

MAY 10 2010

DEPARTMENT OF
WATER RESOURCESDISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAY - 7 2010

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

Case No. 39576

)
) Subcases 01-209, *et al.*
) (see list of 15 subcases attached)
)
) ORDER GRANTING MOTION TO
) ALTER OR AMEND and AMENDED
) SPECIAL MASTER REPORT
) AND PARTIAL RECOMMENDATION
) "Minidoka Return Flow Credit"

FINDINGS OF FACT

Director's Reports

On May 15, 2006, the Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, IDWR Lower Basin 01 (Part 1)*. The Director filed his *Director's Report, Reporting Area Basin 01, IDWR Part 2* on December 19, 2006. The Director recommended the above 15 claims to divert water from the Snake River as follows:

Allow

01-209 – Twin Falls Canal Company, 3,000 cfs, 10/11/1900
01-210 – North Side Canal Company, Ltd (NSCC), 400 cfs, 10/11/1900
01-211A – USDI/BOR, 1,726 cfs, 3/26/1903
01-211B – Burley Irrigation District (BID), 1,200 cfs, 3/26/1903
01-212 – NCCC, 2,250 cfs, 10/7/1905
01-213 – NCCC, 350 cfs, 6/16/1908
01-214A – USDI/BOR, 1,000 cfs, 8/6/1908
01-214B – BID, 544 cfs, 8/6/1908
01-217 – USDI/BOR, 2,500 cfs (power), 6/15/1909
01-218 – USDI/BOR, 200 cfs (power), 7/1/1912
01-219 – USDI/BOR, 41,700 af (Lake Walcott), 12/14/1909

Disallow

01-10187 – Minidoka Irrigation District (MID), disallow: "Recommended as right no. 01-211A."
01-10188 – MID, disallow: "Recommended as right no. 01-214A."
01-10192 – MID, disallow: "No beneficial use found."

01-10194 – MID, disallow: “Recommended as right no. 01-214A.”

Early Objections

10/3-6/2006:

- Twin Falls Canal Co. – place of use
- Producers Irrigation Co. – quantity
- Independent Water Users of Mud Lake – quantity
- Mud Lake Water Users, Inc. – quantity
- Monteview Canal Co. – quantity
- Blackfoot Irrigation Co. – quantity
- United Canal Co. (fka Danskin Ditch Co. & Trego Ditch Co.) – quantity
- Fremont-Madison Irrigation District – quantity
- USDI / BLM – place of use

Amended Director’s Reports

On December 19, 2006, IDWR wrote to the SRBA Court stating that “a remark relating to the Minidoka Credit is needed in the above listed water rights [all 15 of the above water rights, except 01-217, 01-218 and the 4 MID claims recommended disallowed] in order to further define and administer the water rights in accordance with the prior decree.” Accordingly, IDWR submitted *Amended Director’s Reports* recommending inclusion of a Minidoka Credit Remark in the claims. In the same letter, IDWR wrote it would do the same when it filed the *Director’s Report for Basin 01, Part 2* to be filed later the same month. That second *Director’s Report* recommended the identical Minidoka Credit Remark in subcases 01-217 and 01-218.

Foster Decree and Minidoka Credit Remark

IDWR cited the following language from Judge Edward A. Walters’ 1913 *Foster Decree*¹ as requiring a Minidoka Credit Remark:

It is further ORDERED, ADJUDGED AND DECREED, until otherwise provided by Statute, the State Engineer of the State of Idaho, or his duly authorized deputy; shall determine what part of the water flowing in Snake River at the Minidoka and Milner Dams, is storage waters, and what part is natural flow ... 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 the Milner Dam.

¹ *Twin Falls Canal Company v. Charles N. Foster*, June 20, 1913, 4th Judicial District, Twin Falls County.

Foster Decree, at 10-11.

Both of IDWR's *Amended Director's Reports* changed only one element – Other provisions necessary for definition or administration of this water right – by adding the following Minidoka Credit Remark:

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 waters 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 v Foster*, Decree (4th Jud. Dist., Twin Falls Co., June 20, 1913). The natural flow to which the Twin Falls Canal Company and the Northside Canal Company are entitled shall be measured at the Milner Dam.²

Later Objections

4/17-20/ 2007:

Twin Falls Canal Co. – remarks

Burley Irrigation District – remarks

City of Pocatello – source and quantity ³

Responses

12/6/2006 - 6/11/2007:

Idaho Ground Water Appropriators, Inc.⁴

USDI / BLM

Twin Falls Canal Co.

