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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. 65-11412 and 65-11412A

**EMMETT IRRIGATION DISTRICT'S
RESPONSE TO UNITED STATES' MOTION
FOR SUMMARY JUDGMENT**

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I.

INTRODUCTION

Emmett Irrigation District (the “District”), by and through its counsel of record Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and in accordance with Idaho Rule of Civil Procedure 56, SRBA Administrative Order 1, and the scheduling orders in this matter hereby responds to the United States’ (“Bureau”) Motion for Summary Judgment and supporting documents. There are no genuine issues of material fact, and this matter should be resolved as a matter of law. Application of the appropriate legal standards leads to the conclusion that the District should be decreed the owner of the water right used to power the hydro pumps at Black Canyon Dam, or at a minimum, the equitable (beneficial) owner.

Therefore, the District respectfully requests that the Special Master grant its Motion for Summary Judgment and deny that of the Bureau, for the reasons set forth in the Memorandum in Support of Emmett Irrigation District’s Motion for Summary Judgment (“Memorandum in Support”), the evidence in the record, and for the reasons set forth herein.

II.

FACTS

The parties have presented many of the same documents in support of their respective motions. The dispute lies not in what the documents say, but in what they mean. That meaning can only be determined by analysis of the facts in light of *applicable* law.

A. Both The District And The Bureau Have Received Benefits From Their Cooperative Efforts

The Bureau would have the Special Master believe that the benefits derived from the relationship between the District and the Bureau inured almost entirely to the District. The Bureau characterizes itself as an ever-patient benefactor who bent over backwards to help the District. It is true that the Bureau has played an integral role in the settlement and viability of the arid West. Let us not forget, however, the reason for the Bureau's existence: to facilitate irrigated agriculture. Absent the willingness of those hard-working, brave farmers and ranchers who first populated lands such as the District, who labored incessantly to put water diverted to a beneficial use, the Bureau would not exist.¹

The recitals in the 1921 Contract also show that the District's cooperation was critical to the feasibility of the Black Canyon Dam and Project, which was a long-held goal of the Bureau:

18. AND WHEREAS, the Secretary of the Interior has caused plans and surveys to be made for the irrigation of about Fifty-six Thousand (56,000) acres of arid land in the Black Canyon Division of the Boise Project, located in the Black Canyon Irrigation District, a large part of which is public land of the United States, and most of the remainder thereof is land which was public land at the time of the initiation of the Boise Project and was entered under the provisions of the said Federal Reclamation laws and was settled upon in the expectation of receiving water for irrigation under said Acts of Congress.

19. AND WHEREAS, under the said plans the said proposed Black Canyon dam is necessary as a means of diverting the waters

¹ Indeed, the 1921 Contract (Ex. 3 to First Campbell Affidavit) between the Bureau and the District, with its description of the construction of the original system which conveyed water from the dam at Montour to the District, reflects the tenacity of farmers and others in the Emmett area.

of the Payette River for the irrigation of the lands of the said proposed Black Canyon Division of the Boise Project.

20. ***AND WHEREAS, the cost of constructing the irrigation works necessary for the irrigation of said Black Canyon Division is such that the said Black Canyon Division is considered to be a feasible project if it can be built without charging the same with the entire cost of the Black Canyon Dam, but that the cost thereof is sufficiently high so that the feasibility of said Black Canyon Division of the Boise Project is considered doubtful, if it were necessary to charge to the said Black Canyon Division the entire cost of the Black Canyon Dam.***

21. AND WHEREAS, it is necessary to pump water for about one-third of the land proposed to be irrigated in said Black Canyon District, and whereas the Black Canyon Dam will furnish a convenient and economical power site for generating the electric power necessary for such pumping.

Ex. 3 to First Campbell Affidavit (emphasis added). The District was every bit as valuable to the Bureau, if not more, than the Bureau was to the District. The fact that the joint cooperation of the Bureau and the District was necessary for the construction of Black Canyon Dam provides yet more support for the District's position that it should be decreed to be, at the least, the beneficial owner of SRBA Claim Number 65-11412.

