

Moffatt Thomas

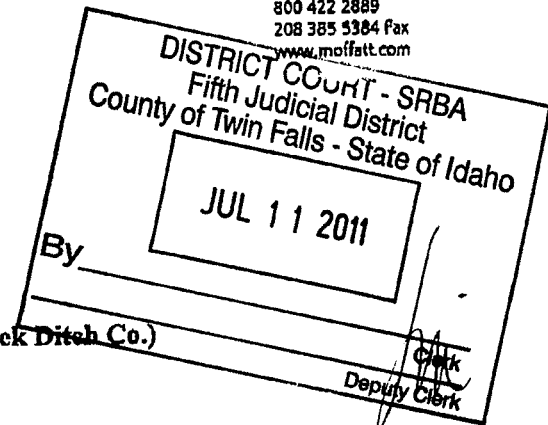
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John C. Ward
D. James Manning
David B. Lincoln
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Larry C. Hunter
Randall A. Peterson
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Stephen R. Thomas
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July 7, 2011

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www.moffatt.comSpecial Master Theodore R. Booth
Snake River Basin Adjudication Courthouse
253 3rd Avenue North
Twin Falls, ID 83303-2707Re: Subcase Nos. 63-00179C, 63-32580 (Mason Creek Ditch Co.)
MTBR&F File No. 18946.0137

Dear Special Master Booth:

At the June 7, 2011 scheduling conference in the above-referenced subcases, you asked the objector Pioneer Irrigation District to provide a proposed scheduling order for discussion at the continued scheduling conference of July 12, 2011. I have enclosed a proposed scheduling order with this letter. As you will see, I have left the trial related dates and times blank in the proposed scheduling order. However, I would like to offer the following thoughts regarding the timing of trial.

First, as to the trial itself, Pioneer strongly believes that there should be one trial on all three of the Mason Creek Ditch Company claims, rather than one trial on the two claims that have already been recommended (63-00179C, 63-32580), and a subsequent trial on the late claim that has yet to be reported (63-33392). Pioneer has previously argued in the summary judgment proceedings that Mason has essentially replaced its Boise River diversions with diversions of water under its two "drain" rights, including 63-33392. Therefore, it is logical and practical for all three water rights to be the subject of the same trial, as there is a substantial likelihood that Pioneer will file an objection to the recommendation for 63-33392, once it is issued.

My understanding is that the next late claim Director's Report will be issued in November or December of 2011. Issuance of the Director's Report will trigger an objection and response period, which typically lasts for approximately five months total.¹ Once that period ends,

¹ The most recent late claims Director's report provided an objection period of approximately 60 days, and a subsequent response period of approximately 90 days.

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depositions and exchanges of written discovery requests and responses could take up to three months. Perhaps these time frames could be shortened if Pioneer and Mason are the only parties to that subcase. However, there is at least a possibility that another party will file an objection to that recommendation. Having a new party involved could hinder any attempts to expedite the proceedings. Obviously, we will not know for sure whether there will be any additional parties to the proceedings until the objection deadline, which will likely fall somewhere within the January-February 2012 timeframe. Therefore, at this time, Pioneer suggests that trial on all three Mason water rights should not be scheduled to occur earlier than September 2012, in order to allow time for the issuance of the late claim Director's Report for 63-33392, the subsequent objection and response period, discovery, and trial preparation.² While Pioneer regrets this protracted timeline, obviously, Pioneer has had no control over the timing of the filing of the late claim or the late claim Director's Report.

As to the other trial-related dates and deadlines, I started with the previous Trial Scheduling Order of May 27, 2010, added references to re-opening discovery, exchanging witness/exhibit lists, and a hearing on pre-trial motions, and broke out the deadlines for completion of written discovery and depositions separately. As to identifying specific dates, I see no reason to depart from the general timing of the previous Trial Scheduling Order, which consists of a summary judgment hearing approximately 60 days prior to trial, completion of written discovery approximately 25 days prior to trial, and a pre-trial conference approximately 14 days prior to trial. In addition, I would suggest that the deadline for all depositions to be taken should be approximately 14 days prior to trial.

I also added dates and deadlines related to the injury/enlargement hearing process, based upon Presiding Judge Wildman's April 4, 2011 decision in the Aberdeen-Springfield Canal Co. subcases (01-23B, *et al.*). In that opinion, Judge Wildman states that the injury/enlargement hearing process consists of submission of information to IDWR, and the subsequent issuance of an Amended and/or Supplemental Director's Report. Therefore, I have included deadlines

² Both Mason Creek Ditch Company and IDWR disagree with this suggested timing, and instead believe that the late claim (63-33392) should be separated from the reported claims (63-179C and 63-32580) so that trial can occur on the latter two claims sooner, with a subsequent separate trial on the unreported claim. The relative merits of the two positions can be discussed at the July 12 scheduling conference. For the purposes of this letter, I simply wish to note the differing views.

