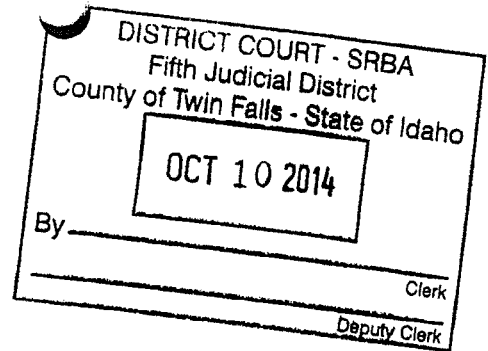


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

)
) Subcase Nos. 01-10614, 01-10615, 01-10616,
) 01-10617, 01-10618, 01-10620, 01-10621,
) 01-10622, 01-10623, 21-13161, 37-22806,
) 63-33732, 63-33733, 63-33734, 63-33737,
) 63-33738, 65-23531, and 65-23532
)

) **STATE OF IDAHO'S SCHEDULING**
) **PROPOSAL**
)

This Court's *Order Re: Scheduling Proposals* (Sep. 10, 2014) stated that if the parties agree to a stipulated scheduling proposal, it was to be filed by October 10, 2014. Otherwise, each party was to file its own scheduling proposal by that date.

The “Surface Water Coalition” filed its scheduling proposal on October 8, 2014.¹ The Coalition proposes consolidating these subcases, as well as the two pending late claims for Ririe reservoir and Henry’s Lake, into a unified proceeding. *SWC Proposal* at 2. The Coalition also proposes that these subcases be stayed pending Court-ordered mediation. *Id.* at 3-4. The State disagrees with the Coalition’s proposal and submits this alternative scheduling proposal.

State’s Scheduling Proposal

The State disagrees with the Coalition’s proposal to consolidate these subcases because they are based on claims of actual historic use of water (primarily for irrigation but in some cases for additional purposes), in different places, at different times, and by different users. Such factual questions are best resolved on a subcase-by-subcase basis rather than in consolidated proceedings. The State also disagrees with the Coalition’s proposal for Court-ordered mediation because the parties’ settlement negotiations have been productive and injecting a Court-ordered mediator at this point would delay negotiations and complicate settlement efforts.

In addition, these subcases involve competing federal and private claims to ownership of the same storage water rights for the same federal reservoirs, which implicates the Idaho Supreme Court’s decision *United States v. Pioneer Irr. Dist.*, 104 Idaho 106, 157 P.3d 600 (2007). Under *Pioneer*, the private claims are void as a matter of law and must be dismissed. This is a threshold question of law that should be resolved

¹ The “Surface Water Coalition” entities that filed the scheduling proposal were identified as A&B Irrigation District, American Falls Reservoir District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company. *Surface Water Coalition’s Proposed Trial Schedule/Motion For Settlement Conference & Court Ordered Mediation* (Oct. 8, 2014) (“*SWC Proposal*”). Two other irrigation entities, Falls Irrigation District and Hillsdale Irrigation District, were identified as part of the “Surface Water Coalition” in its motion to file late claims. *Memorandum In Support Of Motion To File Late Claims, Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, and 01-10619* (Jan. 31, 2013).

to clarify and narrow the issues for purposes of both litigation and potential settlement. The State raised the *Pioneer* question in the May 2013 hearing on the motions to file the late claims at issue and this Court determined the issue should await the Director's Reports.

The Director's Reports recommended the late claims be disallowed but did not address the *Pioneer* question.² The State proposes, therefore, that this Court set a briefing and hearing schedule on the State's motion for summary judgment based on *Pioneer* (filed herewith), with responses to be filed no later than November 10, and the reply filed on November 24. If this Court's calendar allows, the motion could be heard before December 25.³ After this Court resolves the State of Idaho's summary judgment motion, separate status conferences should be set in all remaining subcases. The pending motions for leave to file late claims for Ririe reservoir (a federal reservoir) and Henry's Lake reservoir (a private reservoir) do not involve competing claims and should proceed under their existing schedules.⁴ Comprehensive schedules should not be set for any of the late claims until this Court has resolved the State's summary judgment motion.

