

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for Twin Falls Canal Company

2-22
RECEIVED

FEB 23 2012

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

Case No. 39576

)
) **Subcase Nos.: 1-4, 1-10, and 1-209**
)
) **MEMORANDUM IN SUPPORT OF**
) **TFCC'S MOTION FOR**
) **PROTECTIVE ORDER**
)
)

COMES NOW, the Claimant, Twin Falls Canal Company ("TFCC"), by and through its undersigned attorneys of record, and submits this memorandum in support of its *Motion for Protective Order* in the above-referenced subcases. For the reasons set forth below the Court should issue an order protecting TFCC from certain discovery in this proceeding.

INTRODUCTION

The SRBA is a lawsuit not a permanent water court. Because of the magnitude of the case and the way *the SRBA is procedurally structured a "point in time" approach must be taken with respect to investigating, reporting, and adjudicating the rights.* For example, absent subsequent administrative changes, IDWR *reports the status of a water right as of the date of inception of the SRBA.*

Memorandum Decision & Order on Challenge; and Order of Partial Decree (Wood v. Troutt) ("Memo Decision"), Subcase 65-05663B, at 21 (May 5, 2002) (emphasis added).

The SRBA commenced on November 19, 1987. The date is crucial for purposes of IDWR's investigation and recommendations filed with the Court. Moreover, the date is also critical for purposes of the partial decrees issued by the Court. To provide a consistent decree for all water right holders in the Snake River Basin, the Court and the Legislature have required the "point in time" approach for the adjudication of all claims in the basin. *See Memo Decision* at 21; *see e.g.*, Idaho Code § 42-1427.

Despite this requirement and over 20 years of common practice in the SRBA, the City of Pocatello ("City") refuses to follow the law and is proposing a "new" paradigm for the adjudication of TFCC's water rights. The City has erroneously submitted numerous discovery requests to TFCC seeking information beyond the scope of this proceeding. Specifically, the City has requested information related to the elements and use of TFCC's water rights that post-dates November 19, 1987. Although such information could be relevant or admissible in the current administration of TFCC's water rights, such information is outside the scope of the SRBA, not relevant, and should not be discoverable. Moreover, there is no legal basis to treat TFCC's water rights differently than the thousands of other claims already recommended and partially decreed. The City's requests place an impermissible and unreasonable burden on TFCC that should be addressed by this Court. Therefore, the Special Master should issue a protective order limiting the scope of discoverable material to documents and information that pre-dates November 19, 1987.

STATEMENT OF FACTS

The City served its first discovery requests on TFCC on January 11, 2012. *See Ex. A to Arrington Aff.* Among the requests, the City seeks information relating to the use of TFCC's water rights after the commencement of the SRBA.

For example, the City's discovery includes the following requests:

Interrogatory No. 4: If **YOU** contend that total acreage that was actually irrigated by water diverted pursuant to the **TFCC CLAIMS** on the date the **TFCC CLAIMS** were filed was 196,162 acres, please state the basis for **YOUR** contention.

Request for Production No. 4: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 4.

Request for Admission No. 2: Please admit that the total acreage that was actually irrigated by the **TFCC CLAIMS** in 2009 was less than 196,162 acres.

Request for Production No. 5: If **YOU** deny Request for Admission No. 2, please **PRODUCE** all **DOCUMENTS** in support of **YOUR** contention.

...

Request for Production No. 8: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 7 for the time periods of January 1, 1900 through August 2, 1989 and August 3, 1989 through December 31, 2011.

...

Request for Production No. 9: Please **PRODUCE** all **DOCUMENTS** in support of any contention that **YOU** have made in response to Interrogatory No. 8 for the time periods of January 1, 1900 through August 2, 1989 and August 3, 1989 through December 31, 2011.

...

Request for Production No. 12: If **YOU** contend that **TFCC** requires 1,844,417 acre-feet during the irrigation season, please **PRODUCE** all **DOCUMENTS** reflecting such usage from January 1, 1900 through August 2, 1989 and August 3, 1989 through December 31, 2011.

...

Request for Production No. 14: Please **PRODUCE** all **TFCC** newsletters or other regular, periodical **COMMUNICATIONS** between **TFCC** and its shareholders from 1903-1990. This request for production specifically excludes records related to invoicing.

Request for Production No. 15: Please **PRODUCE** all correspondence, **DOCUMENTS**, or memoranda **RELEVANT** to **COMMUNICATIONS** between Water District 01 and **TFCC** representatives regarding the

administration of the water rights sought in the **TFCC CLAIMS** from January 1, 1903 through August 2, 1989 and August 3, 1989 through December 31, 2011.

