

RECEIVED

AUG 24 2012

DEPARTMENT OF
WATER RESOURCES

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
195 River Vista Place, Suite 204
Twin Falls, Idaho 83301-3029
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Roger D. Ling, #1018
P.O. Box 623
Rupert, Idaho 83350
Telephone: (208) 434-2717
Facsimile: (208) 436-6804

*Attorney for Burley Irrigation
District*

*Attorneys for North Side Canal Company
and Twin Falls Canal Company*

**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	)	Subcase Nos. 1-219, 1-10034
	)	
	)	MOTION FOR PARTIAL
Case No. 39576	)	CONSOLIDATION & SUPPORTING
	)	POINTS AND AUTHORITIES
	)	
	)	
	)	
	)	

COME NOW, Objectors BURLEY IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, and TWIN FALLS CANAL COMPANY (hereinafter collectively "Canal Companies"), by and through counsel of record, and pursuant to AO1(11) and I.R.C.P. 42(a), and hereby move this Court to partially consolidate the above-referenced matters with subcase nos. 1-2064 et al. (American Falls / Palisades) for a single trial scheduled to begin December 10, 2012. This motion is supported by the *Affidavit of Travis L. Thompson* filed together herewith. For the reasons set forth below, the Court should separate and partially consolidate the common issue of fact and law.

INTRODUCTION

The Canal Companies request an order of separation and partial consolidation of a distinct issue concerning necessary remarks to include on the Lake Walcott storage water right 1-219. As set forth below, this common question of fact and law should be addressed in a single proceeding rather than through multiple trials. Although storage water right 1-219 was following the litigation track for the natural flow claims (1-4 et al, 37 subcases), it should have been grouped together with the storage water rights (1-2064 et al.). Since there does not appear to be any dispute as to the elements for water right 1-219, the elements could be separated and properly addressed in a partial recommendation from the Special Master. The Canal Companies' motion meets the standard under AO1(11) and I.R.C.P. 42(a) and will provide a sensible and consistent path forward for resolution of all the Basin 01 storage water rights.

BACKGROUND

IDWR filed its Director's Reports for the U.S. Bureau of Reclamation's (Reclamation) Basin 01 storage water right claims in December 2006 (Basin 01, Part 2 Report) including an amended report for water right 1-219. IDWR recommended a common remark for the storage water rights at Lake Walcott Reservoir (1-219), American Falls Reservoir (1-2064), Palisades Reservoir (1-2068), and Jackson Lake Reservoir (1-4055, 1-10044, 1-10045). That remark, addressing the place of use, reads as follows (example from 1-219):

Place of use for irrigation is Lake Walcott, provided, however, that water under this right may be temporarily held in the unoccupied space of any of the reservoirs upstream of Milner Dam, located at township 10S, range 21E, sections 28 and 29, when determined by the Department of Water Resources, the Water District advisory committee, and the United States Bureau of Reclamation that such temporary storage will maximize the storage of water upstream of Milner Dam.

See Ex. A to Affidavit of Travis L. Thompson ("Thompson Aff.").

Several parties filed objections to IDWR's recommendations, including Reclamation and the Canal Companies. Between late 2007 and 2011, the parties engaged in litigation over various "hydropower" issues associated with the facilities at Minidoka, American Falls, and Palisades Dams. Also, in 2011 the parties engaged in settlement meetings in an effort to resolve the objections to IDWR's recommendations, both to the elements and the remarks. The parties were successful in part, filing a *Stipulation to Resolve Certain Objections* on January 26, 2012. Thereafter, the parties filed summary judgment motions resulting in the Court's recent *Order on Motions for Partial Summary Judgment* (July 27, 2012).

Although the American Falls and Palisades storage claims have followed the same track in the SRBA, the storage water rights for Lake Walcott (1-219, 1-10034) were mistakenly grouped with and followed the litigation track of the Basin 01 natural flow water rights (i.e. 1-4 et al., 37 subcases). The litigation over the natural flow water rights culminated with the Special Master's *Order on Motions for Summary Judgment* (December 11, 2009) and the Presiding Judge's decision affirming that order in his *Memorandum Decision and Order on Permissive Review* (June 21, 2011). Since entry of the Presiding Judge's decision last year, all of the 37 water rights included in that litigation, except 1-219 and the natural flow rights¹ held by Reclamation for Minidoka Irrigation District, have gone to partial decree.

