

**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	)	Consolidated Subcase 67-13701
	)	(United States and Nez Perce Tribe
Case No. 39576	)	Springs or Fountains Claims)
)	
	)	I.R.C.P RULE 7(b)(3) NOTICE,
	)	ORDER DENYING MOTION FOR
	)	CLARIFICATION AND MOTION
	)	FOR RECONSIDERATION
	)	and
	)	ORDER SETTING PRETRIAL /
	)	SCHEDULING CONFERENCE

PROCEDURAL BACKGROUND

Orders on Motions for Summary Judgment

On February 18, 2003, the Special Master entered *Orders on Motions for Summary Judgment* holding that there are genuine issues of material fact as to the intent of the parties and meaning when the United States and the Nez Perce Tribe used the phrase: “all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished.” For that reason, motions for summary judgment filed by the United States and the Nez Perce Tribe, the State of Idaho and the Pioneer Irrigation District, *et al.*, were denied.

State of Idaho Motions for Clarification and Reconsideration

On March 4, 2003, the State filed its *Motion for Clarification, and Motion for Reconsideration, of “Orders on Motions for Summary Judgment.”* The State’s *Motions* sought clarification and reconsideration because the *Orders on Motions for Summary Judgment* could be construed “as determining a number of issues raised in summary motions.” The *Motions* also

stated, “the Special Master mischaracterized areas of agreement and disagreement among the parties, which may result in the failure to address certain issues key to resolution of the springs and fountains claims of the Tribe.”

The Pioneer Irrigation District, *et al.*, filed their *Notice of Joinder to State of Idaho’s Motion for Clarification and Motion for Reconsideration* on March 14, 2003. Pioneer was particularly interested in the issues of springs or fountains claims on private lands and the standing of the Little Salmon Water Users Association and the Payette River Water Users Association to file objections. John W. Brewer filed his *Notice of Joinder* on March 20, 2003.

United States and Nez Perce Tribe Joint Response

The United States and the Nez Perce Tribe filed their *Joint Response to Idaho’s Motion for Clarification, and Motion for Reconsideration, of “Orders on Motions for Summary Judgment”* on May 2, 2003. The United States and the Nez Perce Tribe asked that the State’s *Motion for Reconsideration* be denied, but that certain issues be clarified before trial through an I.R.C.P. Rule 56(d) order or a Rule 16 procedure.

State of Idaho Reply

The State lodged its *Reply Memorandum Re: State’s Motions for Clarification and Reconsideration* on May 30, 2003. It agreed with the United States and the Nez Perce Tribe that it would be useful that the Special Master, “if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.” I.R.C.P Rule 56(d). The State agreed that a Rule 56(d) order, followed by a Rule 16 pre-trial conference “would allow the parties to identify the factual disputes remaining for trial.” The Pioneer Irrigation District, *et al.*, filed their *Notice of Joinder Re State’s Reply* on May 30, 2003.

Hearing on Motions for Clarification and Reconsideration

A hearing on the *Motions for Clarification and Reconsideration* was set for June 5, 2003. However, on June 4, 2003, the Special Master entered an ***Order Vacating Hearing*** based on the United States and the Nez Perce Tribe *Joint Motion to Vacate* filed on June 2, 2003, which was unopposed by the State and objector John W. Brewer. Further contact with the remaining parties was not possible given the limited time.

Rule 7(b)(3) Notice

The parties have extensively briefed the issues raised in the State's the *Motions for Clarification and Reconsideration*; the parties advised the Special Master that argument on the *Motions* "will not assist the parties in reaching agreement on the settlement terms and will cause the parties to incur expenses and time;" and it is important that these proceedings continue in an orderly manner. Therefore, the Special Master will rule on the *Motions* without oral argument pursuant to I.R.C.P. Rule 7(b)(3).