In addition, the documents which the District attached to the first Affidavit of Scott Campbell (filed on or about February 10, 2003), show that the Bureau had long planned to construct the Black Canyon project. Ex. 1 - 3 to First Campbell Affidavit. However, Emmett Irrigation District and its predecessor had existed and its landowners irrigated for a considerable amount of time prior to 1924. It is difficult to see how the Bureau could have constructed the Black Canyon facilities and project without impacting the Emmett Irrigation District's pre-

existing rights, rights which are now diverted through Black Canyon Dam.² The District's cooperation and assistance was indispensable.

B. Not All Of Emmett Irrigation District's Water Rights Stem From Bureau Projects

As the historical documents filed in this matter show, the District and its predecessor were irrigating long before the Bureau constructed Black Canyon Dam. Therefore, the Bureau's statement that "[a]lthough the lands of the [District] are not part of the Boise Project, the District receives water diverted at Black Canyon Dam through a Warren Act contract," is not entirely accurate. Bureau's Memorandum in Support, p. 2. The District owns separate water rights, which predate the construction of Black Canyon Dam. *See* Exhibit 14 to Second Affidavit of Scott L. Campbell ("Second Campbell Affidavit"), filed concurrently herewith. The quantities and priority dates for those *pre-Black Canyon rights* are as follows³:

<u>Claim Number</u>	<u>Priority Date</u>	<u>Quantity</u>
65-23	11/26/1883	18.50 cfs
65-2004	05/26/1903	169.390 cfs
65-2080	07/29/1908	124.00 cfs
65-10491	04/01/1919	205.230 cfs ⁴

The District also holds contracts for storage water from Cascade Reservoir and Deadwood Reservoir. *See, e.g.* Ex. 11 to First Campbell Affidavit.

² Again, one should remember that the Black Canyon Dam is not a water storage facility but, instead, a water raising facility.

³ The District also owns irrigation water rights 65-7832 with a 1977 priority date and 65-12194 with a 1978 priority date.

⁴ There are certain limitations, not relevant to the matter at hand, imposed on those rights. The District also possesses other rights with post-Black Canyon priority dates.

In addition, it is incorrect to say that “EID’s water rights for irrigation purposes are not at issue in this case.” Bureau’s Memorandum in Support, p. 2. While this matter does not concern the validity of any of the District’s specific irrigation water rights, the ability to use the major portions of those rights is critically dependent on the continued use of the hydro pumps at Black Canyon Dam. At this time, use of the pumps is the only way to ensure that the District’s north-side landowners obtain irrigation water. As discussed herein (and also discussed in the District’s original Memorandum in Support), the water to run the hydro pumps is beneficially used to provide for delivery of irrigation water on the lands within the District’s boundaries, and should be considered appurtenant thereto. The only way that the District can ensure the perpetual use of the water right to drive the hydro pumps, for that purpose, is to be decreed the owner of that water right.

C. The Bureau’s “Power Right”

At pages 7 and 8 of its Memorandum in Support, the Bureau discusses its 1,300 cfs power water right. The Bureau notes that at one time it viewed that water right as being available either for hydroelectricity or power to drive the hydro pumps. Apparently, in the Bureau’s view, this further supports its argument that it should be the full owner of SRBA Claim Number 65-11412.

However, the facts belie any such assertion. The Bureau has claimed the full 1,300 cfs in the SRBA as Claim Number 65-02288 for “power” purposes. Ex. 15 to Second Campbell Affidavit. If that right was intended to be for hydropower to drive the pumps as well, one questions why has it been claimed as SRBA Claim Number 65-11412? The reality is that 65-2288 is for hydroelectric rights, of which the Bureau may be the full owner. The opposite is

true of SRBA Claim Number 65-11412: it is a hydropower right, and the District is the beneficial owner.