Request for Production No. 16: Please **PRODUCE** all correspondence, **DOCUMENTS**, or memoranda **RELEVANT** to **COMMUNICATIONS** between IDWR and **TFCC** representatives regarding the administration of the water rights sought in the **TFCC CLAIMS** from January 1, 1903 through August 2, 1989 and August 3, 1989 through December 31, 2011.

Ex. A to *Arrington Aff.* at 5-6 (emphasis in original).

In addition, while these requests explicitly seek post-SRBA commencement information, other requests could be construed as seeking information post-commencement as well. TFCC objected to and responded to the City's requests on February 17, 2012. TFCC filed the present motion to clarify the allowed scope of discovery and ensure the issues and elements are properly framed before the Special Master.

STANDARD OF REVIEW

The Idaho Rules of Civil Procedure apply in these subcases. *See* Administrative Order 1

§ 1.a. Civil Rule 26 allows the Court to enter protective orders in discovery:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matter relating to a deposition, the court in the district where the deposition is to be taken ***may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had ... (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.***

I.R.C.P. 26(c) (emphasis added).

A decision whether to grant such a motion is within the discretion of the trial court.

Selkirk Seed Co. v. Forney, 134 Idaho 98, 104 (2000); *Montalbano v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 837 (2011). The court's decision will not be overturned absent an abuse of discretion. *Id.*

ARGUMENT

The commencement of the SRBA on November 19, 1987 marks the point at which the Idaho Department of Water Resources (“Department” or “IDWR”) recommends claimants’ water rights and this Court determines the nature and extent of water rights claimed in the adjudication. *See* I.C. §§ 42-1420, 1427. Notably, in a recent memorandum submitted to the steering committee working on the form of the SRBA Final Unified Decree, the Department confirmed this approach. Ex. B to *Arrington Aff.* According to that memo, “the Department has considered that date [i.e. November 19, 1987] as the ‘point in time’ for which to make water right recommendations.” *Id.* at 1. In fact, recommendations for decreed rights are “based on use as of the 1987 commencement of the SRBA.” *Id.* at 3; *see also Id.* at 3-4 (discussing recommendations for licenses and beneficial use claims and confirming that all are based on use as of the commencement of the SRBA). IDWR has followed this approach since inception of the adjudication nearly 25 years ago. Tens of thousands of water rights have already been recommended and partially decreed based upon this law and procedure.

The SRBA Presiding Judge confirmed this “point in time” approach: “Absent subsequent administrative changes, IDWR reports the status of a water right as of the date of inception of the SRBA.” *Memorandum Decision & Order on Challenge; and Order of Partial Decree (Wood v. Troutt)*, Subcase 65-05663B, at 21 (May 5, 2002). The Court’s holding is law of the case in the SRBA and precludes the City’s discovery in these subcases. Therefore, the Special Master should apply the law and protect TFCC from discovery requests by the City seeking post-1987 information.

I. Statutes and SRBA Case Law Require the 1987 “Point in Time” Approach.

This “point in time” approach is consistent with the process required by the legislature. For example, section 42-1427 plainly requires IDWR to recommend water right elements not previously described in a license or decree as of the date of the adjudication, in this case November 19, 1987. The statute expressly states:

. . . [T]he legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.

(2) If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1209, Idaho Code, the director ***shall include*** in his report recommendations for those elements not defined by the prior license or decree ***based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication.***

I.C. § 42-1427 (emphasis added).

Clearly, the legislature has required IDWR to follow the “point in time” approach for previously undefined elements of a water right. Furthermore, both the accomplished transfer and enlargement statutes require that any change of use must have occurred prior to November 19, 1987 in order to be allowed in the adjudication. *See* I.C. §§ 42-1425 & 42-1426. The accomplished transfer and enlargement statutes provide a safe harbor to water users that made changes to their water rights prior to the commencement of the SRBA without following the application for permit or transfer procedures. For example, if a water user moved the point of diversion for a water right prior to November 19, 1987, the Court may recognize that change even if the water user failed to file a transfer application as required by Idaho Code § 42-222. Importantly, however, this protection is not provided to water rights that were changed after

November 19, 1987 (i.e. such changes must be accomplished through a formal transfer application).

Similarly, this Court has provided protections to water rights in the form of a tolling of the forfeiture time frame during the SRBA litigation. *See Memo Decision, supra* at 8-22. This protection finds its roots in the public's interest in having the "timely completion of the SRBA." *Id.* at 20. Indeed, the SRBA would never be able to be completed if every time a forfeiture period accrued prior to the issuance of the partial decree, the Court had to entertain a new cause of action within a particular subcase." *Id.* at 21. Accordingly, "the SRBA is procedurally structured a 'point in time' approach." *Id.* The statutes and governing law in the SRBA clearly show that a water right is recommended and decreed based upon the extent of use up to and as of 1987.

