

RECEIVED

APR 01 1999

Department of Water Resources

1999 MAR 31 PM 3:16
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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

) Subcases: 36-00006, 36-00007, 36-00008,
) 36-00022, 36-00023, 36-00047, 36-00068,
) 36-00069, 36-00099, 36-00100, and
) 36-00106

) ORDER ON MOTIONS FOR SUMMARY
) JUDGMENT AND MOTION IN LIMINE

I. PROCEDURAL AND FACTUAL BACKGROUND

This matter is before the court on several motions for summary judgment. The claimants filed a *Motion for Summary Judgment* alleging that the State of Idaho, appearing in these cases under the Idaho Department of Fish and Game (State), is bound under *res judicata* by the *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (*International Mortgage Decree*).

Several other motions for summary judgment were filed focusing on that part of the claims which included wildlife, recreation, and aesthetics as purposes of use (collectively "the purposes"). The claimants filed a *Motion for Partial Summary Judgment* against the State, Cranney Bros., Kevin Michaelson, Doug Grant, North Snake Ground Water District, and Faulkner Land & Livestock Company (collectively "the respondents") involving the interpretation and application of I.C. §§ 42-1425, 42-1426, and 42-1427. The respondents filed a *Motion for Partial Summary Judgment* arguing that the claimed purposes did not exist as of the claimed priority dates.

The respondents also filed a *Motion in Limine* arguing that the *International Mortgage Decree* could not be admitted as evidence because some of the respondents were not parties or privies to the decree.

II. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the nonmoving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R.G. Nelson, A.I.A. v. M. L. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or if reasonable minds might reach different conclusions, summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

The Director's Report constitutes *prima facie* evidence of the water right. I.C. § 42-1411(4). When a party relies on the Director's Report, that party is relieved from offering any facts in support of the summary judgment motion. Giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *State v. Hagerman Water Right Owners (24 Hagerman Subcases)*, 130 Idaho 736, 746, 947 P.2d 409 (1997). On summary judgment, the party opposing any element in the Director's Report has the burden of raising an issue of material fact in order to defeat summary judgment. I.C. § 42-1411(5). Presumptions may support either the moving or nonmoving party on summary judgment. See, e.g., *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *In the Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994).

III. DECISION (EVIDENTIARY MATTERS)

A. MOTION IN LIMINE

Prior to ruling on the summary judgment motions, it is necessary to rule on the respondents' *Motion in Limine* which seeks to exclude the *International Mortgage Decree*. With the exception of the State, the remaining respondents were not parties or privies to the *International Mortgage Decree*. Because prior decrees entered in private adjudications are not binding or conclusive as to nonparties or nonprivies, *State v. Hagerman Water Right Owners (24 Hagerman Subcases)*, 130 Idaho 736, 742, 947 P.2d 409 (1997), the respondents argue that the decree should not be admitted into evidence. This argument fails for a number of reasons.

The respondents cite *Payette Lakes Protective Ass'n v. Lake Reservoir Co.*, 68 Idaho 111, 189 P.2d 1009 (1948). In that case, the court held that a prior decree, except for limited circumstances, cannot be used against nonparties or nonprivies. *Id.* at 124; but see *Hill v. Merrimac Cattle Co.*, 687 P.2d 59, 68 (Mont. 1984) (prior decree may be admitted against non-parties or non-privies as "some evidence of the water right") citing *Wills v. Morris*, 50 P.2d 862 (Mont. 1935).¹ For purposes of admitting the *International Mortgage Decree* to support a theory based on *res judicata* or collateral estoppel, this court agrees that the decree cannot be offered for those purposes.

However, *Payette Lakes* was decided before the adoption of the Idaho Rules of Evidence. In many instances, the rules changed the way evidence is considered.² Therefore, this court will evaluate the *International Mortgage Decree* under those rules. As with any evidence, the first inquiry is whether the evidence offered is relevant. This inquiry was answered by the Supreme Court

¹ The legal principles outlined in *Wills v. Morris* are sound. In that case, the Montana Supreme Court likened a decree to a document creating title. As with all titles affecting a property right, the title is admissible even against strangers to title.