D. The Payette River Basin Adjudication

The District discussed the factual history of the Payette River Basin Adjudication (“PRBA”) in its Memorandum in Support. District’s Memorandum in Support, pp. 25 - 27. That discussion will not be repeated here, except to note that the Bureau’s claim was not accepted for filing in the PRBA until November 21, 1988, which was after the SRBA’s commencement. Therefore, it is questionable whether the claim was even valid at that point. Most certainly, the partial decree for water right 65-11412 was not valid. *See Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 686, 871 (1993) (stating that “Once SRBA was commenced, jurisdiction to resolve all of the water rights claims within the scope of the general adjudication is in the SRBA District Court *only*.”)

It is also interesting to note that the Bureau was less than prompt in pursuing claim number 65-11412 in the SRBA. In 1982, *after* prompting by IDWR, the Bureau forwarded a notice of claim for that right to the Field Solicitor’s office. Ex. 27 and 28 to Bureau’s Memorandum in Support. However, the claim was not actually filed in the SRBA until *two years* later, in 1984. Ex. 30 to Bureau’s Memorandum in Support. Moreover, it appears that the Bureau followed through on filing the claim only after being prompted to do so by the District. Ex. 29 to Bureau’s Memorandum in Support.

E. Summary

Again, the facts are not significantly in dispute. This matter is resolvable by answering a rather straightforward question of law: is an irrigation district entitled to be decreed

the owner or, at a minimum, the beneficial owner of a water right used to power direct-connect pumps essential to divert water into that district's irrigation canal? A review of pertinent legal authority, including those cited in the District's Memorandum in Support, show that the question should be answered affirmatively.

III.

ARGUMENT

A. The Bureau Has Ignored Critical Cases Which Show That The District Is The Beneficial Owner, At Least, Of The Water Rights Described In SRBA Claim Numbers 65-11412/11412A

In its Memorandum in Support, the District cited and discussed several cases which have a direct bearing on the matter at hand. *See* District's Memorandum in Support, pp. 17-22 (citing and discussing 43 U.S.C. Section 383; *California v. United States*, 438 U.S. 645, 98 S. Ct. 2985 (1978); *Ickes v. Fox*, 300 U.S. 82, 47 S. Ct. 412 (1937); *Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332 (1945); and *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. (1983)). Those cases emphasize deference to state law, and the fact that beneficial ownership of water rights associated with Bureau facilities lies with those who have true beneficial use of the water. The United States Supreme Court has held that water users, who are the beneficial users of irrigation water from Bureau projects, should be decreed the beneficial owners, with the Bureau (or the United States) holding only nominal title. The same principle applies under the circumstances present here, and the absence of those authorities from the Bureau's brief is striking.

The District is the beneficial user of the hydro pump water: it is the District's demand for water which dictates whether the pumps will operate, how much water they will

pump into the North Side Canal, and by extension, how much water will be necessary to operate the pumps. Stated differently, the District decides how much water it will need to pump into the North Side Canal, and conveys that information to the Bureau. The amount of water pumped into the canal is directly related to the amount of water needed to operate the hydro pumps.

Second Affidavit of Roy Maxwell.

B. The Water Right Is Appurtenant To Emmett Irrigation District Lands, And Is Beneficially Used By The District And Its Landowners

1. The District is the Beneficial User and the Beneficial Owner of the Water Right at Issue

The Bureau argues that the water right to drive the hydro pumps is appurtenant to those pumps. In contrast, the District's position is that the water right is appurtenant to lands within the District. Resolution of the question turns on a determination of the true beneficial use of the water. It is also important to keep in mind that when determining the validity of a water right, the focus is on the beneficial use at the time the right was created and, to a certain extent with regard to questions of forfeiture, the current beneficial use of the water. However, potential *future* beneficial uses of the water, such as those described at page 20 of the Bureau's Memorandum in Support, are irrelevant to the matter at hand.⁵

Under the Idaho Code, when a water right has been established due to diversion and beneficial use, "such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, *through necessity*, said water is being applied" I.C. § 42-101 (emphasis added). That language is important: the necessity for the use of the water is

⁵ That discussion of potential future uses *does*, however, illustrate and confirm a significant fear of the District: the Bureau's willingness or desire to take the hydro pump water right and use it for purposes other than supplying water to power the only feasible means of diversion of water to the District's North Side Canal.

created by the District's beneficial use of water for irrigation. But for the irrigation, the water right at issue would not be beneficially used. Therefore, the District is the beneficial user and, thus, the beneficial owner of SRBA Claim Number 65-11412. It follows, then, that the water right should be considered appurtenant to the lands within the District.

