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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAY 25 2012	
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	)	Subcases 01-9, 01-17 and 01-2050 ¹
	)	
	)	ORDER DENYING MOTION TO STRIKE AND
	)	MOTION IN LIMINE AND ORDER SETTING
Case No. 39576	)	MANDATORY SETTLEMENT CONFERENCE
_____	)	

BACKGROUND

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, IDWR Lower Basin 01 (Part 1)* on May 15, 2006. The Director recommended claim 01-9 to the Milner Irrigation District for 121 cfs from the Snake River to irrigate 13,335 acres (combined total acreage of 45-463, 01-9, 01-17 and 01-2050) within the Milner Irrigation District from March 15 to November 15 with a priority date of April 1, 1939, based on a decree.

Supplemental Director's Report

On the parties' agreement, the Special Master entered a *Summary Judgment Schedule Order* in the three subcases on February 3, 2012.² As part of the *Order* to assist the parties prepare for summary judgment proceedings and later trial, IDWR agreed to file a supplemental director's report (I.R.E. "706 report") no later than February 29, 2012.

¹ The present matter concerns *Motions* filed only in subcase 01-9, but the three related subcases proceed together.

² A *Second Amended Summary Judgment Schedule* was entered on March 16, 2012, in subcase 01-9 setting a deadline to file motions for summary judgment (June 29, 2012) and the hearing on motions for summary judgment (August 23, 2012, 9:30 a.m.). In that *Order* and *Second Amended Summary Judgment Schedule*, the Special Master wrote: "The parties noted that because IDWR can no longer support its earlier recommended priority date for 01-9, as stated in its February 29, 2012 *Supplemental Director's Report*, the matter will likely require summary judgment proceedings." That *Second Amended Summary Judgment Schedule* remains in effect.

On February 29, 2012, IDWR filed its *Supplemental Director's Report Regarding Subcase Nos. 01-09, 01-17 & 01-2050*. The Director wrote:

[D]uring the preparation of this Report, it was determined that the recommended priority for 01-09 should be changed from April 1, 1939 to July 12, 1967, and that the recommended quantity should be changed from 121 cfs to 113 cfs. . . . The Department's recommendations do, however, recognize the priority dates and number of acres that were irrigated when water was put to beneficial use under each of the rights.

Amended Reports

IDWR filed its *Amended Director's Report, Subcase No. 01-9* on March 30, 2012. There were no changes in the recommended digital boundary, but the Director now recommended the claim for 113 cfs with a priority date of July 12, 1967. The same date, IDWR filed a lengthy *Amended Supplemental Director's Report Regarding Subcase Nos. 01-09, 01-17 & 01-2050*. The Director noted "Milner's water use under the subcases at issue was developed over time" and therefore the quantity and priority date in subcase 01-9 must be amended to recognize when water was put to beneficial use.

Milner's Motion to Strike

On April 27, 2012, Milner filed its *Motion to Strike* in subcase 01-9 arguing the Special Master was without authority to order an amended or supplemental director's report and the IDWR Director, who is not a party, cannot file pleadings without a specific request from the Court. The District noticed up a hearing on its *Motion* before SRBA Presiding Judge Eric J. Wildman.

State's Response

The State of Idaho filed its *Response to Milner Irrigation District's Motion to Strike* on May 4, 2012. It argued the District's *Motion* before Judge Wildman, and not the Special Master, is an improper attempt to circumvent permissive review; subcase 01-9 continues as a live controversy; and denial of the *Motion* will not prejudice the District.

Presiding Judge's Bench Order

Milner's *Motion to Strike* was heard by Judge Wildman on May 11, 2012, when the Judge ruled from the bench on "procedural grounds." The judge held Milner read the Special Master's May 16, 2006 *Order of Reference* "too narrowly." The Judge then stated:

The subcase is then referred to the special master, and the special master is then vested with and retains jurisdiction over the subcase until a special master's report

and recommendation is filed and the time for filing motions to alter or amend has expired; unless, for whatever reason, the court rescinds the order of reference. . . . [I]n this case, the special master has not issued a special master's report and recommendation and so, as a result, still has jurisdiction over the matter, you know.

Milner's Amended Motions

On May 14, 2012, Milner filed its *Motion to Strike / Motion in Limine* in subcase 01-9 and noticed the matter for hearing before the Special Master. This time, Milner wrote:

Since there were no live objections to the Director's original recommendation for Milner's water right 1-9 as of February 29, 2012, the Special Master was without authority to order an amended or supplemental director's report. Likewise, the Director of the Idaho Department of Water Resources, who is not a party to these proceedings, cannot file pleadings without a specific request from the Court.

