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DISTRICT COURT-SRBA
 TWIN FALLS CO., IDAHO
 FILED _____

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 and R. Hall

**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 NO. 43-10356**
)

NO. 39576

) **REPLY BRIEF**
)
)
)

This is Objectors brief in *Reply* to the Jones' closing brief on the trial of this issue. This brief will explore the logical implications of Claimants surprising total reliance upon the *Jobe Adams Decree* in asserting collateral estoppel against Objectors. If the *Jobe Adams Decree* is applicable to this subcase, as is the position of Claimants, any diversion of water outside its terms, is an illegal diversion of water. Any beneficial use which post dates the decree would thus be precluded.

Claimants only defense to the argument in the *Opening Brief* renders their claim invalid and leaves Claimants without a water right. The house of cards has fallen. The Court will have to decide whether the *Jobe Adams Decree* is, or is not, applicable. If it is, as Claimants argue – then Claimants do not have a water right. If it is not, then any right of Claimants is subject to the seniority of the Objectors. It cannot be both.

I. REPLY TO PROCEDURAL HISTORY

Claimants spend an inordinate amount of space apparently trying to accuse Objector's of "changing" their position. However, Claimants are ignoring the extremely complex procedural

posture of this case and the clarity of Objectors' assertions at every point. To the extent that Objectors' position has evolved (and it most assuredly continues to do so) it does in response to Claimant's position. Claimants correctly state that the original objection in this case stated succinctly that the relevant water right does not exist. And, Respondents correctly note that during Respondents' *Joint Motion for Interim Administration*, the Respondents did take the position that if the water right existed, it should be administered with those on Raft River. Out of the interim administration hearing flowed a trial that was narrowly focused and left open to the possibility of further evidentiary hearings.

MR. MICIAK: ... Although I would ask, just for clarification, are you asking whether we have any objection to confining the issues to the separate stream issue?

SPECIAL MASTER DOLAN: Well, I guess I was trying to explain to the audience what we're here to talk about and let everybody know what we're going to focus on. Is the issue going to be anything else other than the separate streams?

MR. MICIAK: Well, I don't know, actually, at this point, and so, you know, there had been some discussions, as you well know, at our conference, about whether or not there would be - -

Trial Transcript p.7, 12-25

The Court went on to state:

SPECIAL MASTER DOLAN: This business of interim administration and the immediacy of the problem has kind of created this situation. It's unique. I agree with counsel on that. I guess what we'll do is go forward with what we can today, and if we do have to continue the trial on separate issues later on, we'll do that.

Trial Transcript p.9, 18-24

The Court then correctly proceeded to essentially try the issue of administration of the water right and the question of "separate streams." Objectors then opened their *Post Trial Brief* focusing only upon the question of administration. Objectors restated their long held position that with respect to administration, the element of the Director's Report objected to is the general provision recommending separate administration. Objectors then expressly stated "Objectors shall await Claimants' *Response Brief* and address any new issues or arguments arising from Claimant's response in Objectors' final *Reply Brief*."

Objectors' position has never wavered, the specific element of the Director's Report objected to is the General Provision concerning separate administration. Objectors have always maintained that as a whole, the water right does not exist as a lawful beneficial use right. The argument that no beneficial use could legally have been made was to be in this final argument even before Claimants' hung their argument on a theory that invalidates their entire claim.

II. REPLY TO FACTS

Objectors adhere that with respect to their objection to the general provision concerning administration, the only relevant facts are those set forth in *Objectors' Opening Brief*. Claimants, however, assume many facts that simply are not part of the record or are wrong in making an argument that requires incredible hubris. Nearly every "fact" required to assert collateral estoppel is flawed as both a factual and legal question. But more incredibly, if true, the collateral estoppel argument precludes the issuance of this water right.

Claimants' state that Jones and his predecessors were not a party to the *Jobe Adams Decree* "as pointed out by the Objectors." Objectors have "pointed out" that Claimants were not a party to the *Jobe Adams Decree*, with respect to this claimed water right - which is indisputably not part of the *Jobe Adams Decree*. Claimants though were a party to the *Jobe Adams Decree* with respect to their other Raft River rights.

Jones predecessor in interest is his grandfather William Jones who had and Claimants have water rights on Raft River decreed to lands downstream of the current claimed place of use. *See Water Right 43-00184 and 43-00185*.

The existence of these Raft River water rights can be used to explain all the testimony concerning beneficial use from the 1930's forward. The trial was narrow in focus and there was very little testimony on beneficial use, but one example of such an instance is the testimony of Buddy Ward concerning bringing hay from "downstream and across the river." *Trial Transcript*, pp. 166-67. These water rights may also explain why Lyle Woodberry, the manager of the Knight land and the person possible most familiar with the area, would testify that he had "never heard of an Almo Creek water right" until 1999. *See Testimony of Lyle Woodberry, Trial Transcript*, pp. 166-67.

