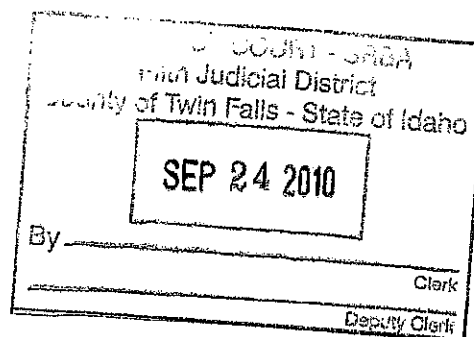


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DEPARTMENT OF
WATER RESOURCES



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

) Subcase 01-6

) (American Falls Reservoir District #2)

Case No. 39576

) ORDER GRANTING MOTION TO STAY
) SUMMARY JUDGMENT SCHEDULE AND
) DENYING MOTION FOR PROTECTIVE
) ORDER

Background

Settlement Conference Report

The genesis of these proceedings was a *Settlement Conference Report* filed by the parties on April 1, 2010, following entry of an *Order on Motions for Summary Judgment* (subcase 01-4, *et al.*, December 11, 2009) in 37 subcases on several discrete issues – source, priority date, subordination and season of use. The parties agreed the best course of action in the near future would be to temporarily delay further settings in those subcases pending an appeal then before Judge John Melanson. The parties also announced that American Falls Reservoir District No. 2 (“AFRD #2”) would soon file its notice of intent to file a motion for summary judgment on its claim in subcase 01-6.

Notice of Intent

AFRD #2 filed its *Notice of Intent to File Motion for Summary Judgment* in subcase 01-6 on April 13, 2010. It said the issue is how the IDWR Director seeks to describe AFRD #2’s water right “differently than it was decreed in the *Eagle Decree*¹ proceedings.” It framed the issue as follows and asked the Court to set a scheduling conference:

¹ *Burley Irrigation District, et al. v. Henry Eagle*, July 10, 1968, Judge Theron W. Ward, Fifth Judicial District, Twin Falls, County.

Whether the 01-06 water right should be decreed and administered 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 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 [emphasis in original].

Scheduling Orders

On May 13, 2010, the first *Scheduling Order* set the deadline to file motions for summary judgment as August 2, 2010, with the hearing on November 15, 2010. No one requested a discovery cutoff and none was ordered because this issue was one part of the puzzle. On July 20, 2010, at AFRD #2's request, the deadline to file motions for summary judgment was extended to August 30, 2010, and the hearing extended to December 13, 2010.²

Amended Director's Report

On August 3, 2010, IDWR filed its *Amended Director's Report, Subcase No. 01-6*. In the cover letter with the *Report*, IDWR attorney Garrick L. Baxter wrote that interim Director Gary Spackman changed the narrative condition currently listed under the quantity element preferring instead the language of the *Eagle Decree*. Mr. Baxter suggested the amendment "will simplify the issues before the Court" because the change is consistent with AFRD #2's *Objection*.

Amended Notice of Intent

In response, AFRD #2 filed its *Amended Notice of Intent to File Motion for Summary Judgment* on August 19, 2010, because "the Director has expressed that he will not specifically recommend how the right should be administered." This time, it phrased the issue on summary judgment as follows:

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 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 [emphasis in original].

² After IDWR filed its *Amended Director's Report*, the deadline to file motions for summary judgment was finally extended to September 29, 2010, with the hearing on January 24, 2011.

Amended and New Objections

The Fremont Madison Irrigation District, United Canal Company and Blackfoot Irrigation Company filed *Amended Objections* in subcase 01-6 on September 3 and 22, 2010. The Ground Water Districts³ filed their *Second Amended Objection* on September 20, 2010, and a new party, the Palisades Water Users, Inc., filed an *Objection* the same date. The City of Pocatello also filed its *Amended Objection* on September 20, 2010.

Motion to Stay Summary Judgment Schedule and Response

On September 20, 2010, AFRD #2 filed a *Motion to Stay Summary Judgment Schedule* because it has not completed discovery and alleged because no trial is set, no party would be prejudiced by delay. It also requested an expedited status hearing on the matter.

The State of Idaho filed its *Response* on September 22, 2010, stating the *Amended Director's Report* recommended the *Eagle Decree* language sought by AFRD #2 and "the only issue remaining is how that language should be interpreted for purposes of administration."

Motion for Protective Order

The State filed its *Motion for Protective Order* on September 22, 2010, "for a protective order providing that no further discovery be had in this subcase until the Special Master has heard motions for summary judgment."

Expedited Hearing

An expedited hearing on AFRD #2's *Motion to Stay Summary Judgment Schedule* and the State's *Motion for Protective Order* was held on September 23, 2010. C. Tom Arkoosh and Isaac D. Keppler appeared for AFRD #2; Michael C. Orr appeared for the State; Candice M. McHugh appeared for the Ground Water Districts; Jerry R. Rigby appeared for Fremont Madison Irrigation District, *et al*; David W. Gehlert appeared for the United States, along with Fredric W. Price; and Chris M. Bromley appeared for IDWR.

³ The Ground Water Districts include: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey-Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District and North Snake Ground Water District.

Discussion

The plan of the parties and the Court has been to resolve all remaining Basin 01 subcases in an orderly and expeditious manner, including subcase 01-6, despite the multiple issues and wide range of parties. It was thought that if this particular issue of *Eagle Decree* language in subcase 01-6 could be resolved by summary judgment, many or all the remaining issues could be settled. However, at the hearing, counsel for AFRD #2 announced that if the summary judgment schedule is not stayed to allow it further discovery, it would withdraw its intent to file such a motion. Following that, the State hesitated to say whether it would or could file its own motion for summary judgment by the September 29, 2010, deadline.

These developments leave the Court in an untenable situation. Since no party has actually filed a motion for summary judgment and extending the deadline is probably the only solution for the State to file its own motion, AFRD #2's *Motion to Stay Summary Judgment Schedule* must be granted. But by doing so, the Court takes no position on the merits of the parties' objections and responses to the Director's amended recommendation.

Neither does the Court take a position on the merits of the State's *Motion for Protective Order* except to hold that because no discovery deadline has been established and the State's *Motion* was premised on barring further discovery until *after* the summary judgment motions are heard, the *Motion* must be denied.

At the suggestion of AFRD #2, further consideration of this subcase will be continued until the status / scheduling conference set for January 6, 2011, in multiple Basin 01 subcases, including subcase 01-6.

Order

THEREFORE, IT IS ORDERED that:

1. AFRD #2's *Motion to Stay Summary Judgment Schedule* is **granted**; and
2. The State's *Motion for Protective Order* is **denied**.

DATED September 24, 2010.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO STAY SUMMARY JUDGMENT SCHEDULE AND DENYING MOTION FOR PROTECTIVE ORDER was mailed on September 24, 2010, with sufficient first-class postage to the following:

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