On August 20, 2012, several Spaceholders² with property right interests in Reclamation's storage water rights in the Upper Snake River Basin filed a *Unified Stipulation* ("Stipulation"). See Ex. B to *Thompson Aff.* The Stipulation globally addresses all issues remaining in the

¹ Water right claims 1-211A and 1-214A. Standard Form 5s for these claims have been signed by certain parties and are expected to be filed prior to the scheduled trial on August 30-31, 2012.

² A&B Irrigation District, American Falls Reservoir District #2, Blackfoot Irrigation Company, Burley Irrigation District, Falls Irrigation District, Fremont-Madison Irrigation District, Idaho Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

storage water right subcases.³ The Spaceholders have agreed upon certain remarks to be included in the various storage water rights, as well as water right descriptions for the claims at Island Park, Grassy Lake, and Jackson Lake Reservoirs. *See* Ex. B to *Thompson Aff.* Reclamation supports the Stipulation. The terms of the Stipulation are non-severable. If approved, and when read together with the stipulation filed on January 26, 2012, the Stipulation would finally resolve all of Reclamation's remaining storage water right claims in the Upper Snake River Basin.

IDWR has circulated proposed Standard Form 5s to resolve the outstanding objections to the Lake Walcott storage water rights (1-219, 1-10034). *See* Ex. C to *Thompson Aff.* Although not all parties have signed the SF5 yet, there appears to be no dispute as to the proposed water right elements. Indeed, the Canal Companies agree with the elements as described in the SF5 for water right 1-219. However, comparing the SF5 to the Stipulation it is obvious there is still a minor disagreement as to the proposed remarks. With respect to the determination of implementing the "Temporary Upstream Storage" remark the SF5 lists "the Department of Water Resources," whereas as the remark in the Stipulation lists the "Water District 01 Watermaster." *Compare* Exs. B, C to *Thompson Aff.* In addition, the Stipulation includes the "MID Exchange" remark clarifying Minidoka Irrigation District's right to make annual exchanges and designate storage for delivery and carryover, whereas the SF5 leaves that remark out.

Presently, the trial for the Lake Walcott storage water right (1-219) is set to begin on August 30, 2012. However, the trial for the American Falls (01-2064) and Palisades (1-2068) storage water rights is set to begin on December 10, 2012. Although the parties have focused their settlement and litigation efforts on the same remark issues in the American Falls/Palisades

³ The exception is an issue concerning "refill" which was addressed in the Special Master's *Order on Motions for Partial Summary Judgment* (July 27, 2012), and is pending before the Presiding Judge on a *Petition to Designate Basin-Wide Issue* (Subcase No. 00-92017) (hearing on petition scheduled for September 10, 2012).

subcases, they have not been formally addressed in the context of the Lake Walcott subcases. Similar to the mistaken grouping with the natural flow claims, the parties have overlooked addressing the Lake Walcott storage right with the rest of the storage claims in settlement negotiations.

Since both trials will address the same issue regarding the “Temporary Upstream Storage” and “MID Exchange” remarks, partial consolidation of the subcases is appropriate and will save the Court, IDWR, and the parties considerable time and expense. Moreover, addressing the issue in a single decision from the Special Master will promote judicial economy and prevent any prospect of different or inconsistent procedural tracks in the various subcases.

ARGUMENT

I. Separation and Consolidation of the “Remarks” Issue is Appropriate to Promote Judicial Economy and Avoid Unnecessary Costs or Delay.

The SRBA Court’s Administrative Order #1(11) provides the following with respect to consolidation:

Any matter at issue in any proceeding in the adjudication, including portions of or entire subcases, may be consolidated with or separated from any other matter at issue in the adjudication. Any party to a subcase may move for consolidation or separation of claims or issues. The Presiding Judge or Special Master may order consolidation or separation on the basis of such motion or on their own. I.R.C.P. 42. . . .

NOTE: A motion to consolidate subcases is appropriate in situations where common issues of law or fact present themselves in more than one subcase and resolution of those issues can be most expeditiously and effectively achieved through presentation to the Presiding Judge or a Special Master in consolidated hearings.

AO1(11) (emphasis in original).

The Idaho Rules of Civil Procedure follow the SRBA Court’s procedure and similarly provide:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

I.R.C.P. 42(a).

As described above, the “Temporary Upstream Storage” and “MID Exchange” remarks issues are currently pending in both the Lake Walcott (1-219) and American Falls (1-2064) / Palisades (1-2068) subcases. These remarks present a “common issue of fact and law” to resolve. Although the Spaceholders and Reclamation support resolution of the issue as set forth in the Stipulation, IDWR’s recommendation is slightly different. Whether IDWR and the parties can resolve these minor differences remains to be seen, but the parties are working toward further negotiations and settlement.