A judgment may constitute part of a chain of title to real or personal property. Though not amounting to title, it may show the character of possession of one of the parties to the suit. In either case it is admissible in evidence for or against strangers, as well as for or against the parties to the original suit. Whenever a judgment transfers a title, or is the foundation of a claim to possession, it is admissible upon the same principle as a voluntary conveyance.

Id. at 865, citing 4 JONES ON EVIDENCE (2d Ed.) p. 3375. The court went on to hold that "[a] water right, as we have noted above supra, is property, and a judgment which in some measure determines or affects one's water right is admissible as against a stranger, not to conclude him, but to evidence the right of one in whose favor it is rendered. . . ." *Id.*

² For example, the prior decree 30 years or more of age qualifies as an "ancient document" under I.R.E. 803(16). Prior to adoption of the Idaho Rules of Evidence, the Committee determined that as to ancient documents, "[n]o Idaho statutes, rules or decisions have been located that are relevant to this exception." Idaho State Bar Evidence Committee at C 803 p. 26.

in 24 *Hagerman Subcases*. In that case, the court held that a decree entered in a private adjudication "evidences" the right to use water. Since the prior decree "evidences" a right to use water, it must be relevant in a water adjudication under I.R.E. 401 as "having [a] tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

Although relevant, the decree must also be admissible. As an out-of-court declaration offered for the truth of the matter asserted, the *International Mortgage Decree* is hearsay. I.R.E. 801. The inquiry is whether any hearsay exception applies to the decree. Under I.R.E. 803(16), "ancient documents" may be admitted if the document has been in existence for 30 years or more and the document is authenticated. Ancient documents apply to numerous types of documents including certificates of title. See 7 WIGMORE, EVIDENCE § 2145. Certainly, a decree can be considered an ancient document.³

Ancient documents may be admitted against third parties even if they could not be admitted otherwise. For example, in *Caranta v. Pioneer Home Improvements, Inc.*, 467 P.2d 719 (N.M. 1970), a deed was offered to establish ownership in a quiet title action. The deed was offered against a third party who was neither a party nor privy to the deed. Under the facts of the case, the court held that the deed was improperly considered because the deed did not qualify as an ancient document. However, had the deed qualified as an ancient document, it would have been admissible against the third party.

Although the general rule is that recitals in a deed are mere hearsay and are inadmissible in evidence as against a third person who claims by a paramount title, there is an exception to this rule in the case of an ancient deed accompanied by possession and such deed is admissible, even as against third persons, as prima facie evidence of the facts recited in it.

Id. at 721, citing 6 THOMPSON ON REAL PROPERTY (1962 Replacement) § 3110 at 852.

The whole purpose of the ancient document exception is that with the passage of time and out of necessity, the ancient document may be the only probative evidence establishing the existence or nonexistence of any particular controversy before the court. "Statements in such ancient documents are admissible due to a rule of necessity as well as to the reliability of such evidence in

³

The decree deemed not admissible against the nonparties in *Payette Lakes* was dated 1944. The decision in *Payette Lakes* was dated 1948. At most, the prior decree was only four years old and, therefore, would not have complied with the ancient document exception had that exception existed in 1944.

comparison to any other form of available evidence." *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (1985), citing LOUISELL AND MUELLER, FEDERAL EVIDENCE, vol. 2 § 464 (1972); J. MOORE, MOORES FEDERAL PRACTICE, vol. 11 § 803(16) (2nd ed. 1976 and 1982 Supp.); WICKES, ANCIENT DOCUMENTS AND HEARSAY, 8 Tex.L.Rev. 451, 461-464 and n. 25 (1930). MCCORMICK, EVIDENCE, § 298 (1954), § 323 (2d ed. 1972); 5 WIGMORE, EVIDENCE § 1573a (Charbourn rev. 1974).