The grounds for the State's proposal are set forth below.

A. **The Competing Federal And Private Claims To Storage Water Rights In The Same Federal Reservoirs Raise A Threshold Question Of Law Under *United States v. Pioneer Irr. Dist.***

² *Reporter's Transcript, Monthly Status Conference* (May 21, 2013), at 24, 31. The State recently informed counsel for the Coalition that the State intended to file a summary judgment to resolve the *Pioneer* question before proceeding further in these subcases.

³ While this briefing and hearing schedule would allow the Court to expeditiously resolve the *Pioneer* question, it still provides more than sufficient time for the claimants to file responses and prepare for the hearing. See I.R.C.P. 56 (c) (providing that summary judgment motions must be served "at least twenty eight (28) days before the time fixed for hearing").

⁴ The Ririe motion is pending under Water Right Claim No. 25-14413. The Henry's Lake motion is pending under Water Right Claim No. 21-13193. Both motions are scheduled to be heard on November 18.

The claims in these subcases are for storage water rights for a number of different federal reservoirs, in several different basins: Lake Walcott, American Falls, Palisades, and Jackson Lake reservoirs in Basin 1 (Snake River above Milner Dam); Island Park reservoir in Basin 21 (Henry's Fork); Lucky Peak, Arrowrock, and Anderson Ranch reservoirs in Basin 63 (Boise River); Cascade and Deadwood reservoirs in Basin 65 (Payette River); and the Little Wood River reservoir in Basin 37. The United States has filed claims for all of these reservoirs. Various irrigation organizations have filed competing claims asserting full ownership of storage water rights for some of the federal reservoirs: Lake Walcott, American Falls, Palisades, Jackson Lake, Arrowrock, and Anderson Ranch.⁵

The need to resolve and reconcile competing federal and private claims of ownership of storage water rights for federal reservoirs in the Boise River basin and the upper Snake River basin implicates the Idaho Supreme Court's decision in *United States v. Pioneer Irr. Dist.*, 104 Idaho 106, 157 P.3d 600 (2007), which also involved competing claims to federal reservoirs by the United States and various irrigation organizations. As explained in the State of Idaho's summary judgment motion, the irrigation organizations' competing claims to full ownership of storage water rights for the federal reservoirs are

⁵ The United States' claims for Lake Walcott, American Falls, Palisades, Jackson Lake, Lucky Peak, Arrowrock, and Anderson Ranch are, in order: Subcase nos. 01-10622, 01-10620, 01-10621, 01-10623, 63-33734, 63-33732 and 63-33733. The Surface Water Coalition has filed competing claims for Lake Walcott (01-10617), American Falls (01-10616 and 01-10618); Palisades (01-10615), and Jackson Lake (01-10614). The Boise Project Board of Control has filed competing claims for Arrowrock (63-33737) and Anderson Ranch (63-33738). The following table summarizes the competing federal and private claims:

Reservoir	United States Claims	Board of Control Claims	Coalition Claims
Arrowrock	63-33732	63-33737	
Anderson Ranch	63-33733	63-33738	
Lake Walcott	01-10622		01-10617
American Falls	01-10620		01-10615, 01-10618
Palisades	01-10621		01-10615
Jackson Lake	01-10623		01-10614

void as a matter of law under *Pioneer*. This is a threshold question of law that can be resolved expeditiously and should be addressed to avoid unnecessary confusion, duplication, and a potential waste of time and resources in these subcases and in settlement negotiations. After the Court resolves the State of Idaho's summary judgment motion, separate status conferences should be set in each remaining subcase to set comprehensive schedules appropriate for the individual claims.

B. These Subcases Arise From Claims That Water Was Actually Applied To Beneficial Use And Must Be Resolved On A Subcase-by-Subcase Basis.

The starting point for determining how these subcases should proceed is the nature of the underlying claims: they are "beneficial use" claims.⁶ A "beneficial use" claim is based on the "constitutional method" of appropriation, the *sine qua non* of which is actual application of water to the claimed beneficial use:

Under the constitutional method of appropriation, appropriation is completed upon application of the water to the beneficial use for which the water is appropriated. When following the constitutional method, one "must depend upon actual appropriation, that is to say, actual diversion and application to beneficial use." *Basinger v. Taylor*, 36 Idaho 591, 598, 211 P. 1085, 1086–87 (1922).

