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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JAN - 8 2010
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 01-23B, 01-297, 35-2543 and 35-4246
	)	(Aberdeen-Springfield Canal Co.)
Case No. 39576	)	
	)	ORDER DENYING RULE 56(f) REQUEST
	)	FOR ADDITIONAL DISCOVERY AND
	)	MOTION FOR RECONSIDERATION

Background

Special Master's Order

On June 11, 2009, the Special Master entered an *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike Affidavits* in the above four subcases. In the *Order*, the Special Master concluded that 1) recharge for irrigation was recognized as a beneficial use of water before enactment of its groundwater recharge statute in 1978, and 2) a portion of ASCC's diversion from the Snake River decreed "for irrigation and other purposes" in water right 01-23B was lawfully changed to "recharge for irrigation" with a priority date of February 6, 1895.

A related conclusion in the *Order* was that remanding the matter to the IDWR Director "for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right." (I.C. § 42-1425(2)(a)) would only serve to delay final resolution of the claim – the Director has already submitted his findings and conclusions recommending the accomplished transfer. That is, the Director found that 1) a portion of ASCC's irrigation water right 01-23B was changed to recharge for irrigation before

November 19, 1987 (commencement of the SRBA), 2) the accomplished change in purpose of use did not injure other existing water rights and 3) the change did not result in an enlargement.

Concerning the Coalition's *Motion the Strike Affidavits*, the Special Master concluded the affidavits of former-Director Karl J. Dreher and Senior Water Resource Agent Michael Holliday were admissible. IDWR's records are admissible in evidence as business or public records; the Director's statements constitute opinion testimony of an expert (I.C. § 42-1401B) in furtherance of his duties; and Mr. Holliday's statements were based on his personal knowledge.

Motion for Reconsideration

On June 25, 2009, objectors the Surface Water Coalition¹ filed their *Motion for Reconsideration* alleging three grounds: 1) the Court failed to rule on the objectors' request for discovery pursuant to I.R.C.P. 56(f), 2) the granting and denial of the summary judgment motions would need to be set aside pending completion of discovery and 3) the Court misinterpreted the plain and direct language of I.C. § 42-1425 (remand to the Director for further hearing). The Coalition lodged their *Brief in Support of Motion for Reconsideration* on July 9, 2009.

Stipulation to Resolve Objection

On July 21, 2009, ASCC, USDI (BLM and BOR), Surface Water Coalition (except Burley Irrigation District) and State of Idaho, with IDWR's concurrence, filed a *Stipulation to Resolve Objection* in all four subcases solely to resolve the United States' concerns about places of use.²

State of Idaho's Memorandum

On September 30, 2009, the State of Idaho lodged its *Memorandum in Response to Objectors' Motion for Reconsideration*. The State paraphrased *Jenkins v. Boise Cascade Corp.*,

¹ The "Surface Water Coalition" includes: American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

² It should be noted that the Director recommended both 01-23B and 01-297 for irrigation *and* recharge for irrigation purposes of use while the July 21, 2009 *Stipulation* signed by nearly all the parties included both uses only in 01-23B. The other three claims listed only irrigation use. There is no apparent reason for the differences, but that does not change the reasoning or outcome of this *Order*.

141 Idaho 233, 108 P.3d 380 (2005) to argue the Surface Water Coalition failed to show good cause for their belated discovery request: “Where a party’s own lack of diligence is to blame for that party’s failure to secure discoverable information, it is not an abuse of discretion to deny a Rule 56(f) motion.” *Memorandum* at 12. Then the State argued that summary judgment was proper because the Coalition failed to offer any evidence to rebut the presumption afforded the *Director’s Report* on the issue of injury or enlargement. Finally, the State argued the Coalition cannot use the remand provisions of I.C. § 42-1425(2) – the accomplished transfer statute – “to take additional discovery or obtain testimony it failed to secure during a court-ordered discovery period.” *Memorandum* at 16.

ASCC’s Response Brief

The ASCC lodged its *Brief in Response to Objectors’ Motion for Reconsideration* and *Affidavit of Randall C. Budge* on October 7, 2009. It argued the Surface Water Coalition’s “lack of diligence and failure to present any evidence of injury or enlargement other than speculation and their failure to prevail on their summary judgment motion simply does not warrant the Court permitting them to now use a Rule 56 approach to conduct further discovery.” *Brief in Response* at 5. Attached to Mr. Budge’s *Affidavit* is an e-mail from counsel for several of the Coalition stating their objection to IDWR’s recommendation of recharge for irrigation use as early as August 18, 2008 – nearly seven months before the discovery cut-off of March 6, 2009.³

Surface Water Coalition Reply

On October 13, 2009, the Surface Water Coalition lodged their *Reply to Response Briefs*. They argued the court must grant their *Motion for Reconsideration* because I.C. § 42-1425(2) requires remand to the Director and because certain affidavits filed by the State were not filed until more than three weeks after ASCC filed its *Motion for Summary Judgment*. Because of that, the Coalition was entitled to further discovery. They argued:

Objectors [the Coalition] should be entitled to take the depositions of these affiants in order to determine if there are facts, foundation, documents, and other

³ In *Jenkins*, the Idaho Supreme Court held:

Moreover, the district court was soundly within its discretion in denying the motion. Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and upon which that party will bear the burden of proof at trial [italics in original]. *Jenkins*, 141 Idaho at 239, 108 P.3d at 386.

evidence to support these conclusory statements. The options for the Court are straightforward under the law, it can either allow the discovery required for the Objectors to properly respond, or strike the statements that do not meet Rule 56's criteria.