Resolution of the question of appurtenancy is important because of the Bureau's claim that under the 1955 Contract, it owns the Black Canyon facilities and appurtenances thereto. However, the fact the water passes through a Bureau facility in some fashion does not mean that the water therefore becomes appurtenant to it. If that were the case, the Bureau could be decreed the owner of all water which flows through Black Canyon Dam, despite the ultimate beneficial user / owner of the water rights allowing use of that water.

In attempting to show that it is the beneficial user of the water right to drive the hydro pumps, the Bureau asserts that, "Idaho's constitution recognizes that generating power is a beneficial use." Bureau's Memorandum in Support, p. 16 (citing Idaho Const. Art. XV, § 3, *Idaho Dep't of Parks v. Idaho Dep't of Water Administration*, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974)). That statement is true as far as it goes. However, a review of the Proceedings and Debates of the Idaho Constitutional Convention shows that the type of power contemplated by the drafters of that section was hydroelectricity. The person who introduced the amendment adding the word "power" to Section 3 of Article XV stated:

I shall move to insert the word "power or motor" after the word "manufacturing" in line 8, and for this reason. The case Mr. McConnell cites is motor power of the electric light company of this city on the other side of this ditch. Of course that is not the manufacturing purpose; they might have several establishments of that kind for the purpose of generating power and monopolize all the water of that ditch. They don't manufacture anything; they generate light.

Idaho Const. Conv.: Proceedings and Debates, p. 1125-16 (1889) (Mr. Wilson). Mr. Wilson, therefore, distinguished between water used to drive pumps for manufacturing purposes, and those used to drive pumps which generated hydroelectricity. One could surmise that Mr. Wilson would have also distinguished between hydro pumps of the type used at Black Canyon Dam from hydroelectricity facilities, stating that the former was part of the irrigation right.

Indeed, such an outcome is likely given the clear intent of the drafters to protect irrigated agriculture:

The object was to fix the fact that when water was once diverted for domestic or agricultural purposes it could not be taken away from those people, because their homes and everything they had in the world depended upon its continued use I do not know of anything that will come before the convention at our sitting which will probably be of more importance to the future existence of the state of Idaho than this question of irrigation

Id. at 1121 (Mr. McConnell).

The District is the beneficial user of the water right used to drive the hydro pumps, because it is the District's demand for water which determines how much water is used to drive the pumps. Moreover, the hydro pump right should be considered part and parcel of the District's irrigation water rights, as the very reason for the hydro pump's existence is to deliver the District's irrigation water rights.

2. The 1955 Contract Does Not Mandate that Ownership be in the United States

The Bureau makes much of the language in the 1955 contract which provides that:

Title to Black Canyon and Deadwood Dams and Reservoirs, including all properties incidental and appurtenant thereto, and all other reserved works, shall remain in the United States until otherwise provided by Congress.

Ex. 11 to First Campbell Affidavit, p. EID 00199. The Bureau argues that language makes the hydro pump water right the property of the Bureau, because it is allegedly appurtenant to property to which the United States has title. However, a careful examination of the Contract reveals that is not the case at all.