State of Idaho

2006 Settlement Agreement

On February 14, 2006, the Minidoka Irrigation District (“MID”), Burley Irrigation District (“BID”), Twin Falls Canal Company (“TFCC”), North Side Canal Company (“NSCC”) and American Falls Reservoir District #2 (“AFRD#2”) signed a “Settlement Agreement for Determining Natural Flows Pursuant to Foster Decree.” The parties

² At trial in the present matter, Anthony “Tony” Olenichak, Program manager of Water District 01, defined the Minidoka Credit as the “calculation of gains or returns flows in the Minidoka-to-Milner reach that are credited back upstream to Minidoka canals and the Minidoka Project instead of being included in the natural flows applied to the Twin Falls and North Side canals.”

³ The City of Pocatello was granted leave to amend its *Objections* on May 21, 2008, but on May 18, 2009, the City filed its *Motion to Withdraw Objection to Minidoka Credit Remark* – the *Motion* was granted the same date.

⁴ Idaho Ground Water Appropriators, Inc. (“Ground Water Districts”) is a party here because it joined in earlier summary judgment proceedings (01-4, *et al.*) involving nine of the above 15 subcases.

included a number of premises (paraphrased in part here) to explain the context of their Agreement:

1. MID and BID are part of the Minidoka Project and are entitled to all irrigation water **stored** in Lake Walcott behind Minidoka Dam.
2. TFCC and NSCC are entitled to certain storage water and **natural flows** from the Snake River downstream from Minidoka Dam which pre-date storage rights in Lake Walcott.
3. The *Foster Decree* entitles MID and BID to a credit to their storage uses for return flows from the Minidoka Project below Minidoka Dam “so long as the return flow . . . exceed[s] losses to the Snake River as the result of storage of water behind Minidoka Dam in Lake Walcott . . . which [credit] shall be provided from the storage of TFCC and NSCC.”
4. While the return flow may benefit natural flows to TFCC and NSCC, evaporation losses from Lake Walcott could injure AFRD#2’s natural flow rights.
5. The parties want to avoid further disputes “as to the method by which net return flow credits shall be computed to meet the intent of the Foster Decree.”

Based on those premises, the parties then agreed that TFCC and NSCC would provide 14,500 acre-feet of storage water annually to MID, BID and AFRD#2. The parties then agreed:

The evaporation and water supply accounting provisions contemplated by the *Foster Decree* and set forth herein, are required for the administration of the water rights of the respective parties and shall be incorporated into and become a part of any final decree entered by the court in the Snake River Basin Adjudication. . . .

IDWR Exhibit 3, at 4.⁵

Trial and Amended Minidoka Credit Remark

Trial on the Minidoka Credit Remark was held on May 20, 2009, at the SRBA Courthouse, Twin Falls, Idaho. The following counsel appeared:

⁵ The 2006 Settlement Agreement was signed by all the parties, but not “approved” by the IDWR Director. At trial, counsel for IDWR explained that former Director Karl Dreher did not sign the Agreement because of ongoing proceedings, but he and Interim-Director Gary Spackman support the Agreement as well as inclusion of the amended Minidoka Credit Remark incorporating the Agreement.

Travis L. Thompson
Burley Irrigation District
North Side Canal Co.
Twin Falls Canal Co.
John K. Simpson
Idaho Power Co.
W. Kent Fletcher
Minidoka Irrigation District
David W. Gehlert
USDI/BOR
David I. Stanish
State of Idaho
Candice M. McHugh and Scott J. Smith
Idaho Ground Water Appropriators, Inc.
Garrick L. Baxter
IDWR

At the beginning of trial and in light of the 2006 Settlement Agreement, IDWR offered the following amended Minidoka Credit Remark in place of its initial recommended Remark:

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 District #2 and recorded in the Bonneville County Recorder's Office as Instrument No. _____.
IDWR Exhibit 4.⁶

Early on, the Ground Water Districts conceded that if the Court determines there is a legal basis for the amended Minidoka Credit Remark, the credit should be calculated based on the 2006 Settlement Agreement. At the conclusion of trial, the parties agreed to submit simultaneous post-trial briefs / proposed findings of fact and conclusions of law on July 31, 2010, and responses on August 28, 2010.