Here, the *International Mortgage Decree* is 68 years old and, therefore, qualifies as an ancient document. See also, I.R.E. 803(14) and 803(15). The priority dates covered by the decree date back to the early 1900s or late 1800s. The court will assume that most, if not all, of the witnesses to the use of these water rights as of the claimed priority dates are deceased. Because these parties are deceased, the *International Mortgage Decree*, as an ancient document, has evidentiary value. Any alleged defects in the decree, such as the decree being entered as a consent decree, go to the weight rather than the admissibility of the decree. See *Hill v. Merrimac Cattle Co.*, 687 P.2d at 71 ("the nature of the [ancient] document must be considered when considering the weight it can be given in proving a point in controversy").

Outside the rules of evidence, the statutory scheme behind title 42, chapter 14, Idaho Code, suggests that prior decrees must be admissible. For example, I.C. § 42-1427 allows parties to use data as of the commencement date, 1987, to prove undefined elements of prior decrees. The decree would be admitted as foundational evidence for the claimant being able to use data from 1987 to prove the use of any undefined elements of the decreed water right. See *infra* § VI(A). If the court cannot consider prior decrees, then I.C. § 42-1427 would be a nullity. Furthermore, since the court is allowed to consider forfeiture or abandonment in evaluating any particular right, the court must have a baseline to determine what, if any, of the right has been forfeited or abandoned. The prior decree sets that baseline.

Finally, the court is reminded that the State is a party to all these subcases. The State is a privy to the *International Mortgage Decree*, and therefore, the decree is binding and admissible against the State. The State is not shielded from the binding effect of the prior decree simply because there are other parties litigating these subcases who were not parties to the prior decree. See *infra* § IV.

For these reasons, the respondents' *Motion in Limine* is DENIED.

B. JUDICIAL NOTICE OF PLEADINGS

The State asks the court to take judicial notice of pleadings filed in the *International Mortgage Decree*. The court may take judicial notice of adjudicative facts if the facts are "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." I.R.E. 201(b). The pleadings offered by the State fail both parts of the test.

First, a prior decree entered by a federal court certainly is not a fact "generally known" within the jurisdiction of the SRBA, a state court. *See, e.g., Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992) (trial court in post-conviction relief case could not take judicial notice of record in the criminal action even if the judge in both cases is the same). Second, the pleadings are not "capable of accurate and ready determination." All evidence offered must be authenticated. I.R.E. 901, 902. Here, the pleadings were not authenticated prior to hearing. If the document is not authenticated, then there is no way for this court to make any initial determination that the pleadings are, in fact, the pleadings offered in the prior proceedings.

Because the court did not take judicial notice of pleadings, the pleadings had to be offered through an affidavit. I.R.C.P. 56(c). "Sworn or certified copies of matters referred to in an affidavit shall be attached thereto or served therewith." I.R.C.P. 56(e). Exhibits must be mentioned in or attached to a party's verified complaint or affidavit. *Johnson v. City of Homedale*, 118 Idaho 285, 796 P.2d 162 (Ct. App. 1990). If exhibits are not attached to affidavits or verified complaints, then they cannot be considered on summary judgment. *Shacocass, Inc. v. Arrington Constr. Co.*, 116 Idaho 460, 776 P.2d 469 (Ct. App. 1989). Here, the pleadings offered by the State were not attached to or offered through an affidavit. Therefore, the pleadings were not properly offered.⁴

For all these reasons, the court will not take judicial notice of the pleadings offered in the *International Mortgage Decree*. Furthermore, since the pleadings were not properly offered, they will not be admitted for any purpose.

⁴

The pleadings could be admitted as ancient documents under I.R.E. 803(16) so long as the pleadings are authenticated. Again, the pleadings offered in support of these motions were not authenticated or properly offered. Therefore, for the same reason as the court cannot take judicial notice of the pleadings, it cannot consider the pleadings as ancient documents.