United States v. Pioneer Irr. Dist., 144 Idaho 106, 110, 157 P.3d 600, 604 (2007). The claimed beneficial use must have occurred prior to 1971. *Id.*

A beneficial use claim "must be based upon evidence, not speculation." *City of Pocatello v. State*, 152 Idaho 830, 841, 275 P.3d 845, 856 (2012). The claimant has the burden of proving "with definite evidence" that the claimed beneficial use actually took place. *Id.* at 842, 275 P.3d at 857. The evidence must be sufficient to support "definite and certain findings as to the amount of water actually diverted and applied":

⁶ Each of the claim forms filed in these subcases states that the "Basis of Claim" is "Beneficial Use."

“Water rights are valuable property, and a claimant seeking a decree of a court to confirm his right to the use of water by appropriation must present to the court sufficient evidence to enable it to make definite and certain findings as to the amount of water actually diverted and applied, as well as the amount necessary for the beneficial use for which the water is claimed.” *Reno v. Richards*, 32 Idaho 1, at page 15, 178 P. 81, 86, *Federal Land Bank v. Union Cent. Life Ins. Co.*, 51 Idaho 490, at page 500, 6 P.2d 486; *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475.

Head v. Merrick, 69 Idaho 106, 109, 203 P.2d 608, 609 (1949) (emphasis added). The priority of a water right established under the “constitutional method” of appropriation “dates from the application of the water to a beneficial use.” *City of Pocatello*, 152 Idaho at 841, 275 P.3d at 856 (internal citation omitted).

The principal “end use”⁷ claimed in these subcases is “irrigation from storage.” The United States also has claimed additional uses at some of the other reservoirs: “power from storage” for Cascade, Deadwood, Anderson Ranch, American Falls, and Palisades; “municipal from storage” at Cascade and Anderson Ranch; and “streamflow maintenance from storage” at Lucky Peak.⁸

The issue in each of these subcases, therefore, is whether the claimant actually applied the quantity of water claimed, to the claimed use, at the time and in the place claimed. These are questions of historic fact: the claimed use either occurred or it did not. Each claim stands or falls on this inquiry. Such individualized factual questions do not lend themselves to resolution in unified or consolidated proceedings. The Coalition

⁷ As the Idaho Supreme Court stated in its decision regarding Basin-Wide Issue 17, the “purpose of use” element of a storage water right generally is broken into two parts. The first authorizes storage for a particular purpose (i.e., “irrigation storage,” or “power storage”). The second authorizes the subsequent use of the stored water for that purpose, which is often referred to as the “end use” (i.e., “irrigation from storage,” or “power from storage”). *In re SRBA, Subcase No. 00-91017 (Basin Wide-Issue 17)*, 2014 WL 3810591 at 3. As discussed *infra*, storage alone is not a “beneficial use” under Idaho law. Therefore, the claimants in these subcases must prove actual use of the water claimed for the purpose identified as the “end use.”

⁸ Subcase Nos. 65-23531 (Cascade), 65-23532 (Deadwood), 63-33733 (Anderson Ranch), 01-10620 (American Falls), 01-10621 (Palisades), and 63-33734 (Lucky Peak).

in proposing consolidation misapprehends the nature of the issues. While it may be that some of the same witnesses will be called in each subcase, *SWC Proposal* at 2, the relevant historic facts that must be established to support each individual claim of actual beneficial use of water will be different in each subcase.