For the purpose of Administration of this water right, Objectors continually have pointed out that Claimants were not a party claiming this water right in the *Jobe Adams Decree*. Admittedly, Objectors should have been more precise in their verbage, but there has never been a

question that Claimants *do* have Raft River Water Rights and Claimants were under a duty to admit such.

Claimants' Raft River water rights were irrelevant to the question of administration. However, the central premise of Claimants' collateral estoppel argument is that the same "issue" was litigated in the *Jobe Adams Decree*. Claimants brazenly then seek to limit the applicability of the *Decree* to the separate stream issue. Claimants require that the other portions of the *Jobe Adams Decree*, these which prohibit the beneficial use claimed as the basis of this water right, be ignored.

III. STANDARD OF REVIEW

No position set forth in Claimants' brief is more perplexing than their "unique" argument pertaining to this Court's standard of review. Claimants' state: "Contrary to the suggestion of the Objectors, this Subcase is not before the Special Master on appeal or review." Apparently Claimants are referring to Objectors' citation of *State v. Nelson*, 131 Idaho 12, 14, 951 P.2d 943, 945 (1998) that "whether a General Provision from the Director's Report should be included in the SRBA Decree presents a mixed question of law and fact over which the Court conducts free review." *Id.* Obviously, this standard was set out by an appellate court (the Supreme Court) in *Nelson*. Claimants' position fails to understand that mixed questions of law and fact receive free review by any court, including one of original jurisdiction over the Director's Report.

The special master sits in the place of the district court. The special master's findings which the court adopts are considered to be the findings of the court. I.R.C.P. 52(a); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct.App. 1993); *Seccombe v. Weeks*, 115 Idaho 433, 434, 767 P.2d 276, 278 (Ct.App. 1989). The special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991). To the degree that the district court adopts the special master's conclusions of law, they are also the conclusions of the court. *Higley*, 124 Idaho at 534, 861 P.2d at 104. The question of compliance with the rules of procedure and evidence is one of law. See *Harney v. Weatherby*, 116 Idaho 904, 906-07, 781 P.2d 241, 243-44 (Ct.App. 1989). This Court, like all courts, freely reviews conclusions of law. *Kootenai Elec. Co-op. Inc. v. Washington Water Power Co.*, 127 Idaho 432, 434, 901 P.2d 1333, 1335 (1995).

The utilization of the proper standard of review is essential in this particular subcase because of two critical questions of law. Claimants correctly state that the facts within the Director's Report are entitled to prima facie weight. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 746 947 P.2d 409, 419 (1997). However, Claimants imply that legal conclusions made within the Director's Report are also presumptively correct. That Objectors must somehow "disprove" IDWR's conclusions of law. That is simply not true. As stated in *Objectors' Opening Brief*, stripping the district court, or the Special Master, of the ability to review the contents of the Director's Report and apply the law to the facts as established in that report is an unconstitutional intrusion into the judicial department of government. *In Re: SRBA* 39576, *State of Idaho, ex rel. R. Keith Higginson v. United States (Basin Wide Issue 3)* 128 Idaho 246, 259, 912 P.2d 614, 627 (1995).

This subcase turns on the binding effect of the *Jobe Adams Decree*. The applicability of the *Jobe Adams Decree* involves principles of *res judicata*, *collateral estoppel* and interpretation of the decree itself – all questions of law. From these pure legal issues flows the answers to whether or not as a matter of law Claimants have a water right, and how that right might be administered. With respect to these questions, the Director's Report is irrelevant.

IV. REPLY TO CLAIMANTS' ARGUMENT

A. The Jobe Adams Decree, if Applicable Invalidates Claimants' Entire Claim

Claimants surprisingly rest their case upon the conclusiveness of the *Jobe Adams Decree*, and assert that the identical issue is being tried again. Claimants state:

"The decree and the decision of the court demonstrate that the objectors' predecessors in interest did have a full and fair opportunity to litigate the issue of whether the Raft River water users should have any claim or interest in the use or distribution of the waters of Almo Creek."

Claimant's Post-Trial Memorandum P. 10, 4-9

Claimants were counting on the Objectors and the Court forgetting that Claimants predecessors in interest were also a party to the decree. Indeed, for the Claimants to argue that the *Jobe Adams Decree* applies, it is imperative that it be left aside that they themselves were a Raft River

water user and that they had a "full and fair opportunity to litigate" any interest they had Almo Creek.

