



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WARDEN

December 16, 2010

Special Master Terrence A. Dolan  
Snake River Basin Adjudication Court  
P.O. Box 2702  
Twin Falls, Idaho 83303-2707

Re: SRBA Subcase Nos. 45-536 et al. (Bedke, Whittle, Winecup, Inc.)

Dear Special Master Dolan:

I am writing to update you on the significant progress being made in resolving the issues in these three groups of subcases, and to explain why under the circumstances the trial presently scheduled for December 17<sup>th</sup> needs to be vacated.

If you recall, there are three separate groups of water rights involved here. Two of the groups involve objections by claimants Bruce and Jared Bedke only (hereinafter "the Bedkes"). These two groups will be referred to hereinafter as the "Basin Creek group" which contains 16 rights and the "Beaverdam-Pole Creek rights" consisting of two overlapping rights. The third group involves objections by the Bedkes to six of their own rights, as well as objections they filed on behalf of two neighboring claimants to water rights held by those claimants. These include three rights held by James Whittle and three rights claimed by Dennis Smith, but now owned by Winecup, Inc., a corporation whose principal shareholder is, to my understanding, Rep. Scott Bedke. This group of 12 will be referred to hereinafter as the "Whittle rights."

Following the close of the objection period in Basin 45 several preliminary discussions and an in-person settlement conference were held on these three groups of subcases. However, after a preliminary exploration of the issues, an informal agreement was reached by the objectors, the non-objector claimants, and IDWR not to actively pursue further objection resolution activities for the time being in order to allow the Bedkes time to actively prosecute other groups of objections they had filed, which ultimately resulted in litigation being pursued against the Oakley Canal Company, the City of Oakley, and the United States Forest Service and Bureau of Land Management, including large numbers of objections involving small stockwater rights on federal land. The Bedkes have diligently pursued their efforts to prosecute these other groups of objections. Because of this they resolved a large number of small stockwater subcases with both the Forest Service and the Bureau of Land Management ahead of several other small stockwater objectors. They have resolved disputes with the United States and the Oakley Canal Company that were on an active litigation path. They have pursued litigation against the City of Oakley all the way to the Idaho Supreme Court, and are presently involved in vigorously litigating another action against the City of Oakley in the SRBA Court.

All this activity notwithstanding, in June of this year the SRBA Court determined that the Basin Creek group, the Beaverdam-Pole Creek rights, and the Whittle rights could be delayed no longer. Accordingly

they were set on a short trial track. Since that time the parties and IDWR have invested a lot of time in moving these subcases toward resolution. The status of each of these three groups is detailed below.

Basin Creek Group. (16 subcases) These rights had been previously decreed in the Basin Creek Adjudication, which was concluded in 1987, shortly before the commencement of the SRBA, and were thereafter claimed and recommended in the SRBA. Most of the discussions between the Bedkes and IDWR have concerned whether this prior adjudication operates as a bar to raising in the SRBA objections that were not raised in the Basin Creek adjudication. The Bedkes have informed me that they will withdraw all of their objections in this group of subcases.

Whittle Rights. (12 subcases) These rights are complicated not only by the fact that they involve three separate owners, but also by the fact that the Oakley Canal Company presently delivers these rights, and therefore is intimately involved in the issues even though it has not filed objections in order to become a party to the subcases. Both a place of use objection and a season of use objection were raised as to all 12 rights.

Based upon my discussions with Bruce and Jared Bedke, as well as Rep. Scott Bedke, and through information relayed to me from Jim Whittle through Jared Bedke, I have been authorized by all four to report to the court that the place of use objections have been resolved as to all 12 subcases.

Additionally, there has been a lot of discussion about the season of use objections and the parties and IDWR are in agreement as to the legitimacy of the concerns raised in the objections. The parties are now focused on how best to address those concerns. However, what has become apparently to me in the last week to ten days is that none of these rights was claimed or recommended in the manner they have been used since the Lower Goose Creek Reservoir and Oakley Canal Company project were constructed in the 1920s. The rights were claimed and recommended as flow rights, as they were originally decreed in the 19<sup>th</sup> century. However, with the reservoir in place, and the project delivery system having obliterated a portion of Goose Creek below the reservoir, these rights can no longer be used that way. Rather, even though they are owned by the individual claimants, and not the Oakley Canal Company, they are stored and delivered by the canal company pursuant to agreement between it and the right holders.

Therefore it has become to me that they should be claimed and recommended with storage components. All three claimants will need to file amended claims to accomplish this, and the Court will need to set deadlines for the filing of amended director's reports, objections and responses. All three claimants have indicated a willingness to do this, but I have asked them to delay because such claims will need to be carefully drafted to correctly differentiate between the components of the right that are defined by Idaho water law, and those attributes of the storage and delivery arrangement that are governed by the terms of the agreement with the canal company. To this end I am working with Carter Fritschle, the Adjudication Section Leader here at the State Office to get draft recommendations prepared which can be used as the basis for amended claims, assuming they are satisfactory to the claimants. The Oakley Canal Company needs to be kept involved in this effort, as it is crucial that the recommendations describe the rights in a manner satisfactory to both the right holders and the canal company. The goal I am working toward here is to get the water rights described in a way that neither gets the appropriators crosswise of future water right administration efforts, nor in any way compromises the excellent working relationship between the appropriators and the Oakley Canal Company.