Moreover, a beneficial use claim does not hinge upon state administration but rather “focuse[s] purely on the actions of the appropriator.” *Idaho Power Co. v. IDWR*, 151 Idaho 266, 275, 255 P.3d 1152, 1161 (2011).⁹ Federal reservoir operations are not the focus of the inquiry in these subcases. None of these claims include “flood control” as a purpose of use,¹⁰ and federal reservoir operations are not beneficial uses of water. *See Pioneer*, 144 Idaho at 110, 157 P.3d at 604 (“There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities.”). Filling or refilling a reservoir is a storage operation, and it is well established under Idaho law that simply storing water is not a beneficial use. *See Rayl v. Salmon River Canal Co.*, 66 Idaho 199, 209, 157 P.2d 76, 81 (1945) (“Respondent operating company merely diverts, conveys, stores and distributes, it does not as such apply any water to a beneficial use The water is applied to beneficial use by the

⁹ The Coalition also misapprehends the issue by relying on the *Stipulation* in the subcases for the license-based and decree-based water right claims for the federal reservoirs in the upper Snake River basin. *SWC Proposal* at 2. The licenses and decrees are not at issue in these subcases.

¹⁰ The United States has never filed SRBA claims for “flood control” water rights at any of the federal reservoirs in Idaho that are operated for flood control purposes. Rather, the United States has consistently taken the position that because flood control operations are authorized by federal law, the United States need not obtain state water rights to authorize or continue its flood control operations. *See, e.g., Notice of Water Usage, Subcase No. 83-11874* (Nov. 17, 2011), at 2 (“The Dworshak [Project] was authorized by the Flood Control Act of 1962. . . . The United States has not asserted water rights in connection with the operation of the Project, nor is the use, storage or control of water in this project for its authorized purposes amenable to administration by the State of ID.”). Indeed, the United States represented to this Court in the Basin-Wide Issue 17 proceedings that “flood control operations are entirely independent of the water rights system” and “the outcome of this proceeding will have no effect on Reclamation’s flood control operations.” *The United States Response Brief On Basin-Wide Issue No. 17* (Jan. 10, 2013), at 5.

stockholder, the individual water user.”).¹¹ “Beneficial use” for irrigation does not take place at the reservoirs, but rather in the fields of the irrigators served by the Coalition entities.

Therefore, under the legal principles established by the Idaho Supreme Court, resolution of the “beneficial use” claims in each of these subcases requires an individualized factual inquiry. Consolidation is not appropriate under such circumstances; to the contrary, consolidation would result in unnecessary confusion and delay.

C. Court-Ordered Mediation Would Complicate And Delay The Settlement Negotiations.

The Coalition acknowledges that the parties to the Coalition’s subcases “have been in negotiations for several months.” *SWC Proposal* at 4. The State supports these negotiations but respectfully disagrees with the Coalition that a Court-ordered mediator is necessary for “identifying the issues, reducing misunderstandings, clarifying priorities, and exploring areas of compromise and agreement.” *Id.*

Settlement negotiations have been underway for some time, including many formal and informal meetings, telephone discussions, and emails. In the State’s view, the current settlement negotiations have not broken down or reached an impasse; to the contrary, they have been quite productive, particularly in recent weeks, and the parties have reached agreement on many points. The parties understand the issues and each

¹¹ This very principle was vigorously asserted in the *Pioneer* litigation by the same irrigation organizations who have asserted beneficial use claims in these subcases. See, e.g., *Brief Of Respondents Boise Project Board Of Control, et al., And Committee Of Nine, et al., Supreme Court Case No. 31794* (Dec. 6, 2005), at 20 (“While Idaho law does allow distribution entities to appropriate water for storage, no valid water right is created *until* such water is put to beneficial use”) (emphasis in original); *Brief Of Respondents Boise Project Board Of Control, et al., And Committee Of Nine, et al., Supreme Court Case No. 31790* (Oct. 31, 2005), at 32 n.13 (“the irrigation districts’ landowners put that very water to beneficial use [and] perfected the water right”).

others' interests and positions, and have worked together to find areas of compromise. Although some disputed issues remain, in the State's view they are relatively few and progress continues to be made.

While the issues raised by the "beneficial use" claims in these subcases are few and narrow, as previously discussed, the settlement negotiations have of necessity encompassed a number of additional matters that can be quite complex, both factually and legally. The parties have had considerable time to come to grips with these matters and their implications. A mediator, to play the role envisioned by the Coalition, would need to become equally familiar with these subjects, their ramifications, and the course of the negotiations. Injecting a Court-ordered mediator under these circumstances would interrupt the course of the negotiations, delay rather than expedite matters, and carries risks of setbacks on points that had been considered to be settled.