IV. DECISION (RES JUDICATA)

The claimants own water rights decreed under the *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (*International Mortgage Decree*). The claimants allege that the State is bound under *res judicata* from contesting the claimants' water rights.

The *International Mortgage Decree* was a private adjudication. In the context of a general adjudication such as the SRBA, only parties or privies are bound by decrees entered into in prior private adjudications. 24 *Hagerman Subcases* at 742. Here, the State admits that it is a privy to the *International Mortgage Decree*.⁵ Therefore, under *res judicata*, the State is bound by all issues actually decided and those issues which could have been decided. See *Farmers Nat'l Bank v. Shirley*, 126 Idaho 63, 878 P.2d 762 (1994).

However, the State, like the claimants, may litigate the meaning of any vague or undefined portions of the *International Mortgage Decree*. Furthermore, the State is not foreclosed from litigating the use of the water right after the date of the decree. For these reasons, the claimants' *Motion for Summary Judgment* on whether the State is bound under *res judicata* is GRANTED.

V. DECISION (RECOGNITION OF BENEFICIAL USES)

The claimants' *Motion for Summary Judgment* seeks a declaration of the court as to whether wildlife, aesthetics, recreation, and system maintenance are beneficial uses. The claimants did not present any facts in support of this motion other than the *Affidavit of Don Schaff*, an employee of IDWR, outlying IDWR's recognition of aesthetics as a beneficial use. IDWR's agency interpretation is to be given "great weight." *State v. Hagerman Water Right Owners (Partial Forfeiture)*, 130 Idaho 727, 734, 947 P.2d 400 (1997). Therefore, as to aesthetics, the court finds that there is no material issue of law as to whether it constitutes a beneficial use of water.

For the other uses, the court declines to rule on this motion because the claimants failed to provide legal authority or support any arguments with facts. Any ruling on whether wildlife, recreation, or system maintenance constitute beneficial uses would be an advisory opinion based on

⁵

The facts establish that the State is a privy to the *International Mortgage Decree*. James Bedal was a party to the *International Mortgage Decree*. He transferred his water right to Richard and Frances Tucker. The Tuckers then deeded their property to the State. See *Affidavit of Patrick D. Brown*.

a set of hypothetical facts not before the court. *Harris v. Cassia County*, 106 Idaho 512, 681 P.2d 988 (1984); *Country Ins. Co. v. Agricultural Development Inc.*, 107 Idaho 961, 695 P.2d 346 (1984).

Therefore, as a matter of law, the claimants' *Motion for Summary Judgment* on the issue of whether aesthetics constitutes a beneficial use of water is GRANTED. This is not a finding that these claims, as a matter of fact, include aesthetics as a purpose of use.

VI. DECISION (I.C. §§ 42-1425, 42-1426, AND 42-1427)

A. I.C. § 42-1427(1)(b)

The claimants allege that the "other purposes" phrase decreed under the *International Mortgage Decree* is an undefined element of the prior decree; therefore, the claimants argue that I.C. § 42-1427(1)(b) may be used to define the "other purposes" by viewing those uses which were in existence on or about the commencement date of the SRBA, November 19, 1987. The respondents argue that if the prior decree defines an element, regardless of whether the element decreed is vague, I.C. § 42-1427(1)(b) is inapplicable.⁶

When there is a dispute regarding the application of a statute, the court will apply basic principles of statutory construction to determine the intent of the statute.

Statutory interpretation always begins with an examination of the literal words of the statute. In so doing, every word, clause and sentence should be given effect, if possible. The clearly expressed intent of the legislature must be given effect and there is no occasion for construction where the language of a statute is unambiguous. Finally, when construing a statute, its words must be given their plain, usual and ordinary meaning.

Rim View Trout Farm v. Higginson, 121 Idaho 819, 822, 828 P.2d 848, 851 (1994) (citations omitted).

⁶ I.C. § 42-1427(1)(b) in its entirety reads as follows:

Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon the historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.

Section 42-1427(1)(b), in pertinent part, reads as follows:

[T]he legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication. . . ."