However, this work cannot be completed prior to the December 17<sup>th</sup> trial date. If trial were to be held on this group of subcases, the season of use issue could be framed and submitted to the court on stipulated facts. However, since the rights were incorrectly claimed and recommended, it does not matter how the court would rule on that issue, because its ruling would not change the fact that the rights as presently before the court are incorrectly described--irrespective of what season of use the court should adopt.

Simply stated, it makes no sense to hold a trial if notwithstanding its outcome the rights remain erroneous as they move forward to partial decree.

Beaverdam-Pole Creek Rights. (2 subcases). This set involves a right decreed in the *Oakley Canal Company v. Whittle* [Goose Creek] decree, (Cassia County, February 21, 1925) and an overlapping beneficial use right. The Bedkes, claimant-objectors, have asserted priority date and place of use objections. We have previously discussed the priority date objection and are evaluating a likely method of settling it, although I want to continue to discuss with the Bedkes the impact of the proposed settlement on the established delivery order under the Goose Creek Decree. The place of use objection implicates the question of whether IDWR incorrectly split the decreed right between the Bedkes and another claimant, which in turn is complicated by the question of whether either the priority date or place of use objection can be adequately resolved without re-opening the partial decree of the other portion of the split. In further evaluating these rights I have just recently also identified a question as to whether an amended claim might be necessary in order adequately to resolve the place of use objection. I simply have not yet had time to discuss this latest wrinkle with the Bedkes. But suffice it to say that it would not be a productive use of the Court's, IDWR's, or the parties' time to conduct a trial in two subcases where proper resolution might instead require a motion to set aside a partial decree of another right and a motion for leave to file amended claims.

For all these reasons I ask that the December 17<sup>th</sup> trial be vacated. Jared Bedke concurs in this request. Rep. Scott Bedke, Bruce Bedke, and James Whittle, communicating through Jared Bedke, have also informed me that they concur in this request.

Further, I ask that in addition to vacating the trial, the Court enter an order setting the following deadlines for moving these subcases forward to resolution:

Basin Creek Group:

Claimant-objectors Jared and Bruce Bedke file a notice of withdrawal of objections in all 16 subcases by January 14, 2011. Jared Bedke has indicated to me that this deadline is acceptable to him.

Whittle Rights:

IDWR will complete draft amended claims for all 12 rights and send them to the three claimants by no later than December 30, 2010. IDWR Adjudication Section Leader Carter Fritschle, who is researching and preparing the draft amended claims, has indicated to me that this deadline is acceptable.

The three claimants will review the draft amended claims, coordinate with IDWR on preparing corrections and revisions, completing final amended claims and motions to amend, and filing them with the Court by January 28, 2011. This date is acceptable to Jared and Bruce Bedke. While I understand that Jared Bedke has communicated this proposed date to Rep. Scott Bedke and James Whittle, I have not heard back from either one of them as to whether it is acceptable. Since Rep. Bedke is not only a member of the Idaho House of Representatives, but is a member of the legislative leadership as well, this is an extremely busy time of the year for him. I am concerned that one month may not be enough time for him to undertake and complete this project while at the same time attending to his legislative duties. If the Court could see fit to extend this deadline, I think it would be helpful.

Following the filing of the motions to amend, the Court can schedule and hold a hearing on the motions by no later than April 1, 2011. At that hearing, should the motions be granted, the Court can set a deadline for IDWR to file amended director's reports in response to the amended claims, and an objection

and response deadline. To my understanding this deadline is acceptable to Jared and Bruce Bedke, but I have not yet heard back from Rep. Scott Bedke and James Whittle as to its acceptability.

Beaverdam-Pole Creek Rights:

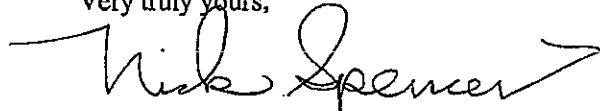
The claimants and IDWR will continue to exchange information on both rights and will hold an informal telephone settlement conference by no later than February 11, 2011. This deadline is acceptable to Bruce and Jared Bedke. A February deadline is being proposed because January will be busy with working through issues involving the Whittle Rights.

A deadline of March 15, 2011, can be set for the filing of SF-5s in both subcases, or a motion to set aside the partial decree in water right number 45-136A. The hearing on the motions to amend in the Whittle Rights could also be used as a status/scheduling conference for these rights as well. This deadline is acceptable to Bruce and Jared Bedke.

In conclusion, Special Master Dolan, I ask that you consider these matters and respond to this letter at your earliest convenience.

Thank you very much.

Very truly yours,

A handwritten signature in black ink, appearing to read "Nick Spencer", with a long horizontal stroke extending to the right.

NICHOLAS B. SPENCER  
Deputy Attorney General  
Idaho Department of Water Resources

Cc: Jared Bedke  
Bruce Bedke  
Rep. Scott Bedke  
James Whittle