The 1955 Contract defines the “reserved works” as “Deadwood Dam and Reservoir, Black Canyon Dam and Reservoir, including the direct-connected pumping installation serving the north side lands of the District, but exclusive of Black Canyon Powerplant.” *Id.* at EID 00192. Thus, the direct-connected pumping installation was included within the reserved works. However, the apportionment of the rehabilitation and betterment charges for Black Canyon Dam show the Bureau’s acknowledgment that the direct-connected pumps are for the benefit of irrigation:

Since the dam serves as the diversion works for various irrigation interests and provides head for power production, the costs of its rehabilitation and betterment will be apportioned by the Secretary among the irrigation interests served and the Black Canyon Powerplant on the basis of the relative benefits derived therefrom, .

...

Id. at EID 00193. Thus, the Bureau drew a clear distinction between the powerplant (which generates hydroelectricity) and the remainder of the facilities, which are operated *for the benefit of irrigation*.

The 1955 contract’s discussion of the care, operation and maintenance of Black Canyon Dam also clarifies that it is the District which is the beneficial user and the recipient of the benefits of the hydro pumps:

11. (a) The United States will operate and maintain the reserved works so as to make available to the District (1) the direct-connected pumping installation; (2) the District’s share of

the capacity in Deadwood Reservoir, as defined in Article 16; and (3) the District's proportionate interests in Black Canyon Dam and Reservoir.

(b) The District, during the time that any part of the reserved works described in (a) of this article is being operated by the United States, will pay to the United States, in advance, these costs of operating and maintaining those works:

...

(3) The costs of operating and maintaining the direct-connected pumping installation *to serve the north side lands of the District*, including the intake and discharge lines.

Id. at EID 00197 (emphasis added). That language shows, yet again, that the District is the beneficial user of the direct-connect pumps, in particular, and that the direct-connect pumps were to be operated for the District's benefit. Thus, even if the water right at issue were to somehow be determined to be appurtenant to the pumps themselves (instead of the lands of the District), beneficial or equitable ownership should still lie with the District.

In addition, a careful reading of Section 12 of the 1955 contract (quoted above) also leads to the conclusion that it is the District which is *at least* the beneficial owner of SRBA Claim Number 65-11412. Section 12(a) provides that Title to the Dam "including all properties incidental and appurtenant thereto", lies with the Bureau. However, Section 12(a) then states, in a separate clause, that title to "all other reserved works" remains with the United States. Noticeably missing from the reservation of "all other reserved works" (which includes the direct-connected pumps) is a reservation of all properties incidental and appurtenant. Thus, even if the water right at issue could be deemed somehow appurtenant to the pumps, instead of the lands which are the true beneficial users of the hydro pump water right, the Bureau failed to make a reservation of that right.

The Bureau knew very well how to reserve a water right or protect ownership of the same. Section 13 of the 1955 Contract provided:

The Black Canyon Powerplant and any other hydroelectric powerplant built in connection with the reserved works and water rights in connection therewith shall be and remain in the exclusive control, possession, and ownership of the United States unless and until otherwise provided by Congress, but such water rights shall at no time be exercised to the detriment of the water rights held for the benefit of the District as provided in this contract.

Id., p. EID 00200. That passage illustrates several points. First, the United States specifically provided that water rights used to generate hydroelectricity were to be in its “exclusive control, possession and ownership.” Thus, if the United States truly intended that it would be the sole owner of the water rights used to drive the hydro pumps, it surely would have included specific language of exclusive ownership, as it did regarding hydroelectricity power rights. Second, the United States clearly recognized that water rights used for other purposes, such as those used to drive the hydro pumps, could not be in its exclusive control and ownership. Not only were hydroelectricity water rights to be used only when not detrimental to the District, but other types of water rights were “held for the benefit of the District.” Therefore, the District is at least the beneficial/equitable owner of SRBA Claim number 65-11412, used to drive the hydro pumps, with the Bureau holding nominal legal title only.

The District recognizes that the Bureau advocates a different construction and result regarding much of the just-discussed language. Thus, there are conflicting constructions. However, when one takes into account Congress’ clear expressions of deference to state water law, and the cases finding that irrigation entities are the beneficial owners of water rights from

Bureau projects, the conclusion to which one is led is that the District's construction is more in accord with congressional intent and legal precedent.

