

DISCUSSION

It is undisputed that water right no. 01-0006 should be decreed consistently with the *Eagle Decree*, which sets forth a description of the water right.² Because the original Director's Report in this subcase included a remark that attempted to interpret the *Eagle Decree* language for purposes of administration rather than simply reciting it, this subcase originally presented two questions: (1) how should the *Eagle Decree* be interpreted for purposes of administering water right no. 01-0006, and (2) whether the former's Director's interpretation of the *Eagle Decree* was correct. The latter question was rendered moot by the amended Director's Report, filed by the current Director on August 3, 2010, which simply recites the language of the *Eagle Decree* without attempting to interpret it. Further, the Director stated in his July 28, 2010 deposition that "I'm not in a position right now to state how I would instruct the watermaster to deliver water [under the language of the *Eagle Decree*]. . . . I think there are some significant interpretations that need to be determined by a court."³

Thus, the sole remaining issue is the question of how the *Eagle Decree* should be interpreted for purposes of defining and administering water right no. 01-0006. Even District No. 2 has recognized this:

Given the amended recommendation, the summary judgment issue(s) have substantially become:

Whether the 01-06 water right should be interpreted and administered according to its plain language as it was previously decreed and set forth in the *Eagle Decree*, which provides that all water diverted by American Falls Reservoir District No. 2 before

² See *Supplemental Decree* at 5, *Burley Irr. Dist. v. Eagle* (5th Jud. Dist., Twin Falls County Dist. Ct.) (Jul. 10, 1968). A copy of the *Eagle Decree* is attached to the *Affidavit of David I. Stanish In Support Of The State Of Idaho's Motion For Partial Summary Judgment*, filed in Subcases Nos. 01-0217 et al (Minidoka and Palisades Power Rights) as Exhibit E (Aug. 18, 2009).

³ Transcript of Deposition of Gary Spackman at 53-54. Copies of excerpted pages of this transcript are attached to the *Affidavit of Michael C. Orr* ("Orr Aff.") as Exhibit 1.

American Falls Reservoir fills for the last time in a given irrigation season and begins to drop will be considered natural flow and not charged as storage.

Amended Notice Of Intent To File Motion For Summary Judgment at 1-2 (Aug. 19, 2010) (“*Amended Notice*”) (underlining in original).

This issue is a straightforward question of law that hinges on the language and intent of the *Eagle Decree*. The applicable language of the *Eagle Decree* was drawn in large part from the Palisades Contracts and therefore the historic record of the *Eagle Decree* and the underlying Palisades Contracts is relevant to interpreting any ambiguities in the *Eagle Decree*. Likewise, past administration of the water right under the *Eagle Decree* language is relevant to the interpretation of the provision.

In short, the issue in this subcase can and should be resolved on the basis of the *Eagle Decree* and its historic record. The historic record has been thoroughly developed, and the Bureau of Reclamation, District No. 2 and the State have exchanged numerous documents on this subject. The documents that constitute the historic record speak for themselves, and their legal significance hinges on what the documents say, which District No. 2 can determine simply by reviewing the documents.⁴ The State’s views of the legal significance of any historic documents are a matter of legal argument that is properly addressed in briefing and oral argument before the Special Master, and a deposition for purposes of determining the State’s views on this point would inevitably amount to

⁴ The historic record has been well developed in this case, and the documents the State provided to District No. 2 are only part of this record. The Bureau of Reclamation and District No. 2 both previously provided historic and background documents, and the number of documents each provided was greater than the number of documents the State provided to District No. 2 on August 10. Further, the parties agreed to delay the summary judgment schedule so that District No. 2 would have sufficient time to review the documents the State provided.

nothing more than an attempt to obtain confidential attorney-client communications and privileged attorney work product.⁵

This is confirmed by a review of the list of the 68 documents the State provided on August 10,⁶ only four of which are less than forty-two years old, and most of which are considerably older.⁷ A review of the document list demonstrates that these documents are part of the historic basis and background for the *Eagle Decree*, the “Palisades Contracts,” and the historic administration of water right no. 01-0006. Their legal significance arises from their content, not from the State’s interpretation of the documents.