Section 42-1427(1)(b) applies to "undefined" elements contained in prior decrees. The inquiry before the court is whether the word "undefined" is synonymous with the word "vague." If the two terms have the same meaning, then I.C. § 42-1427(1)(b) may be used to clarify vague terms in prior decrees.

The term "undefined" means: "1: not defined; not precisely limited, determined, or distinguished ; VAGUE" WEBSTER'S THIRD INTERNATIONAL DICTIONARY, UNABRIDGED (1986). When a word is used in small capitals within a definition, it means the word being defined and the word in small capitals are synonyms. *Id.* at 18a. Because the words "undefined" and "vague" have the same meaning, I.C. § 42-1427(1)(b) may be used to define vague terms used in prior decrees.

In this case, the court finds that the term "other purposes" decreed in the *International Mortgage Decree* is a vague term. Therefore, I.C. § 42-1427(1)(b) may be used to clarify the "other purposes" language of the *International Mortgage Decree*. If I.C. § 42-1427(1)(b) is used to define the other purposes language of the decree, then it must only be shown that the claimed uses established do not exceed "any previously determined and recorded element of the decreed or licensed water right." See *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 463, 926 P.2d 1301 (1996).

For these reasons, the claimants' *Motion for Summary Judgment* on the issue of whether I.C. § 42-1427(1)(b) applies is GRANTED.

B. INTERPLAY OF I.C. § 42-1427(1)(b) WITH I.C. §§ 42-1425 AND 42-1426

Having held that the claimants may use I.C. § 42-1427(1)(b) to define the "other uses" provision of the *International Mortgage Decree*, the inquiry is how I.C. § 42-1427(1)(b) interplays with I.C. §§ 42-1425 (accomplished transfers) and 42-1426 (enlargements).

Both I.C. §§ 42-1425 and 42-1426 address changes in the use of a water right in violation of mandatory permitting, licensing, and transfer statutes. If I.C. § 42-1427(1)(b) is used to establish purposes of use that existed on the date of the decree, then those uses will be deemed to be part of

the water rights as decreed. Consequently, there can be no change in the water right, and there can be no accomplished transfer under I.C. § 42-1425 or enlargement of the right under I.C. § 42-1426.

Again, for I.C. § 42-1427(1)(b) to apply, it must only be shown that the purposes of use established do not exceed any previously decreed element of the water right. See *Fremont-Madison Irrigation District*.

**C. APPLICATION OF I.C. §§ 42-1425 AND 42-1426 IN THE ABSENCE OF
I.C. § 42-1427(1)(b)**

In the absence of evidence establishing the applicability of I.C. § 42-1427(1)(b), the claimed purposes of use may be established with evidence of the water right's use after the claimed priority date. If the parties intend to present post-priority date evidence, then the court must discuss the applicability of I.C. § 42-1425 and I.C. § 42-1426.

The first inquiry involves accomplished transfers under I.C. § 42-1425. An "accomplished transfer" is defined as a change in nature or purpose of use which took place in violation of I.C. § 42-222, the mandatory transfer statute. I.C. § 42-1425. Section 42-222 did not apply to changes in nature or purpose of use which occurred prior to 1981. See 1981 Session Laws, ch. 147, § 3, p. 253. Until that time, parties had the right to change their nature or purpose of use so long as the right did not injure any existing rights. The fundamental basis of this rule is that a water right is a real property interest. I.C. § 55-101(c). Like all real property interests, the right may be used in any manner subject only to reasonable governmental regulation.

The principle that water right owners could change aspects of their water right without governmental approval is not a novel rule in Idaho. For example, in *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930), the court held as follows:

One of the valuable incidents of [a water right] . . . which the owner cannot be deprived is the right to use it where he will and to change its place of use, providing always that by such use or such change in the place of use the rights of others are not adversely affected.

Id. at 744.

Specifically, the principle that water right owners could change their nature or purpose of use was best outlined by the Washington Supreme Court in *In Re: Water Rights in Alpowa Creek*, 224 P. 29 (Wash. 1924), wherein the court held:

The appropriator of water is not limited in its application to that use for which he made the appropriation. On the contrary, he may apply the water to any beneficial use that he chooses and in changing from one use to another he does not in any way lessen the rights or forfeit his priority as an appropriator. If this were not true a change in circumstances by which the use of water for a purpose first contemplated would no longer be profitable, would result in a practical destruction of the appropriator's interest therein and in a loss by him of all the water and of all the appliances by which it has been conveyed. . . . The appropriation having become perfect by the diversion of the water and its application to a useful purpose, the appropriation and his successors in interest acquire the right to use the water thus actually appropriated either for the purposes originally contemplated or for any other lawful purpose.

Id. at 32; see also *Seven Lakes Reservoir Co. v. New Loveland and Greely Irr. & Land Co.*, 93 P. 485 (Colo. 1907) ("a priority to the use of water is a property right . . . and its character and method of use may be changed, provided such change does not injuriously affect the rights of others"); *Wimer v. Simmons*, 39 P. 6 (Ore.); *Head v. Hale*, 100 P. 222 (Mont.); *Ramelli v. Irish*, 31 P. 41 (Cal. 1892); see generally, 2 KINNEY ON IRRIGATION AND WATER RIGHTS §§ 869-73, (2nd ed. 1912).

For those changes in nature or purpose use which occurred after 1981, I.C. § 42-1425 does apply. However, those new uses would be allowed, with the original priority date, if the new uses (1) did not injure other rights existing at the time of the change in use and (2) the transfer did not constitute an enlargement. *Fremont-Madison Irrigation District*, 129 Idaho at 458. For practical purposes, whether the transfer occurred before or after 1981, the test is nearly the same; the new uses are allowed in the absence of injury.

The second inquiry involves enlargements under I.C. § 42-1426. An "enlargement" is defined as an increase in the use of a water right made outside "the mandatory permit system provided in sections 42-201 and 42-229. . . ." I.C. § 42-1426(1)(a). The mandatory permit statutes took effect in 1971. Therefore, if the change of use occurred prior to 1971, or if the use occurred after 1971 and there was no enlargement, then I.C. § 42-1426 does not apply. If the change in use occurred after 1971 and there is an enlargement under I.C. § 42-1426, the use could be allowed with the priority date corresponding to the date of enlargement so long as (1) the rate of diversion was not increased and (2) the enlarged use did not injure other users existing on the date of the enlargement. *Fremont-Madison Irrigation District*, 129 Idaho at 460.

If neither I.C. §§ 42-1425 nor 42-1426 apply, then the change in use will be analyzed under the rule announced in *In Re: Water Rights in Alpowa Creek*. If there is an injury, then that portion of the water right resulting in the injury would be assigned a new priority date corresponding to the date of the change in use.

For these reasons, the claimants' *Motion for Summary Judgment* on the application of I.C. §§ 42-1425 and 42-1426 is GRANTED.

D. DIRECTOR'S DUTY UNDER I.C. §§ 42-1425, 42-1426, AND 42-1427

Under I.C. § 42-1427(1)(b), the Director has a mandatory duty to recommend "undefined" elements based upon conditions that existed on or about the date of the commencement of the SRBA. "[T]he director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of the adjudication." I.C. § 42-1427(1)(b) (emphasis added).

In this case, it appears that the Director did not follow his mandatory duty under I.C. § 42-1427(1)(b) in recommending some of these water rights. For some of these water rights, the claimed purposes of use were denied because the Director concluded that the evidence at the time of the original appropriation did not include such uses. For example, the Director's recommendation for water right 36-00007 was as follows:

- a. The touchstone IDWR uses to determine whether an asserted purpose of use can be recommended pursuant to a specific water right is **evidence of intent to divert for the purpose asserted as of the date of the original appropriation.**

Supplemental Director's Report for Water Rights 36-00007 and 36-00008 at 5 (emphasis added).

To complicate matters, some of these rights involved prior licenses and decrees. In that I.C. § 42-1427 applies to prior licenses and decrees, the Director ignored the decree and focused only on the license. For example, in water right 36-00047, the Director's recommendation was as follows:

The purpose of use for this water right when originally licensed in 1918 was "irrigation and domestic use." See Exhibit A. When the water right was transferred in 1927 the water was being used to raise alfalfa and grain. See Exhibit B. The water right transferred could be used solely for irrigation and domestic use on the

place of use. See Exhibit D. No request to change the purpose of use for this right from irrigation and domestic has ever been filed with IDWR.

Supplemental Director's Report for Water Right 36-00047 at 5.⁷

In reviewing this matter, it appears that the Director has been arbitrary in making his recommendations under I.C. § 42-1427(1)(b). For example, as to irrigated acres, an undefined element for may previously licensed or decreed water rights, the Director does not evaluate the irrigated acres at the time of the original appropriation. Rather, the Director uses evidence taken from recent satellite or aerial photography to determine the amount of irrigated acres. See e.g., *Supplemental Director's Report for Water Right 36-00047* at 4. However, as to other undefined elements, such as purpose of use, the Director ignores uses which may have existed in 1987 and focused only on those uses which were in existence at the time of the original appropriation. To avoid applying I.C. § 42-1427(1)(b) arbitrarily, the legislature made it clear that the Director shall base his recommendation as to undefined elements of prior decrees or licenses based on conditions existing as of the commencement date of the SRBA, 1987.

Furthermore, the fact that the Director ignored the use of the right after the claimed priority dates implicates other mandatory duties. Both I.C. §§ 42-1425 and 42-1426 allow for accomplished transfers or enlargements which were made in violation of the mandatory transfer, permitting, and licensing requirements. In 36-00047, the Director disallowed the claimed purposes of use because "[n]o request to change the purpose of use for this right from irrigation and domestic has ever been filed with IDWR." Based on this conclusion, the court can only conclude that the Director ignored or overlooked I.C. § 42-1425. The legislature has made it absolutely clear that the Director cannot deny a claim because of the failure to comply with transfer statutes.

Denial of a claim based solely upon the failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and to the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of claim.

I.C. § 42-1425(1)(a).

7

In the case where the right is based on a license and decree, particularly when the decree was entered after the licenses, there is an open question on whether the Director should follow the license or decree when determining undefined elements under I.C. § 42-1427(1)(b).

Based on the information currently before the court, it appears that the Director either failed or improperly complied with his mandatory duty under I.C. §§ 42-1425, 42-1426, and 42-1427. Therefore, the court will entertain any proper motion to consider whether the Director should reexamine these rights or, in the alternative, whether the court should strike the recommendations where the Director is found to have improperly applied the statutes.

VII. DECISION (RESPONDENTS' MOTION FOR SUMMARY JUDGMENT)

The State filed a *Motion for Summary Judgment* against the claimants alleging that the claimed purpose of use did not exist on or about the priority date. The other respondents joined in the *Motion for Summary Judgment* and filed their own motion. The respondents' motion fail for two reasons.

First, the respondents did show that none of the claimants knew what purposes existed at the time of the original appropriation. However, the *International Mortgage Decree* includes "other purposes" which may or may not include the purposes claimed. As previously stated, the decree is evidence. As evidence, it creates a material issue of fact as to the existence of the claimed purposes of use.

Second, regardless of which party has the burden of proof at trial, it is the moving party's burden on summary judgment to show the absence of a material fact. *Thompson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 887 P.2d 1034 (1994). If the moving party raises a material issue but fails to support it with facts, the non-moving party has no burden to respond with supporting evidence. *Id.* at 531. Here, the respondents did not address the use of the right after the claimed priority date to determine whether the claimed purposes of uses existed. Again, prior to 1981 when I.C. § 42-222 was amended to require approval from IDWR for changes in nature or purpose of use, water right owners could change their nature or purpose of use at anytime so long as the change did not cause injury. *See infra* § IV(C).

The court recognizes that a party may prevail on summary judgment if the non-moving party fails to rebut a presumption. *See, e.g., Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990); *In the Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (1994). Had the Director performed his duty to investigate these rights under I.C. §§ 42-1425, 42-1426, and 42-1427 or the

rule outlined in *In Re: Water Rights in Alpowa Creek* as to purposes of use which may have existed after the claimed priority dates or after the licenses or transfers were issued, then the claimants would have had to rebut the presumption or risk losing on summary judgment. However, as previously outlined, the Director did not correctly evaluate the claimed purposes of use for these rights. Therefore, for purpose of summary judgment, the court will not give the Director's Reports for these rights, as to the claimed purposes of use, any presumption.⁸

For all these reasons, there remains a material issue of fact as to whether the claimed purposes of use exist. The respondents' *Motion for Summary Judgment* is DENIED.

VIII. CONCLUSION

To summarize, the court rules as follows:

1. The respondents' *Motion in Limine* is DENIED. The *International Mortgage Decree* is evidence to be weighed against all the other evidence.
2. The claimants' *Motion for Summary Judgment* against the State on the issue of *res judicata* is GRANTED. The State may not litigate those issues decided or those issues which could have been decided. However, as to any undefined or vague portions of the prior decree, the State may litigate the meaning of those undefined or vague terms. Furthermore, the State is not precluded from litigating the use of the water rights after the date of the decree.
3. The claimants' *Motion for Summary Judgment* as to whether wildlife, aesthetics, recreation, and system maintenance are beneficial uses is GRANTED, IN PART. The court finds that aesthetics is a beneficial use of water.
4. The claimants' *Motion for Summary Judgment* on the applicability of I.C. § 42-1427(1)(b) is GRANTED. Section I.C. § 42-1427(1)(b) applies to the term "other purposes."

8

The court exercises free review of the content of Director's Reports. "Stripping the district court 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 province of the judicial department of the government." *In Re: SRBA, Case No. 39576 (BWT 3)*, 128 Idaho 246, 259, 912 P.2d 614 (1995).

As to the applicability of I.C. §§ 42-1425 and 42-1426, the court finds:

- a. I.C. § 42-1425 does not apply to changes in use made prior to 1981. Prior to 1981, water right owners could change their purpose of use so long as the change did not injure rights existing at the time of the change in use.
 - b. I.C. § 42-1426 does not apply to changes in use made prior to 1971 and applies to changes in use made after 1971 only if the change in use constitute and enlargement.
5. As to the applicability of I.C. §§ 42-1425 and 42-1426, the claimants' *Motion for Summary Judgment* is **GRANTED** as a matter of law. The court finds:
- a. I.C. § 42-1425 does not apply to changes in use made prior to 1981. Prior to 1981, water right owners could change their purpose of use so long as the change did not injure rights existing at the time of the change in use.
 - b. I.C. § 42-1426 does not apply to changes in use made prior to 1971 and applies to changes in use made after 1971 only if the change in use constitutes an enlargement.
6. The respondents' *Motion for Summary Judgment* as to purpose of use for water rights is **DENIED**.

IT IS SO ORDERED.

DATED this 31 day of March, 1999.



FRITZ X. HAEMMERLE, Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE was mailed on March 31, 1999, with sufficient first-class postage to the following:

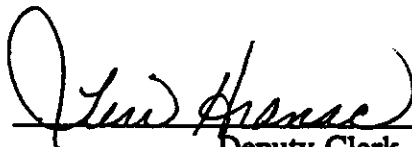
Director of IDWR
P O Box 83720
Boise, ID 83720-0098

Patrick D. Brown
812 Shoshone St E
Twin Falls, ID 83301

Michael Creamer
PO Box 2720
Boise, ID 83701-2720

Dana Hofstetter
PO Box 1427
Boise, ID 83701-1427

John Marshall
Deputy Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449


Deputy Clerk