DISCUSSION

Joint Statement of Undisputed Facts

On August 9, 2002, in preparation for summary judgment proceedings, the United States and the Nez Perce Tribe filed their 22 page *Joint Statement of Undisputed Facts*. On August 30, 2002, the State of Idaho filed its *Response to the United States' and Nez Perce Tribe's Joint Statement of Undisputed Facts*. In its *Response*, the State wrote:

Here, there does not appear to be any dispute as to material facts relating to interpretation of the 1863 Treaty, since the facts themselves are found on the face of historical documents. The only differences between the parties are the inferences to be drawn from the facts. Thus, in large part, the State agrees to the **facts** asserted in the United States' and the Nez Perce Tribe's Joint Statement of Undisputed Facts. . . . Many of the assertions in the Joint Statement, however, are clearly inferences, and need to be identified as such, so that the Court is free to draw its own inferences from the historical record.

. . .
The Court and the parties should note that the State, by agreeing to certain facts and inferences in the Joint Statement, does so only for purposes of these summary judgment proceedings. In some cases, the State's agreement is not based on concurrence with the facts or inferences stated, but is made solely because, in the State's judgment, the asserted fact or inference will have no bearing on the outcome of these summary judgment proceedings. Thus, the State does not waive its right to contest any asserted fact or inference in further proceedings or within the context of other SRBA subcases.

State's *Response*, at 2.

None of the other parties filed statements of undisputed facts, but on September 3, 2002, the Wilder Irrigation District, the Twin Falls Canal Company and the Burley Irrigation District

(“Federal Claims Coalition”) filed its *Notice of Joinder in the State of Idaho’s Response to the United States’ and Nez Perce Tribe’s Joint Statement of Undisputed Facts*.

Rule 56(d)

Idaho Rules of Civil Procedure, Rule 56(d), provides a road map for the courts when motions for summary judgment are denied:

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall *if practicable* ascertain what the material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy . . . and directing such further proceedings in the action as are just [emphasis added].

Overview of the Record

The Special Master’s *Orders on Motions for Summary Judgment* can best be viewed as an overview of the record as it was presented before and during the September 24 and 25, 2002 hearing on motions for summary judgment. None of the disputed issues were determined. The findings were made for purposes of summary judgment only. It was clear that the parties agreed on much of the historical record, but interpreted it in different ways. As the State somewhat euphemistically pointed out, “The only differences between the parties are the inferences to be drawn from the facts.” In the Special Master’s view, that is an oblique way of saying that there remain genuine issues of material fact.

For instance, the meaning of the phrase “springs or fountains” at first seemed to be agreed upon (an issue of water from the earth), but then that became blurred depending on whether the definition included intermittent springs. Similar differences were noted with the phrase “streams or rivers.” Does that mean both perennial and intermittent streams? However, the key difference between the parties concerned the meaning of the phrase “not adjacent to, or directly connected with.”

While the parties may agree on a single isolated aspect, when that “fact” is coupled with a further qualifying element of a reserved water right, the house of cards collapses. By way of example, if the parties were to agree that a certain spring may qualify based on flow, its connection to an intermittent stream or arbitrary distance from that stream based on terrain or the grazing distribution of horses and cattle may be disqualifying. From the Special Master’s

viewpoint, it is not practical to ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted because the “facts” and contrasting inferences are so closely interwoven as to defy segregation.

Treaty interpretation presents questions of law and canons of construction focus on what the Indian tribes understood the language to mean at the time the treaty was executed. In this regard, a treaty may not be amenable to interpretation without evidence as to what the tribe understood the language to mean. This, however, does not automatically implicate or create issues of fact.

In the Nez Perce Tribe instream flow claims¹, former-Presiding Judge Barry Wood decided the contested issues on summary judgment as a matter of law. However, the situation with the instream flow claims was different from the instant matter. First, there were already court cases which interpreted the language of the 1855 Treaty on which the Court could rely. Second, the Nez Perce Tribe and the United States agreed that at the time the Treaty was signed, neither party explicitly contemplated water rights. Lastly, the language at issue there was reasonably susceptible of a certain interpretation.