Further, the historic documents that the State provided on August 10 did not open any new issues or pertain to issues that had not previously been the subject of discovery, but simply supplemented the existing historic record. Throughout this subcase, all parties have recognized the potential importance of the historic record, and it had already been well developed by both the Bureau of Reclamation and District No. 2, each of which had already produced a larger number of documents than the State provided on August 10. Further, at District No. 2’s request, the State agreed to a delay in the summary judgment schedule to allow District No. 2 time to review the documents the State provided. *Second Motion To Extend Summary Judgment Schedule* (Aug. 24, 2010); *Notice Of Agreed*

⁵ District No. 2 confuses the role of the State as a party to this subcase with the role of the Director, who is not a party to the SRBA but rather an independent technical expert who makes recommendations to this Court. Idaho Code § 42-1401B. The State, in contrast, is participating this subcase as a party-litigant.

⁶ A descriptive list of the documents that the State provided to District No. 2 on August 10, 2010 is attached to the Orr Aff. as Exhibit 2.

⁷ Three of the four recent documents are dated this year, and were already in the possession of District No. 2 before the State provided additional copies. The other document is a March 13, 1989 letter from USBR Regional Director John W. Keyes III to Alan D. Jensen of James M. Montgomery Consulting Engineers listing certain documents pertaining to the authorization of Palisades Dam and Reservoir.

Summary Judgment Schedule (Sept. 14, 2010). District No. 2 has had ample time to review the documents.

Moreover, discovery in this subcase has been underway for two years, and since 2008 District No. 2 has explored the question of how the *Eagle Decree* should be interpreted and administered in five depositions.⁸ Under these circumstances, it is appropriate to deny District No. 2 yet another deposition on the same subject. *See Cosgrove v. Merrel Dow Pharmaceuticals, Inc.*, 117 Idaho 470, 474-75, 788 P.2d 1293, 1297-98 (1989). Allowing District No. 2's to take another deposition on this subject would subject the State to annoyance, oppression and undue burden and expense, and therefore should not be permitted. I.R.C.P. 24(c).

There is no need for further delay or discovery or yet another deposition, especially a deposition to obtain the State's views of the legal significance of historic documents that speak for themselves, many of which have long been a part of the public record on the *Eagle Decree* and the Palisades Contracts, and of which District No. 2 undoubtedly was already aware.⁹ The summary judgment schedule in this proceeding has already been delayed twice at District No. 2's request. The summary judgment issue that District No. 2 has presented to this Court is a question of law that can and should be

⁸ District No. 2 questioned Watermaster Lyle Swank and Tony Olenichak of Water District 1 in considerable detail on this issue in depositions taken in October 2008. *See Exhibit 3 and Exhibit 4* to the Orr Aff. District No. 2 also asked former Watermaster Ron Carlson about this issue in his October 2008 deposition. *See Exhibit 5* to the Orr Aff. Further, District No. 2's depositions of Tony Olenichak and IDWR Director Gary Spackman in July of this year were entirely devoted to the question of the interpretation and administration of the *Eagle Decree* language.

⁹ District No. 2, which is a member of the "Surface Water Coalition," has been deeply involved in other SRBA subcases involving the historic record of the *Eagle Decree* and the Palisades Contracts, *see, e.g., Surface Water Coalition's And Idaho Power Company's Joint Memorandum In Opposition To State Of Idaho's And United States' Motions For Summary Judgment* (Subcases Nos. 01-0217 et al.) (Nov. 3, 2009), and sought designation of a basin-wide issue based on the "common plan" of the *Eagle Decree* and the Palisades Contracts. *Joint Motion To Designate Basin-Wide Issue* (Subcase. No. 00-91015) (Oct. 2, 2009).

resolved on the basis of the *Eagle Decree* and the well-developed historic record without further delay or discovery.

CONCLUSION

It is undisputed that the controlling question in this subcase has always been a question of the interpretation of the *Eagle Decree*, and this question is now postured for resolution. The discovery that District No. 2 seeks under its Motions is unnecessary and inappropriate, and one must ask how an issue that District No. 2 has consistently acknowledged as being a simple and straightforward legal question has suddenly become so complex. The answer is that it has not. The only thing that has changed in this subcase is that the Director has filed an amended recommendation that narrowed and clarified the issues by recommending the language of the *Eagle Decree* – which is precisely what District No. 2 has sought all along. *See Standard Form 1 Objection* at 2 (“The quantity should reflect the language of the Eagle Decree.”) (American Falls Reservoir District No. 2) (Sept. 21, 2006). The only issue that remains is how that language should be interpreted for purposes of administration, and there is no reason for further delay or discovery on this question.

Respectfully submitted this 22nd day of September 2010.

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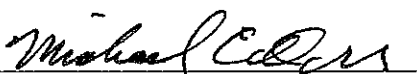


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of SEPTEMBER 2010, I caused a true and correct copy of the foregoing to be filed with the Court and served on the following parties by the indicated methods:

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