D. These Is No "Overlap" Between These Subcases And The Administrative Proceedings In Basin 1 and Basin 63.

Some claimants proposed at the status conference of September 9, 2014 that these subcases be stayed due to actual or potential "overlap" with the administrative proceedings in Basin 1 and Basin 63 regarding water right accounting. The claimants' assertions of "overlap" do not withstand scrutiny, however. As previously discussed, a "beneficial use" claim for irrigation stands or falls on the question of whether the claimant actually used the water for irrigation, at the claimed time and place, and in the amount claimed.

In contrast, the purpose of the administrative proceedings in Basin 1 and Basin 63 is to "to address and resolves concerns with and/or objections to . . . existing accounting

procedures.”¹² The question of whether the additional water claimed in each of these subcases was actually put to irrigation use prior to 1971 is entirely separate from and independent of the question of how water is currently distributed to existing licensed and decreed storage water rights for the federal reservoirs.¹³ Further, the administrative proceedings cannot define or determine water rights based on beneficial use claims: that can only be done in the SRBA. Accounting for the distribution of water is an administrative function, and a beneficial use claim does not hinge upon administration but rather “focuse[s] purely on the actions of the appropriator.” *Idaho Power Co. v. IDWR*, 151 Idaho 266, 275, 255 P.3d 1152, 1161 (2011); see *In re SRBA, Subcase No. 00-91017 (Basin Wide-Issue 17)*, 2014 WL 3810591 at 7-9 (distinguishing between adjudicating water rights and distributing water).

Any assertion of “overlap” on “the refill issue” is illusory. As previously discussed, storage operations at federal reservoirs, including “fill” and “refill,” are not beneficial uses of water, *Pioneer*, 144 Idaho at 110, 157 P.3d at 604; *Rayl*, 66 Idaho at 209, 157 P.2d at 81, and “flood control” has not been claimed as a purpose use. Under Idaho law these subcases must be resolved on the basis of whether the claimants actually

¹² *Notice Of Contested Case And Formal Proceedings, And Status Conference, In the Matter of Accounting for the Distribution of Water to the Federal On-Stream Reservoirs In Water District 1* (IDWR) (Oct. 23, 2013), at 6; *Notice Of Contested Case And Formal Proceedings, And Status Conference, In the Matter of Accounting for the Distribution of Water to the Federal On-Stream Reservoirs In Water District 63* (IDWR) (Oct. 23, 2013), at 6.

¹³ The existing accounting systems in Basin 1 and Basin 63 were implemented after 1971. The Upper Snake accounting system was implemented in 1978. See *Deposition of Anthony Olenichak, Vol. II, Subcase Nos. 1-2064, et al. (American Falls subcases) & 1-2068, et al. (Palisades subcases)* (Mar. 12, 2012), at 154-55 (“In 1978, when the Water District 1 first started using the computerized accounting, there was a pretty good summary or history of the new water right accounting [in the 1978 watermaster’s report].”). The Boise system was implemented in 1986. See *Affidavit of Robert J. Sutter, Subcase No. 63-3618* at 2 (“In 1986, I developed the Boise River Water Right Accounting computer program (hereafter called the ‘Accounting Program’) and the Boise River Storage Allocation computer program (hereafter called the ‘Allocations Program’) for the Boise River.”).

made irrigation use of the water they have claimed, not whether the federal reservoirs “filled,” “refilled,” or were operated for flood control purposes.¹⁴

Respectfully submitted this 10th day of October 2014.

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¹⁴ Most of the confusion that has attended attempts in the SRBA and Idaho Supreme Court proceedings to define or clarify “the refill issue” stems from the fact “refill” originated as a reservoir management term and described storage operations, not water rights administration. The distinction between federal reservoir operations and state water law was blurred when the United States and various irrigation organizations asserted that “refill” has a “priority.”

CERTIFICATE OF SERVICE

I certify that on this 10th day of October, 2014, I caused the foregoing to be filed with the Court and copies served on the following by the methods indicated:

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