The *Jobe Adams Decree* expressly states:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties thereto, both plaintiff and defendants, cross-complainants and interveners, together with their heirs, successors, assigns, agents, servants and employees, are hereby severally particularly restrained and enjoined from using, attempting to use, diverting or attempting to divert, any of the waters of said Raft River or its tributaries as hereinbefore defined and set out in any manner except as hereinbefore provided and set out and in strict accordance with the terms of this decree.

Jobe Adams Decree, P. 55

As a matter of law, Claimants' predecessors in interest were prohibited from diverting water outside the terms of the *Jobe Adams Decree*. Therefore, if there was such a diversion – and there is precious little evidence there ever was¹ – it was an illegal diversion.

Claimants reliance upon the *Jobe Adams Decree* is even more problematic when one considers that testimony elicited by Claimants indicates that some of the land claimed as a place of use for this water right was decreed within the *Jobe Adams Decree*:

Q: Is the place of use that is claimed by the Joneses addressed by the *Jobe Adams* decree?

A: No, it is not.

Mr. Miciak: Okay

Special Master Dolan: Mr. Walker.

FURTHER CROSS EXAMINATION BY MR. WALKER:

Q: The last, last comment, is not exactly correct, is it? I mean, there - - I think your report indicated that in fact there's a portion of the current claim that is addressed by the *Jobe Adams* decree.

A: The Jones property is addressed by the decree and given water rights from Raft River; but the specific place of my recommendation was not included in the *Jobe Adams* decree.

Q: Meaning the 28 acres?

A: Correct.

¹ SPECIAL MASTER DOLAN: Okay. The other thing was I, the partial decree, or I'm sorry, the recommendation of IDWR, they now recommend that the Joneses' claim for 28 acres – and that's what you've marked on the map. I think, is the Joneses' claim –

THE WITNESS: That's from the red line down.

SPECIAL MASTER DOLAN: Okay. Now, the – you're saying that the 28 acres was not irrigated more than three years ago?

THE WITNESS: I have never seen it.

SPECIAL MASTER DOLAN: It was, I think you used the word "sagebrush" before then?

THE WITNESS: How's that?

SPECIAL MASTER DOLAN: It was sagebrush more than three years ago?

THE WITNESS: That's what I remember.

Trial Transcript, p. 125-26 17-9

Q: But originally lands in this quarter - - in this section, were actually on the other side of Raft River?

A: Correct.

Q: And Raft River channel was moved, putting those lands back on the other side, so they really were, but I mean it's really kind of minutia?

A: Yeah.

Trial Transcript P. 83 19-23, P. 84 1-21.

It is thus especially disingenuous for Claimants to state that Objectors are trying to accomplish exactly what was denied them in the Jobe Adams Decree. It can just as easily be said that this entire claim is an attempt to acquire exactly what was denied to Claimants' predecessors.

Claimants cannot establish a lawful constitutional right when the original application to beneficial use could only have been unlawful. The situation would be identical to the line of cases which prohibit the establishment of a water right by trespass². *Jones v. McIntire*, 60 Idaho 338, 341, 91 P.2d 373 (1939) (Appellants likewise concede the correctness of the proposition that a water right cannot be initiated in trespass upon private lands) Citing: *Marshall v. Niagra Springs Orchard Co.*, 22 Idaho 144, 125 P. 208; *Tobey v. Bridgewood*, 22 Idaho 566, 127 P. 178. The question of whether an initial diversion and application to beneficial use was lawful virtually never arises anymore. The administrative oversight is simply too strict, however it certainly applies to constitutional claims. Claimants' predecessors' interests were enjoined from diverting water outside the parameters of the *Jobe Adams Decree* – upon some of the same land they originally claim. Any beneficial use as claimed by Claimants would be more than a trespass, it would have been subject to contempt.

Furthermore, Claimants cannot avail themselves of any prescriptive or adverse possession claim. It is well established that "so long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user" I.C. §42-607. This is sensible given that:

Holders of water rights are entitled to presume that a watermaster, who is authorized to distribute water only in compliance with applicable decrees, is delivering water to them in compliance with the priorities expressed in the governing decree, and unless the holder of water right was aware that he was not receiving water

² This point of law impacts the correctness of Rodney Jones's presumptuous assertion when questioned about whether he had permission to install the PTO pump "I didn't feel like I needed his permission." (*Trial Transcript* P. 279 2-3) One certainly would have needed it in 1935.

from the watermaster in accordance with his decreed right, that right could not be lost through estoppel, the element of knowing acquiescence being lacking. *Almo Water Co. v. Darrington*, 95 Idaho 16, 501 P.2d 700 (1972).

Additionally, Claimants cannot claim any "open" or notorious use of this water when the manager of the land upon which their diversion is made had never even heard of such a right. *Testimony of Lyle Woodberry, Trial Transcript*, pp. 166-67.