II. IDWR Procedure / Application in TFCC Subcases.

Consistent with the statutes and governing law in the SRBA, the Department's Claim Investigation Handbook documents the "point in time" approach. Ex. B to *Arrington Aff.* (Attachments A & B to Memo). For example, as to the place of use element of a water right, the Handbook provides:

IDWR will start with the 1987 information because of the accomplished transfer statute. Idaho Code § 42-1425. The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA. ***Therefore, IDWR generally will recommend beneficial use water rights as they exist as of the commencement.*** IDWR will allow the objection process provided in Idaho Code § 42-1425(2)(a) to raise issues of injury and will not do so in its investigation.

Id. at Attachment B (emphasis added).

IDWR followed the established law and procedure in TFCC's subcases. During his deposition in this matter, Doug Jones, one of the Department agents responsible for the

recommendations in these subcases, confirmed that the recommendations reflect water use and development as of the commencement of the SRBA.

A. [MR. JONES]: ... And our statutory authorization is to acknowledge what was irrigated as of 1987 and in relation to what's claimed.

Ex. C to *Arrington Aff.* at 40, lns. 9-11.

Q. [MS. PEMBERTON]: So when you reviewed this information, were you trying to determine the number of irrigated acres in 1987 or the number of irrigated acres after 1987?

A. [MR. JONES]: My bright line focus was the land-use practice and the extent of irrigation in 1987.

Id. at 41-42.

Q. [MS. PEMBERTON]: And when you say the actual extent of irrigation, are you again basing that statement on 1987 GIS imagery?

A. [MR. JONES]: That is correct.

Id. at 49, lns. 12-15.

Q. [MS. PEMBERTON]: Okay. So when there was an ambiguity in the 1987 imagery, you looked at the 2004 and 1992 imagery to determine what was happening in 1987?

A. [MR. JONES]: That is correct.

Q. And it wasn't an attempt to review post '87 irrigation practices?

A. No, ma'am.¹

Id. at 85, lns. 5-11.

¹ During his deposition, Mr. Jones testified that whenever there was an ambiguity as to whether certain acres were being irrigated in 1987, he referred to aerial photos from 1992 and 2004 to clarify the ambiguities. Ex. C at 80-81; *see also*, *Supplemental Director's Report* at 7 ("When there were ambiguities with the 1987/1988 NAPP imagery . . . imagery from 1992 and 2004 was examined in order to aid in interpreting what was occurring on the ground."). This spot-check verification was performed based upon the available aerial photos in IDWR's possession (Mr. Jones confirmed that IDWR did not have any pre-1987 photos to review at the time). *See* Ex. C at 78, ln. 25 – p. 79, lns. 1-6. Mr. Jones further testified, however, that this review was only to clarify ambiguities in the 1987 information and not to consider post-1987 information as to the elements or development of the water right. *Id.* at 40-42.

In fact, as Mr. Jones confirmed, the Department did not consider the extent of use after 1987:

Q. [MS. PEMBERTON]: In making your recommendations, did you consider whether Twin Falls Canal Company's irrigated acres were reduced after 1987.

A. [MR. JONES]: No, ma'am.

Id. at 52, lns. 18-21.

Mr. Jones further testified that this is the same process that has been used for thousands other recommendations he had made in the SRBA:

Q. [MR. BUDGE]: You mentioned earlier that your focus in recommending acreage was to determine the acreage irrigated as of 1987. Is that the same process you've used in making other water right recommendations in the SRBA?

A. [MR. JONES]: Yes.

Id. at 57, lns. 13-18.

Michael Holliday, the other Department agent responsible for TFCC's recommendations, and the agent that worked on all other Basin 01 water rights, confirmed that the Department did not "review any diversion records after 1987." Ex. D to *Arrington Aff.* at 39, lns. 4-6; *see also Id.* at 71, lns. 7-17 ("my recommendations were based on the decrees and on the – on the 1987 and prior use"). Consistent with Mr. Jones' testimony, Mr. Holliday confirmed that this was the procedure he followed for all other Snake River water rights he recommended in Basin 01:

Q. [MR. THOMPSON]: did you go through that sort of process for similar irrigation claims made by other irrigation entities in Basin 01?