Unlike the instream flow claims, interpretation of the “springs or fountains” language is one of first impression. There are no prior judicial interpretations of the language and the language is susceptible to multiple interpretations. Therefore, evidence of what the Nez Perce Tribe understood the language to mean at the time the Treaty was executed is necessary to interpret the language. Historical uses can be probative of such understanding.

Even if the parties put into evidence little more than what was asserted in the affidavits on summary judgment, the Special Master is not as constrained in drawing inferences from the facts at trial as is the case under I.R.C.P. Rule 56. Also, because the very essence of the dispute in this case is the inferences to be drawn from the facts, there exist genuine issues of material fact.

Another reason this Special Master declined to decide the matter on summary judgment is that one of the issues on appeal currently before the Idaho Supreme Court with respect to the instream flow claims is whether issues of treaty interpretation are inherently factual and cannot

¹ See former-Presiding Judge Barry Wood’s *Order on Motions for Summary Judgment of the State of Idaho, Idaho Power, Potlatch Corporation, Irrigation Districts, and Other Objectors Who Have Joined and/or Supported the Various Motions*, Consolidated Subcase 03-10022 (Nez Perce Tribe Instream Flow Claims), dated November 10, 1999.

be decided on summary judgment. In the event the Idaho Supreme Court finds in favor of this proposition, any decision on summary judgment in this case would be subject to remand. Therefore, the better approach is to fully develop the record at trial. If the parties are in agreement on many of the facts, then substantial time and effort can be saved by a single joint statement of undisputed facts. In any event, at the close of evidence, the Special Master will not be constrained in drawing inferences as is the case under I.R.C.P. Rule 56 and the Special Master will not create future error, depending on how the Idaho Supreme Court rules on the issue of treaty interpretation.

There remain genuine issues of material fact and it would be a disservice to the Presiding Judge *not* to develop a complete record for this case of first impression. And it would be presumptuous for the Special Master to dictate how the parties should present their cases, as has been suggested. The better course is for the parties to submit a single joint statement of **relevant non-cumulative** undisputed facts and then meet with the Special Master in a pretrial / scheduling conference.

Standing to Object

In the *Orders on Motions for Summary Judgment*, the Special Master held that *parties to the adjudication* do not have to allege or prove injury to have standing to file an objection or response to a claim reported in a director's report or abstract of federal reserved water rights and become a party to a subcase. However, as to whether the Little Salmon Water Users Association and the Payette River Water Users Association are parties to the adjudication and thus have standing to object to the United States and Nez Perce Tribe springs or fountains claims was held in abeyance until the record was developed further. The two names do not appear in IDWR's nor the SRBA Court's record as *water right claimants*. Further, there is no record that anyone asserted ownership of Idaho water rights on behalf of the Associations or that they were served or joined as parties to the SRBA. And so far, no one has asserted that the Associations are qualified to represent its members with respect to the members' individual water rights under I.C. § 42-5224.

The fact that the Associations may have been allowed to represent the interests of other claimants in the past is not a sound argument to become or remain a *party to the adjudication*. See Presiding Judge Roger S. Burdick's *Order on Motion to Participate / Intervene, AO1 10K, I.R.C.P. 24(a) & (b); Order on Motion to Dismiss Objections to Amended Claims, I.R.C.P.*

12(b)(6), Consolidated Subcase No. 75-13316, dated July 29, 2002. In the event the issue of the Associations' standing is pursued further, the record will need to be developed further.

ORDERS

THEREFORE, IT IS ORDERED that:

1. The State's *Motion for Clarification, and Motion for Reconsideration, of "Orders on Motions for Summary Judgment"* are **denied**;
2. The parties shall submit to the SRBA Court a single joint statement of relevant undisputed facts no later than **Thursday, July 31, 2003**; and
3. A pre-trial / scheduling conference shall be held on **Thursday, August 21, 2003, 1:30 p.m.**, at the SRBA Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. **Telephone participation will not be allowed.**

DATED June 18, 2003.

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication