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WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
NOV 22 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	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION VACATING
Case No. 39576	)	TEST CASE TRIAL
	)	
	)	WATER RIGHT NOS.: 27-4096 AND
	)	27-11375
_____	)	

The Shoshone-Bannock Tribes and the United States filed some 300 *Objections* in Basin 27, opposing the recommendation of surface water rights on the Blackfoot River because they did not contain volume limitations. Initial Hearings were held in 2006. The subcases were set for many hearings and deadlines. During the last four years, the governmental parties held many informal settlement conferences, worked on a *Blackfoot River Management Plan*, and provided multiple Information Reports to the court. The parties reported that the volumetric *Objections* were based on concerns about provisions in the 1990 *Fort Hall Consent Decree* and the related 1995 *Consent Decree*.

The parties agreed to a test case to resolve the tribal volumetric *Objections*. In 2009, the court issued a *Trial Scheduling Order*. The court established subcase no. 27-4096 as the test case for the volumetric *Objections*, established a procedure for parties to participate in the test case, and set a trial for December 6 through 10, 2010.

Prior to the time set for trial in the test case, the State of Idaho filed a *Motion for Accounting of all Water Rights Benefitting from the Subordination Provisions of the Fort Hall Consent Decree (Motion for Accounting)*. In addition, the Shoshone-Bannock Tribes and the United States filed a

Motion for Enforcement of Fort Hall Indian Water Rights Consent Decree ("Motion to Enforce"). Both *Motions* were filed in front of the Presiding Judge. A status and scheduling conference was held on November 8, 2010.

The Presiding Judge issued an *Initial Scheduling Order* which asked this Special Master to consider whether the trial of the test case would cover many of the same issues involved in the *Motion to Enforce* and *Motion for Accounting*. The Presiding Judge indicated concern that vacating the trial and allowing the United States and Tribes to withdraw their *Objections* could set back efforts to timely resolve matters which have been pending for four years. The Presiding Judge indicated that if the parties have factual issues to resolve, the Special Master should consider proceeding with the trial to avoid the necessity of starting over. Therefore, the court asked the Special Master to submit a recommendation as to whether the trial on the test case should go forward.

At the pretrial held on November 17, 2010, the parties and IDWR discussed whether any factual issues remained to be tried in the test case. The parties indicated that they see the *Motion to Enforce* in front of Judge Wildman as raising broader issues than the test case. The *Motion to Enforce* asks whether non-tribal water users have exceeded the 45,000 AFY threshold referred to in the 1990 *Fort Hall Agreement* and whether the Tribes are therefore entitled to an "equitable adjustment." In addition, the *Motion to Enforce* seeks a resolution of what the "equitable adjustment" would entail.

In contrast, the trial in the test case would likely look only at a subset of those issues. The test case would answer whether state-based surface water rights in Basin 27 are required to have individual volume limitations based on the 1990 *Fort Hall Agreement*. However, the answer to that question would not necessarily address an accounting of which water rights benefit from the subordination provision, would not answer whether the 45,000 AFY limitation has been exceeded and would not answer whether the Tribes are entitled to an "equitable adjustment." In addition, the Tribes and the United States are prepared to withdraw the volumetric and season of use *Objections* in Basin 27.

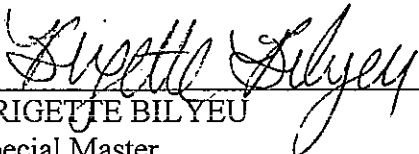
The parties also addressed whether the *Motion to Enforce* would require the District Court to determine any factual disputes. The parties agreed that the question of whether the 45,000 AFY has been exceeded could be submitted by affidavits only. The question of "equitable adjustment" will be

submitted on affidavits, but may also require additional factual development.

At the conclusion of the pretrial conference, this Special Master VACATED the trial set for December 6 – 10, 2010. The Tribes and the U.S. now desire to withdraw the volumetric and season of use *Objection*. Even if the test case answered whether individual volume limitations must be placed on a class of rights in Basin 27, bigger issues would remain unresolved. The parties believe the *Motion for Accounting*, and the *Motion to Enforce* may be submitted to the District Court under a standard similar to cross motions for summary judgment. Consequently, this Special Master makes two recommendations.

- 1) It is recommended that the Trial Set for December 6 – 10, 2010 be VACATED.
- 2) It is recommended that the District Court obtain RECOMMENDATIONS FOR A MEDIATOR for a Mandatory Settlement Conference for all parties to the subcases identified through the *Motion for Accounting*.

DATED: November 22, 2010.



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT AND RECOMMENDATION VACATING TEST CASE TRIAL was mailed on November 22, 2010, with sufficient first-class postage to the following:

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