Reply at 9.

The Coalition summarized their arguments with the following:

Objectors request that the Court allow additional discovery pursuant to IRCP 56(f) as required by Objectors. Further, the Objectors request that the Court follow the mandate set forth in Idaho Code § 42-1425 and remand this matter to the Director for hearing. Finally, either or both of these actions will require the Court to set aside its Order Granting Summary Judgment.

Reply at 13.

Hearing

A hearing on the Coalition's *Motion for Reconsideration* was held on October 15, 2009, at the SRBA Courthouse in Twin Falls, Idaho. Randall C. Budge appeared for ASCC; W. Kent Fletcher and Paul L. Arrington appeared for the Surface Water Coalition; Harriet A. Hensley appeared for the State; Garrick L. Baxter appeared for IDWR; and Fredric W. Price listened in for the BLM.

Discussion

The Surface Water Coalition's *Motion for Reconsideration* failed to present any arguments not already heard in the summary judgment proceedings and they suggested no sound reasons to amend the June 11, 2009 *Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike Affidavits*. More specifically, on the issues of 1) whether recharge for irrigation was recognized as a beneficial use of water in Idaho before enactment of its groundwater recharge statute in 1978, and 2) whether a portion of ASCC's diversion from the Snake River decreed for irrigation and other purposes was lawfully changed to recharge for irrigation, the answer to both questions remains the same, "yes."

As noted earlier, remanding the issue of the accomplished transfer to the Director for further hearings on the issues of when the accomplished change occurred and possible injury to existing water rights and enlargement would only delay final resolution of claim because the Director has already heard the matter. We have his findings and recommendation in support of

the change. The Coalition may disagree with the Director's findings, but the results stand. We can run over a skunk twice, but it's still dead.⁴

The Coalition correctly pointed out the Special Master failed to rule on their request for discovery pursuant to I.R.C.P. 56(f), at least not specifically. The Special Master instead held that Mr. Dreher's and Mr. Holliday's affidavits were admissible and should not be stricken. For the record, Steven T. Howser's affidavit should have been likewise held admissible on the same bases. That is, IDWR's records are admissible in evidence as business or public records; the Director's statements constitute opinion testimony of an expert (I.C. § 42-1401B) in furtherance of his duties; and Mr. Holliday's and Mr. Howser's statements were based on their personal knowledge.⁵

Taken in its entirety, there should be no doubt the Special Master's **Order** effectively denied the Coalition's request for additional discovery, i.e., to depose Mr. Dreher about the accomplished transfer and Mr. Holliday about IDWR's understanding of the 2002 Settlement Agreement. By holding their affidavits were admissible, there was no valid reason to depose them, hence, no reason to allow further discovery. There was reasonable time (over six months) for the Coalition to complete their discovery, especially in light of their early knowledge of the issues and their agreement setting the discovery cut-off date. See September 2, 2008 **Trial Schedule Order**. But in the interest of clearing up the record, the Special Master will now enter an order denying the Coalition's Rule 56(f) request for additional discovery.

As stated in the June 11, 2009 **Order Partially Granting Aberdeen-Springfield's Motion for Summary Judgment and Denying Surface Water Coalition's Motion for Summary Judgment and Motion to Strike Affidavits**, there are no genuine issues of material facts as to the issues presented and ASCC is entitled to partial summary judgment as a matter of law.

⁴ It's worth noting that the Coalition agreed there were no genuine issues of material fact as to the issue of recharge for irrigation use when they filed their *Objectors' Joint Motion for Summary Judgment* in subcase 01-23B on March 27, 2009.

⁵ Steven T. Howser is the General Manager of the Aberdeen-Springfield Canal Company, since 1998. In his April 17, 2009 *Second Affidavit*, Mr. Howser said:

As manager of the Company, I oversee the day-to day operations of the Company and its facilities, and am personally familiar with the Company's water rights, the diversion of water from the Snake River within Water District 01 and from the Company's ground water wells, the delivery to and beneficial use thereof by the Company's shareholders, together with all of the records of the Company and the records of Water District 01 pertaining to the diversion and delivery of the Company's water rights.

Order

THEREFORE, IT IS ORDERED that:

1. The Surface Water Coalition's Rule 56(f) request for additional discovery is **denied**; and
2. The Surface Water Coalition's *Motion for Reconsideration* is **denied**.

DATED January 8, 2010.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING RULE 56(F) REQUEST FOR ADDITIONAL DISCOVERY AND MOTION FOR RECONSIDERATION was mailed on January 07, 2010, with sufficient first-class postage to the following:

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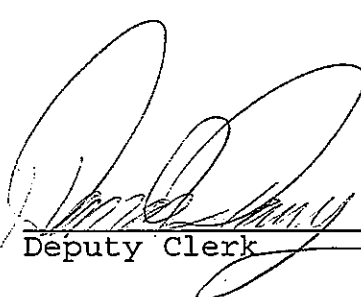
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ORDER

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