⁶ IDWR Exhibit 4 included the following 10 subcases: 01-209, 01-210, 01-211A, 01-211B, 01-212, 01-213, 01-214A, 01-214B, 01-218 and 01-219; subcase 01-217 was inadvertently omitted. Those are the same 11 subcases IDWR recommended for partial decrees. If the Court determines there is a legal basis to include the amended Minidoka Credit Remark, IDWR said it will add the instrument recording information to each of the 11 partial decrees.

Discussion

The earliest calculations of the Minidoka Credit date from 1919, six years after entry of the *Foster Decree*. Between 1919 and 1977, Water District 01 managers calculated net gains and losses in both the Neeley to Minidoka and Minidoka to Milner reaches. In 1978, the method of calculating the credit was changed when the accounting was computerized – a credit was then calculated if there was a daily gain in the lower Minidoka to Milner reach when the Minidoka or Burley Irrigation Districts were using storage water.

That method of calculating the credit was used for the next 22 years, until the year 2000, when former-Water District 01 manager Ron Carlson decided to stop calculating the credit. He felt there was no legal basis for return flow credit. In his words, it was like a water right but without elements, an “aberration in water distribution.” No one else in Water District 01 got return flow credits because, in his opinion, “water users are not entitled to return flows.”

In 2001 or 2002, Director Dreher overruled Mr. Carlson’s decision to abandon the credit and another accounting procedure was tried. But when the Twin Falls and North Side Canal Companies complained about the effect of the new procedure on their natural flow rights, the five senior surface water users began several years of negotiations resulting in the 2006 Settlement Agreement. In 2007, the Director ordered the current Water District 01 manager Tony Olenichak to administer water in accordance with that Agreement, mainly to provide certainty in both wet and dry years.

American Falls Reservoir District No. 2 was included in the Agreement even though it was not a party to the *Foster Decree* because of concerns of how changes in evaporation rate calculations for Lake Walcott might affect its natural flow rights. In the agreement, it received a “token” amount (1,000 afy) mainly “to avoid legal expenses”⁷

In recent years, with the advent of conjunctive management, the Ground Water Districts became concerned that the Minidoka Credit Remark would adversely impact

⁷ The Minidoka Credit Remark was also recommended for the five USDI/BOR claims (01-211A, 01-214A, 01-217, 01-218 and 01-219) even though the United States was not a party to the Agreement because its uses (irrigation, power, irrigation storage and irrigation from storage) are integral to the Minidoka Project. The USDI/BOR supports incorporation of the 2006 Agreement.

mitigation or replacement requirements placed on them in dry years.⁸ In these proceedings, if the Remark has a legal basis, they urge that any Minidoka Credit be subordinated to their junior water rights whenever a delivery call is made.

Mr. Olenichak said that the Minidoka Credit has always been calculated separately from mitigation requirements in delivery calls. Mr. Carlson suggested that without the credit remark, the Ground Water Districts might benefit because there would be less need for mitigation water. Both witnesses agreed the requirements of the *Foster Decree* are binding law.

CONCLUSIONS OF LAW

Minidoka Credit Remark

The central focus in these Minidoka Credit Remark subcases must be Judge Edward A. Walters' admonition to the Idaho State Engineer in 1913. Regardless of whether the *Foster Decree* is considered a private adjudication or not, the Judge ordered the State Engineer to determine whether the water flowing at the Minidoka and Milner Dams is storage water or natural flow. The measurement of natural flow was important because he found that senior water right holders downstream from Minidoka Dam were entitled to the **natural flow** measured at Milner Dam "unaffected by the diversions or acts of the parties hereto . . . **or by the release of stored water** [emphasis added]."

Since 1919, the State Engineer complied with Judge Walters' order by crediting the Minidoka Project (MID and BID) with return flows to the Snake River when the Districts were using their storage water. At first, the net gains and losses were calculated both above and below Minidoka Dam, but since 1968, only below the dam.

⁸ In their *Post-Trial Brief*, the Ground Water Districts wrote:

The SWC [Surface Water Coalition] delivery call was initiated in 2005. A material injury order was issued by the Director finding material injury to TFCC and NSCC and ordering junior ground water users to provide mitigation water to those entities. And, the junior ground water users' mitigation obligation to TFCC and NSCC increased by the amount of the Minidoka Credit that reduced their senior natural flow water rights. In other words, the Director was now seeking mitigation water from ground water users for the benefit of TFCC and NSCC. What TFCC and NSCC gave away through the Minidoka Credit to the Minidoka Canals, they now receive from ground water users in the form of mitigation water.