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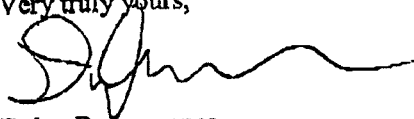
for those steps, as well as for filing objections and responses in the event an Amended Director's Report is issued.³

One issue that is not addressed in Judge Wildman's decision is how the issuance of the Amended/Supplemental Director's Report affects discovery. While Pioneer has already taken the 30(b)(6) deposition of IDWR regarding its original recommendation for 63-00179C, I presume Pioneer would be allowed to re-depose IDWR once the Amended/Supplemental Director's Report is issued, with the scope of the deposition being limited to that document.

Because the injury/enlargement hearing process only relates to 63-00179C, I believe that process can resume relatively quickly, as compared to the scheduling of the trial itself. Given how long this litigation has been on hold, in the proposed scheduling order, I have suggested a deadline for submitting injury/enlargement information to IDWR almost 60 days after the scheduling conference.

Thank you for your attention to this matter. I look forward to speaking with you, IDWR, and opposing counsel on July 12.

Very truly yours,



Dylan B. Lawrence

DBL/ilp

Enclosure

cc: Andrea Courtney, IDWR
Albert P. Barker, Barker Rosholt & Simpson

³ As reflected in Pioneer's previous Objection to IDWR's Notice of I.C. § 42-1425 Fact-Finding Hearing (Nov. 19, 2010), Pioneer does not necessarily agree with the Aberdeen-Springfield opinion's conclusions regarding the procedures governing a Section 42-1425 hearing. While Pioneer understands IDWR's position that that opinion's statements regarding the Section 1425 hearing procedures now constitute law of the case in the SRBA, it is also possible that those statements were *dicta*, as it appears that the issue that had been raised and briefed by the parties was a narrow one over whether denial of a request for a Section 1425 hearing in that particular case was error, not over the specifics of the Section 1425 hearing procedures. Pioneer is still evaluating these issues. By submitting the proposed scheduling order, Pioneer is not waiving its right to request a more formal Section 42-1425 hearing.

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

Subcase Nos. 63-00179C 63-32580

[PROPOSED] TRIAL SCHEDULING ORDER

A scheduling conference was held on July 12, 2011. The following dates shall govern the conduct of these subcases through trial:

Re-opening of Discovery. The prior Trial Scheduling Order closed discovery as of November 19, 2010. With the issuance of this Order, discovery may resume.

September 9, 2011	5:00 PM	Submission of Injury/Enlargement Information. For subcase 63-00179C, this is the deadline for submission of information and documentation to IDWR regarding injury/enlargement, pursuant to Idaho Code Section 42-1425.
November 11, 2011	5:00 PM	Amended/Supplemental Director's Report. Deadline for IDWR's issuance of an Amended Director's Report, if any, in subcase 63-00179C. Also, the deadline for a Supplemental "706" Director's Report explaining IDWR's analysis of injury/enlargement and the basis for its Amended Director's Report, or its decision not to amend its previous Director's Report recommendation.
December 2, 2011	5:00 PM	Objections. Deadline for filing of objections to the Amended Director's Report, if any, in subcase 63-00179C. Objections shall be limited to injury/enlargement issues.

December 30, 2011

5:00 PM

Responses. Deadline for filing of responses to objections to the Amended Director's Report, if any, in subcase 63-00179C.

Hearing on Motion for Summary Judgment. Motions for summary judgment shall be filed, noticed for hearing, and actually heard by this deadline. The filing and service of the motion, affidavits, and briefing shall be conducted in compliance with I.R.C.P. 56(c). The date and time specified herein has been reserved for summary judgment oral arguments in this subcase. If a motion for summary judgment is filed, the hearing will be held at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho.

Written Discovery Served and Responses Completed; Witness and Exhibit Lists Exchanged. Deadline for completion of all written discovery, meaning that all written discovery is served and response is complete, including all interrogatories, request for production/inspections and admissions. Motions to compel should be filed accordingly so as to accommodate this deadline. Deadline for exchange of final witness and exhibit lists.

Depositions Completed. Deadline for taking of all lay and expert witness depositions.

Final Pre-Trial Conference; Hearing on Pre-Trial Motions. Pursuant to I.R.C.P. 16, a final pre-trial conference will be held at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 215-446-0193 and when prompted entering the code 675342. This time will also be reserved to hear pre-trial motions.

Trial. The trial will be held at Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho.

DATED this _____ day of _____, 2011.

By _____
THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of _____, 2011, I caused a true and correct copy of the foregoing [PROPOSED] TRIAL SCHEDULING ORDER to be served by the method indicated below, and addressed to the following:

MASON CREEK DITCH COMPANY

Represented by:
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Boise, ID 83701-2139
Phone: 208-336-0700

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile

PIONEER IRRIGATION DISTRICT

Represented by:
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Director
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Deputy Clerk