A. [MR. HOLLIDAY]: Yes. Yes, I tried to be consistent in the way that I did recommendations, looking at decrees, licenses, beneficial-use claims, trying to determine the extent of beneficial use for each one of those water rights and using the best information that was available in order to make the most accurate recommendation that I could.

Ex. C to *Arrington Aff.* at 58, lns. 1-10.

Notwithstanding the established procedure in the SRBA, and the above testimony from IDWR, the City's discovery requests seek information that post-dates the commencement of the SRBA. The City seeks to undo the certainty of the established law and procedure in the SRBA and unlawfully single out TFCC's water rights for a completely "new" paradigm. Yet, such information has no bearing on the use of TFCC's water rights prior to November 19, 1987, or for purposes of decreeing water rights in the SRBA. Such post-commencement information is not relevant to the extent of TFCC's water right prior to November 19, 1987 and, therefore, is not discoverable. Idaho R. Civ. P. 26(a) (parties may only discover information that is "relevant to the subject matter involved in the pending action").

Furthermore, requiring the discovery of information that is not relevant – such as the post-commencement information sought in the City's discovery requests – would create an undue burden and expense. This is particularly burdensome where, for example, the discovery requests seek information regarding "the total acreage that was actually irrigated by the **TFCC CLAIMS** in 2009." *See* Discovery Requests *supra* (emphasis in original). Such information is not relevant in any respect to the use of TFCC water rights prior to 1987. Presumably, if 2009 is relevant then TFCC would have to respond to any and all requests for information for all years post-1987. There is no basis to discover or require production of documents post-1987 where such information is not relevant to IDWR's recommendation or the partial decrees to be entered by this Court.

Likewise, requiring TFCC to disclose post-commencement information would be inequitable. Indeed, as the Department's memo makes clear, it has long been the practice of the Court and Department to treat the SRBA with a "point in time" approach. Based on this

approach, recommendations and decrees have been issued based on the development and use of water as of November 19, 1987. Ex. B to *Arrington Aff.*; see also Ex. C to *Arrington Aff.*, at 57, lns. 13-18 (“MR. BUDGE: Is that the same process you’ve used in making other water right recommendations in the SRBA? MR. JONES: Yes”). Mr. Holliday further confirmed that was the process used for all other irrigation claims in Basin 01. It would be contrary to law and inequitable to set a different standard and requirement for TFCC when all other water rights in the SRBA, including those within Basin 01, were recommended and decreed based upon a different procedure.

Importantly, the Department did not consider the information and this Court will not enter a decree based on it either. As such, this Court should limit the scope of discovery to those documents and information that pre-dates the commencement of the SRBA.

CONCLUSION

There is no dispute that the recommendations for TFCC’s water rights are based on the development and use of those water rights prior to the commencement of the SRBA – i.e. November 19, 1987. This Court has made clear that decrees are based on that “point in time.” *Memorandum Decision & Order, supra*. Accordingly, the Court should enter a protective order limiting the scope of discovery to documents and information pre-dating the commencement of the SRBA.

DATED this 22nd day of February, 2012.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson
Paul L. Arrington

Attorneys for Twin Falls Canal Company

CERTIFICATE OF SERVICE

I hereby certify that on the 22 day of February, 2012, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF TFCC'S MOTION FOR PROTECTIVE ORDER** on the person(s) listed below, by U.S. Mail, and electronic mail if available:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

U.S. Bureau of Reclamation
Regional Director, PN Region
1150 N. Curtis Rd., Ste. 100
Boise, ID 83706-1234

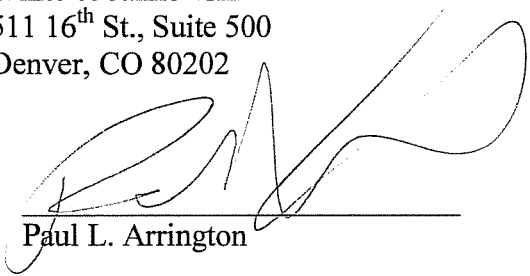
Randall C. Budge
Candice M. McHugh
T.J. Budge
Racine Olson
101 S. Capitol Blvd, Suite 300
Boise, ID 83702

U.S. Department of Justice
Division of Env. & Natural Resources
550 W. Fort Street, MSC 033
Boise, ID 83706-1234

Idaho Attorney General's Office
Natural Resources Division
P.O. Box 44449
Boise, ID 83711-4449

A. Dean Tranmer
P.O. Box 4169
Pocatello, Idaho 83201

Sarah Klahn
Mitra Pemberton
White & Jankowski
511 16th St., Suite 500
Denver, CO 80202


Paul L. Arrington