basin 02 General Provision #4 in lieu of the language recommended by IDWR; and
2. The same settlement language be included in the "other provisions" element of subcase 02-200 if that claim is valid and partially decreed.

DATED November 20, 2009.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

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

)
) SUPPLEMENTAL ORDER OF
) REFERENCE APPOINTING
) TERRENCE A. DOLAN TO PRESIDE
) OVER RECOMMENDED GENERAL
) PROVISION 00-92002GP AND ALL
) RELATED MATTERS PERTAINING
) TO THE GENERAL PROVISION ON
) FLOWS AT MILNER DAM
)
)

On June 4, 2007, this Court issued *Order of Reference Appointing Terrence A. Dolan as Special Master for Irrigation and Other Claims in IDWR Administrative Basins 02, 03, 47, 73 and 75*, which included the following authority:

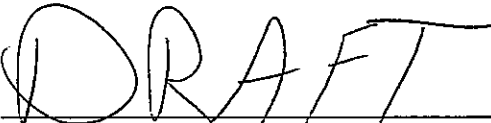
General Provisions – Contested or Uncontested: Identify and preside over any objections filed to the recommended general provision for the above-captioned basin. Following a review of the objections if it is determined that the recommended general provision was uncontested then issue a *Special Master's Report and Recommendation* notifying the Court that the general provision was not contested. Alternatively, if the recommended general provision is contested then following proceedings on objections, issue a *Special Master's Report and Recommendation* consistent with the outcome of the proceedings.

Thereafter, *Objections* and *Responses* were filed to the general provision recommendations for Basin 02, including the recommendation regarding flows at Milner Dam. The subcase relating to the general provision is designated as Subcase 00-92002GP.

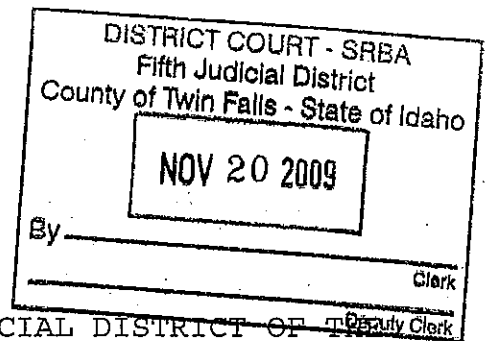
One of the issues before the Special Master involves the scope of application of the general provision outside of Basin 02. This *Supplemental Order* clarifies that the

June 4, 2007, *Order of Reference* confers the authority to preside over all related matters including application of the general provision, if any, outside of Basin 02.

DATED: _____.



JOHN M. MELANSON
Presiding Judge, *Pro Tem*
Snake River Basin Adjudication



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)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

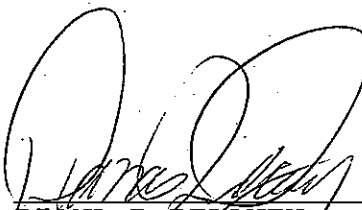
Water Right(s): 00-92002GP

On November 20, 2009, Special Master TERRENCE A. DOLAN issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED November 20, 2009.


DIANA R. DELANEY
Deputy Clerk

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING PETITION; SETTING DEADLINE FOR COMMENTS; SPECIAL MASTER REPORT & RECOMMENDATION was mailed on November 20, 2009, with sufficient first-class postage to the following:

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BONNEVILLE-JEFFERSON GROUND
CLARK JEFFERSON GROUND WATER
MADISON GROUND WATER DISTRICT
MAGIC VALLEY GROUND WATER
NORTH SNAKE GROUND WATER

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(Certificate of mailing continued)

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BASIN 02 -- GENERAL
PROVISIONS

ORDER

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Deputy Clerk