3. Ownership of a Diversion System and a Water Right Conveyed Through that Diversion System May Be In Two Parties

The Bureau argues that because it owns the penstocks and hydro pumps, and because the water at issue is diverted through the pumps, it is the owner of the water right. However, that is not necessarily the case under Idaho law: ownership of a diversion system and a water right can be in different individuals or entities. Long ago, the Idaho Supreme Court held that “[w]e are of the opinion that possessory rights to ditches and to the use of water may each have an existence independent of the other. A ditch may be conveyed, reserving the water right, or the water right may be conveyed, reserving the ditch.” *Ada County Farmers’ Irr. Co. v. Farmers’ Canal Co.*, 5 Idaho 793, 51 P. 990, 992 (1898). Later, the court cited that case, and further held that “[a] landowner’s rights in an irrigation canal or ditch are determined by the amount of water which the landowner conveys through the ditch and not by the amount of water which his shares represent in a canal company which controls the flow.” *Ramseyer v. Jamerson*, 78 Idaho 504, 305 P.2d 1088, 1093 (1957).

Similarly, the fact that the Bureau holds title to the physical diversion system (*i.e.*, the penstocks and the hydro pumps) does not necessarily mean that the Bureau holds title to the water right used to power the pumps – ownership of the pumps and the water right can be in different entities, and in this case it is.

4. The Water Used to Drive the Hydro Pumps is Akin to Water Used for Transmission Losses

Another way of viewing the water used to drive the hydro pumps is that the water is akin to that used in a ditch or canal for transmission or conveyance. As Roy Maxwell, the District's superintendent, described:

7. Water enters the penstocks roughly 30 feet below the top of the dam, and the force of that water is further increased as the penstocks channel that water down an approximately 60 foot drop in elevation as the penstocks enter the powerhouse.

8. Each penstock channels approximately 275 cfs of water to its corresponding hydro pump. That penstock then forks in two, conveying 110 cfs to a turbine located at the bottom of the hydro pump drive shaft, while the remaining 165 cfs is lifted into the District's North Side Canal by an impeller (propeller) driven by the mechanical force of the spinning turbine.

9. The "turbine fork" water is then discharged back into the Payette River just below the powerhouse after it passes through the turbine, while the "impeller fork" water is lifted into the District's North Side Canal.

10. In sum, a combined 220 cfs (110 cfs per hydro pump) is used to lift 330 cfs (165 cfs per hydro pump) into the District's North Side Canal. The hydraulic force of the 200 cfs is converted into mechanical force by a turbine and the pump shaft, and that mechanical energy drives the impellers lifting the 330 cfs into the District's North Side Canal.

First Affidavit of Roy Maxwell, pp. 2-3. The water used to drive the hydro pumps is necessary to ensure that the District's irrigation water rights can be conveyed into the District's canal system; it is used to transport the District's irrigation water to its place of use.

For that reason, the hydro pump water right is akin to the portion of a water right used for conveyance or transmission losses incurred during transportation of water to its place of use. Due to a variety of factors such as porosity of canals, evaporation and distance, the entire

amount of water diverted at the point of diversion does not arrive at the place of use. However, that “extra” amount of water is necessary to ensure that the full amount of water actually used at the place of use can be delivered.

The Idaho appellate courts have allowed an irrigation water right holder a reasonable additional amount of water for conveyance or transmission losses. For example, the Idaho Court of Appeals considered a case in which the plaintiff/respondent asserted a right to an additional quantity of water for his irrigation water right to compensate for evaporation. *Nahas v. Hulet*, 106 Idaho 37, 674 P.2d 1036 (Ct. App. 1983). The Court agreed, stating that:

a reasonable loss of water through evaporation or seepage is allowed. [Citation omitted]. Nahas’ expert testified that the amount of water necessary to compensate Nahas for evaporation, based on records of a local University of Idaho Experiment Station would be 2.5 feet per acre of lake surface area during each summer season. That witness assumed an average lake surface area of 45 acres, resulting in an estimated evaporation loss of 115 acre-feet. In further testimony, which was designed to show that the amount of evaporation loss should be added to the amount of water which would actually be applied to the fields to find the total amount of water to be diverted, the witness rounded that number off to “about one hundred acre-feet.” The court found that Nahas’ lake had a reasonable evaporation loss of 115 acre-feet per year. Substantial competent evidence supports this finding.