Rather than proceed with two separate trials on the same issue, it is appropriate for the Court to separate and partially consolidate the remarks issue in a single proceeding. *See Harrison v. Taylor*, 768 P.2d 1321, 1330, 115 Idaho 588 (1989) (“When claims arise out of the same accident and one trial is sufficient to determine all the facts, separate trials would be a waste of time and expense.”). This Special Master recognized as much in the *Joint Order RE: Separating and Consolidating Common Issue from Subcases*, Subcase 00-92020 (Oct. 25, 2010). There, the Special Master recognized that, while “factual” issues that rely on “different facts” should proceed “individually,” when “overarching issues are identified, it may be appropriate to consider managing these subcases in a more efficient manner.” *Id.* at 1. The Special Master recognized that “common issues” can be “bifurcated and consolidated before on Special Master.”

Further, as the note in AO1(11) recommends, resolution of the issue “can be most expeditiously and effectively achieved through presentation” to the Special Master in a consolidated trial. Partial consolidation will promote judicial economy and save the Court,

IDWR, and parties from addressing the same issue in two different trials (merely a few months apart). *See Harrison*, 768 P.2d at 1330 (“Whenever the court is of the opinion that consolidation will expedite matters and will minimize expense upon the public and the parties, an order of consolidation should be made. . . . It is the policy of the law to limit the number of trials as far as possible.”). For example, it will be more expeditious and effective to have counsel and witnesses present at a single trial, rather than force them to travel to Twin Falls to present the same case and testimony twice.⁴ Moreover, if ongoing settlement discussions prove successful, no trial may be necessary.⁵

Finally, consolidation is warranted in this matter given the different procedural steps that may occur. If the Special Master proceeds with the trial on the issues in the Lake Walcott subcase (1-219), a decision and recommendation may be proceeding to challenge before the Presiding Judge either simultaneously or prior to the trial on the same issues in the American Falls / Palisades subcases. Given the unique process in the SRBA where a motion to alter or amend must be filed prior to any challenge to the Presiding Judge, the process can vary and may take a few or several months. Since the two trials are only scheduled a few months apart, it makes sense to consolidate the common issue and keep it on the same procedural track, assuming the litigation continues to trial. Moreover, given the likely agreement on the elements for the Lake Walcott claim (1-219), there will be no other issues for the trial scheduled for August 30, 2012. Clearly, consolidation of this issue is appropriate.

⁴ Although discovery is ongoing in the American Falls / Palisades subcases, it is likely that IDWR witnesses from either Boise and/or Idaho Falls would be involved to testify as to IDWR’s recommendation. Moreover, Reclamation witnesses from Boise and/or Burley would likely be called to testify as well.

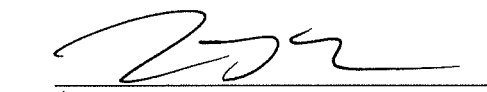
⁵ The parties and IDWR have set a meeting to discuss these issues on August 23, 2012.

CONCLUSION

The Canal Companies' motion meets the standard under AO1(11) and I.R.C.P. 42(a). Since the issues concerning the "Temporary Upstream Storage" and "MID Exchange" remarks are the same in both the Lake Walcott (1-219) and the American Falls (1-2064) / Palisades (1-2068) subcases, and the Court can hear and resolve the matter in a single trial, separation and partial consolidation is appropriate. For the reasons set forth above, the Canal Companies respectfully request the Court to grant their motion.

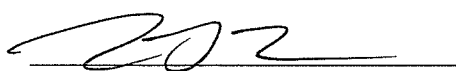
Dated this 22nd day of August, 2012.

BARKER ROSHOLT & SIMPSON LLP



Roger D. Ling

Attorneys for Burley Irrigation District



John K. Simpson
Travis L. Thompson
Paul L. Arrington

*Attorneys for North Side Canal Company and
Twin Falls Canal Company*

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2012, I served a true and correct copy of the foregoing **MOTION FOR PARTIAL CONSOLIDATION / SUPPORTING POINTS AND AUTHORITIES** 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

Jerry R. Rigby
P.O. Box 250
Rexburg, ID 83440-0250

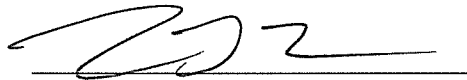
W. Kent Fletcher
Fletcher Law Office
P.O. Box 248
Burley, ID 83318

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

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

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


Travis L. Thompson