Claimants have brought the invalidation of their water right upon themselves by their insistence that the distribution and rights to Almo Creek was thoroughly and completely litigated in 1928. And, that the same issue is being determined again. Claimants cannot disingenuously use the *Jobe Adams Decree* as both a shield and a sword. Either the *Jobe Adams Decree* applies, in total, or it doesn't. It does, the *Jobe Adams Decree* precludes Claimants' SRBA claim.

B. If the *Jobe Adams Decree* Does Not Apply, Claimants' Right Must be Administered with Objectors

In the alternative, if the *Jobe Adams Decree* does not apply, the Objectors' contention that this right should be administered jointly with Raft River remains the same.

The general provision within the Director's Report, concerning separate administration, comes exclusively from the *Jobe Adams Decree*.

SPECIAL MASTER DOLAN: Well, Ms. Hancock, so that we make sure we get that straight, the claim that we're now talking about, 10356, was never administered because it's a beneficial use claim and, therefore, you're not now recommending it be administered separately as part of the separate streams designation?

THE WITNESS: My only basis for including it was the *Jobe Adams decree*. This water right wasn't in the *Jobe Adams decree*, so I would not be adverse to it being included in Raft River.

Trial Transcript, P. 29 14-24.

The evidence before the Court in this subcase supports joint administration as mandated by Idaho Code §42-600 *et seq.* Generally water rights which impact one another are administered together and there is no question that Claimants' alleged right would impact Objectors:

Q. Would you agree that Mr. Jones' water right does impact Raft River?

A. I'm still. I'm sorry, but I still don't know the hydrology of the area. It is definitely an addition to the water rights in the Jobe Adams. So that being the case, there would be more of an impact, if any, because it's an addition and it does take water from the lower reach of Almo Creek. I guess I would have to agree that, given that all the water that would spring up in that ditch and flow into that ditch would go into Raft River, would it not be for the Jones' diversion, that it would, yes, it would impact Raft River.

Trial Transcript p. 42-43, 18-6

Furthermore, IDWR has taken the position that there is nothing unusual or problematic with rights being administered differently within the same district:

MS. MCHUGH: Before I start with Ms. Hancock, I do just want to say one thing just to clarify about the separate streams, that the, in other parts of the state, we do have water rights on a stream that are administered with a main tributary and other water rights that are administered separately. So that we can have – there is that occurrence in the state where some water rights on a stream are separate and some aren't. I just wanted to let the parties know that, if they were wondering.

Trial Transcript P. 18, 3-13

Therefore, IDWR already has in place procedures to cope with differing administration of rights in the same water district. The propriety of any general provision is a mixed question of fact and law. As a matter of law, as between two parties to the *Jobe Adams Decree*, the *Decree* either applies in totality or not at all. Objectors prefer to side with Claimants, the *Decree* applies. However, if the Court finds the *Decree* inapplicable, even IDWR admits there is no basis for the general provision concerning administration. Therefore, that clause should be redacted if the court grants Claimants a water right.

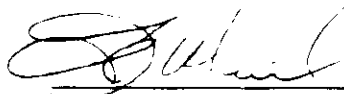
Conclusion

It is helpful to step back, and look at this claim and its place in the larger scheme of things. Claimants are claiming what could be considered the "ultimate" water right in the area. A point of diversion just above the banks of the Raft River (within feet, it one went by where Claimants attempted to put their pump); but low enough to make a plausible tangential claim to "Almo Creek"- itself a moving target through the years. Low enough to have water when others

with senior water rights on Almo Creek have none. A claim which uses the "bible" of Raft River water, the *Jobe Adams Decree*, as both a shield and a sword against seniors. Claimants borrow those aspects of the *Jobe Adams Decree* they need - separate administration, while casting aside the nettlesome injunction against their predecessors. A priority date perfectly placed post *Jobe Adams Decree* - but just barely and prior to mandatory permitting statutes. No pesky administrative costs or assessments. And, most important, the ability to use up to .56 cfs of water from springs headed directly to Objector's headgates with a water right fully 60 years junior. A situation where 28 green junior acres could stand adjacent to Objectors brown senior ground. Perfect.

Except nothing in this world is ever quite that perfect. It is worth asking whether this "perfect" water right really could have existed through the years. Of course not. Only recently, with the *Jobe Adams Decree* fading away in its importance could a party attempt to divert water completely outside its parameters. Any use of water in 1935 must have been in total compliance with the *Jobe Adams Decree* and it is highly likely that Claimants' predecessors were doing just that. Utilizing their *Jobe Adams Decree* rights on Raft River. Objectors suggest they go back to doing just that. Admittedly, those water rights aren't quite as perfect.

DATED this 24th day of October, 2003.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2003, I caused a true and correct copy of the foregoing *Reply Brief* to be sent by U.S. Mail, postage paid to the following:

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