Brief, at 28.

Judge Walters likely knew he was creating an anomaly in Idaho water law – granting a surface water user a right to return flows which would otherwise be lost when the water left its control. But his solution was necessary because then it would have been “inequitable” for senior water right holders below Minidoka Dam to claim their 1900 priority against holders of junior storage water rights above Minidoka Dam – the Minidoka Project. *Stipulation to Foster Decree*, IDWR Exhibit 1.

While everyone agrees the Minidoka Credit is an “aberration in water distribution”, nevertheless, the State Engineer was bound to enforce the terms of the *Foster Decree*. Exactly how that was done over the years has changed, but the record suggests the State Engineer has routinely determined natural flows and credited return flows to the Minidoka Project for 91 years. When the parties to the 2006 Settlement Agreement offered a simpler more predictable mechanism agreed to by the natural flow appropriators, the Director merely incorporated the Agreement into his recommendations. There was no suggestion the amended Remark would **not** comply with the *Foster Decree*. Even the Ground Water Districts conceded the Agreement is the best method to meet that obligation.

Arguments that there is no legal basis for the amended Minidoka Credit Remark recommended by the Director must fail simply because the Judge Walters ordered the Director to do just that. To suggest the Remark has no legal basis is to ignore the *Foster Decree*. Likewise, the argument that Minidoka Credit water must be subordinated to junior ground water rights fails because there is no evidence that any of the ground water claims even existed when the *Foster Decree* was entered. The Ground Water Districts acquired their rights subject to all valid existing water rights and decrees and it does not matter that they were not parties to the lawsuit filed decades before their water rights existed. Of course, if the ground water appropriators held water rights before 1913, but were somehow excluded from the lawsuit, their argument would be valid. But such is not the case here.

When a call on the river is made in water short years, the Director is required to enforce water rights in priority consistent with conjunctive management which sometimes implicates ground water rights. But the Director has consistently calculated the Minidoka Credit wholly separate from mitigation requirements in delivery calls. The

suggestion that subordination of Minidoka Credit water *might* benefit the Ground Water Districts is mere speculation. To somehow partially insulate the Ground Water Districts from a potential mitigation requirement in a delivery call would be to suggest all junior water rights might be similarly exempt. Such an idea is contrary to Idaho's prior appropriation doctrine and wholly unenforceable.

An argument might be made that even though AFRD#2's surface water rights pre-date any of the Ground Water Districts' rights, its Minidoka Credit water should be subordinated because it was not a party to the *Foster Decree*. But the fact is that AFRD#2 lies downstream from Minidoka Dam and diverts its water the same as the Minidoka Project – from Lake Walcott. That suggests AFRD#2 is an integral part of Judge Walters' order to identify storage waters versus natural flow and credit return flows. Hence, the District must be considered when the Director determines the "water flowing in Snake River at the Minidoka and Milner Dams." *Foster Decree*, at 10.

When the Ground Water Districts argued the Minidoka Credit Remark should not impact their water rights simply because they were not parties to the 2006 Settlement Agreement, they miss the point. They are bound by the *Foster Decree* and the amended Minidoka Credit Remark is nothing more than a codification of its terms which the Director has endorsed.

As noted during the trial, exactly how the return flows were calculated over the years has been problematic and unpredictable. The Agreement was negotiated by the parties who hold "a beneficial interest in the water stored in Lake Walcott [MID and BID]" and the parties who "own, operate and maintain Carey Act projects which are entitled to receive . . . natural flows from the Snake River at Milner Dam located downstream from Lake Walcott [TFCC and NSCC]", plus AFRD#2.⁹ IDWR Exhibit 3, at 1. That group encompassed all water users with a direct interest in settling "disagreements as to the method by which net return flow credits shall be computed to meet the intent of the Foster Decree." IDWR Exhibit 3, at 2. In sum, the indispensable

⁹ The Ground Water Districts pointed out that AFRD#2 did not exist in 1913 when the *Foster Decree* was entered and yet it joined in the 2006 Settlement Agreement. As noted earlier, it was joined because evaporation losses from Lake Walcott *might* affect its natural flow rights and "to avoid legal expenses." That made the District a necessary party to the Agreement.

parties were joined and they agreed to a better way to administer their storage and natural flow rights as mandated by the *Foster Decree*.

Finally, the IDWR Director has determined the amended Minidoka Credit Remark is necessary for definition or administration of the above water rights and the Special Master agrees.

Ground Water Districts Exhibit 25

At trial, the claimants (MID, BID, TFCC, NSCC and AFRD#2) objected to the Special Master's admission of Ground Water Districts Exhibit 25 because it *may* have been submitted during negotiations over the Minidoka Credit leading to the 2006 Settlement Agreement. The exhibit is a lengthy document entitled "Water Accounting for the Snake River, Neeley to Milner – Minidoka Project credit, by: Barker, Rosholt & Simpson, LLP" dated June 11, 2003. The exhibit includes two letters, dated June 11 and 17, 2003, signed by Amy D. Chestnut for the law firm and addressed to IDWR Director Karl Dreher. The first letter states:

In light of your invitation to provide the findings of our research regarding the long-term administration of the Minidoka Project credit resulting from an interpretation of the Foster Decree, we attach a compilation and a historical overview of the Foster Decree.

This document has been prepared after several months researching various files and collections at the University of Idaho archives, State of Idaho archives, and Bureau of Reclamation documents.

The exhibit was admitted at trial as part of IDWR's a public record. There is no sound reason to reverse that ruling simply because the document *may* have been submitted during negotiations among parties to the later 2006 Settlement Agreement. The document was sent to the Director at his invitation and basically summarized Ms. Chestnut's research of other public documents. It was obviously intended to help the Director become better informed before he was asked to "approve" the agreement and likely helped the Director in his administration of the water rights as mandated in the *Foster Decree*.

ORDER ON MOTION TO ALTER OR AMEND

On April 5, 2010, the State filed its *Motion to Alter or Amend* “to clarify certain language in the Special Master Report and Recommendation filed on February 12, 2010.” On pages 7-8, the Special Master inadvertently wrote “Milner Dam” instead of the correct “Minidoka Dam.” A hearing on the State’s *Motion* was held on May 6, 2010, and no one opposed the *Motion*.

THEREFORE, IT IS ORDERED that the *Motion* is **granted**.

RECOMMENDATION

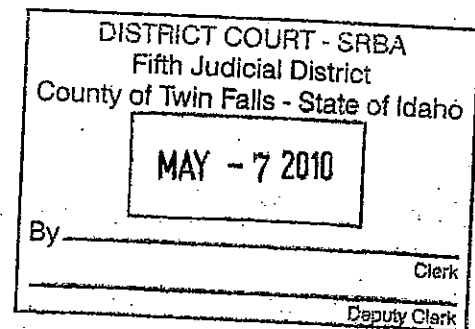
THEREFORE, IT IS RECOMMENDED that if the SRBA Presiding Judge determines some or all of the above 15 claims are valid, the amended Minidoka Credit Remark recommended by the Director be included under the element “Other provisions necessary for definition or administration of this water right.”¹⁰

DATED May 7, 2010.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

¹⁰ Some or all of the 15 subcases remain contested on other issues yet to be determined. Therefore, they should not be considered for partial decrees until all objections have been resolved.



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): 01-00209
(SEE ATTACHED EXHIBIT A)

On May 07, 2010, 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 May 07, 2010.

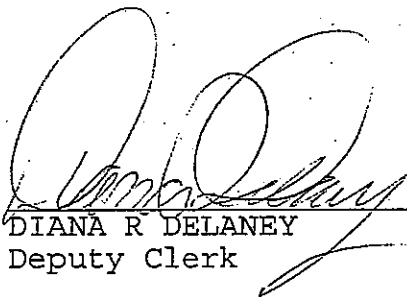

DIANA R DELANEY
Deputy Clerk

Exhibit A

Subcase Nos:

01-00209
01-00210
01-00211A
01-00211B
01-00212
01-00213
01-00214A
01-00214B
01-00217
01-00218
01-00219
01-10187
01-10188
01-10192
01-10194

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO ALTER OR AMEND AND AMENDED SPECIAL MASTER REPORT & PARTIAL RECOMMENDATION was mailed on May 07, 2010, with sufficient first-class postage to the following:

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the NOTICE SETTING HEARING ON MOTION TO ALTER OR AMEND was mailed on May 07, 2010, with sufficient first-class postage to the following:

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USDI BUREAU OF RECLAMATION

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Deputy Clerk