State's Response

The State filed its *Response to Milner Irrigation District's Motion to Strike / Motion in Limine* on May 18, 2012. The State argued the Presiding Judge has already ruled the Special Master retained jurisdiction and authority over subcase 01-9; IDWR's *Amended Director's Report* and *Amended Supplemental Director's Report* were authorized by the March 16, 2012 *Second Amended Summary Judgment Schedule*; and the February 29, 2012, *Supplemental Director's Report Regarding Subcase Nos. 01-09, 01-17 & 01-2050* properly discussed subcase 01-9.

Milner's Reply

Milner argued the Presiding Judge did not decide issues presented in its present *Motions* ("the merits"); the Special Master's authority to order an amended director's report was removed when all objections were resolved; and the Director had no authority to amend his recommendation through an amended director's report and amended supplemental director's report.

Hearing

The Special Master heard Milner's *Motion to Strike / Motion in Limine* on May 24, 2012, in court and via telephone and video conference. Travis L. Thompson appeared for Milner; Michael C. Orr appeared for the State; Candice M. McHugh appeared for the Idaho Ground Water Districts; Mitra M. Pemberton appeared for the City of Pocatello; Jerry R. Rigby appeared for the Blackfoot Irrigation Company, Fremont Madison Irrigation District and United Canal

Company; David W. Gehlert appeared for the United States of America, Department of Interior, Bureau of Reclamation; and Chris M. Bromley appeared for IDWR, along with Ray Williams.

DISCUSSION

This matter warrants a deliberative yet quick decision because of the importance of the issues presented and the current summary judgment schedule. These three subcases are not set for trial because the parties agreed they will likely be resolved in mandatory settlement or ultimately in summary judgment proceedings.

It is settled that the Special Master has the authority to hear and decide disputed matters leading up to the filing of a report and recommendation to the Presiding Judge. Until that time, absent a motion and recommendation for permissive review, the Special Master is left to determine all interlocutory matters such as Milner's present *Motions*.

These three subcases have been considered together at the parties' request and it is likely all three will be resolved as a package whether by negotiated settlement or summary judgment. For those reasons, the parties agreed back in February that IDWR would prepare and file a supplemental director's report, called a 706 report, to help them prepare for summary judgment proceedings and possible trial.

The fact that one of the three claims was considered settled does not change the Director's duty to report all three claims nor does it alter his prerogative to reconsider any one of the claims in light of newly considered evidence. While the Director is not a party to the Adjudication, he is the Court's "independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported." It would be anomalous, and frankly a breach of the Director's duty to the Court, to suggest he can ignore compelling evidence that his original recommendation is wrong – all because he is not a party to the Adjudication or the parties consider the subcase settled.

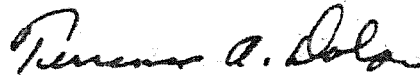
The parties agreed the Director's amended recommendation in subcase 01-9 has been sufficiently noticed and all parties have had ample opportunity to object. At this point, no one can reasonably claim surprise and undue prejudice. Now it is time to move forward to final resolution of all three claims.

ORDER

THEREFORE, IT IS ORDERED that:

1. Milner's *Motion to Strike / Motion in Limine* in subcase 01-9 is **denied**;
2. A mandatory settlement conference in subcases 01-9, 01-17 and 01-2050 shall be held on Thursday, June 1, 2012, 9:30 a.m., at the Idaho Water Center, 322 E. Front Street, Boise, Idaho. Special Master Theodore R. Booth shall be the settlement moderator.

DATED May 25, 2012.



TERRENCE A. DOLAN

Special Master

Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOITON TO STRIKE AND MOTION IN LIMINE AND ORDER SETTING MANDATORY SETTLEMENT CONFERENCE was mailed on May 25, 2012, with sufficient first-class postage to the following:

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ABERDEEN AMERICAN FALLS GROUND
BINGHAM GROUND WATER DISTRICT
BONNEVILLE-JEFFERSON GROUND
JEFFERSON CLARK GROUND WATER
JEFFERSON-CLARK GROUND WATER
MADISON GROUND WATER DISTRICT
MAGIC VALLEY GROUND WATER
NORTH SNAKE GROUND WATER

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