Id. at 42, 674 P.2d at 1041. *See also Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980) (stating that “some loss of water through seepage or evaporation is considered a prerogative of the appropriator, so long as the loss is reasonable. [Citation omitted]. The senior appropriator retains his right to all of the water, including that which is lost through reasonable seepage, and thus may reclaim it, for instance, by improving his transmission system.”); *Oliver v. Skinner*, 226 P.2d 507, 515 (Or. 1951) (stating that a water right holder’s “system of diversion and distribution need not be perfectly efficient; it

is sufficient if they are reasonably so. He is entitled to hold and divert, as incident to his appropriative rights, such amount of water as may be reasonably necessary to take care of normal storage and transportation losses.” [Additional citations omitted.]

By analogy, in the matter at hand, the District should be decreed the owner of the water right allowing use of the water to drive the hydro pumps. That water is, in reality, part of the irrigation water rights, used to ensure that the irrigation water can reach its place of use. The District is the beneficial user of that water, and could reclaim the water by improving or changing the transmission system from hydro pumps to some other method, much as a canal company might tile its canal.

5. Other Irrigation Districts Share Ownership of Water Rights Used to Drive Direct-Connect Pumps With the Bureau

The District was able to find two instances in which it appears that the Bureau shares ownership of a water right used to drive direct-connect pumps. The first is located in Montana; the water right is co-owned by the Bureau of Reclamation and the Helena Valley Irrigation District. The purpose of use, according to documents from Montana’s version of the Idaho Department of Water Resources, is “Power Generation: This water is used in the Helena Valley Pumping Plant to propel hydraulic turbine driven pumps which lift water to the Helena Valley Canal for use on the Helena Valley Project. The water used to propel the turbines is then returned to the source below Canyon Ferry Dam.” Ex. 16 to Second Campbell Affidavit. That is very much like the description of the operation of the hydro pumps at Black Canyon Dam. Even more interesting is the fact that the Bureau is the owner of the pumping facilities (included as part of the “Water Supply Works” or “Supply Works” in a 1959 contract between HVID and the Bureau). Ex. 17 to Second Campbell Affidavit. In fact, in 1975, the Bureau transferred the

supply facilities to the District except for the pumping plant. Ex. 19 to Second Campbell Affidavit. Nevertheless, the District still shares title of the water right to operate the hydro pumps with the Bureau.

In the Yakima Adjudication in Washington State, the Bureau stipulated with the Kennewick Irrigation District that the two entities would share ownership of certain water rights, including a portion of a right used to power hydraulic pumps at the Chandler pumping plant. Ex. 19 to Second Campbell Affidavit. More specifically, while the Bureau was decreed the owner of the hydropower rights, those rights were held for the use and benefit of the District. This is true even though “[t]itle to all facilities remains with the United States.” Ex. 20 to Second Campbell Affidavit.⁶ Moreover, the Bureau still agreed that Kennewick Irrigation District should share ownership of the pumping right even though:

This plant was constructed and is operated by the Bureau of Reclamation for the Kennewick Irrigation District. It is located on the left bank of the Yakima River, ten miles below Prosser and is contained in the same building as Chandler Powerplant, ... The present installation includes two turbine-pump units each rated to deliver 166 2/3 c.f.s. of water pumped, with about 210 c.f.s. additional required for power water or a total of 753 c.f.s.

Ex. 20 to Second Campbell Affidavit.

In subsection III(B)(4), above, the District discussed how the hydro pump right is like the transmission or conveyance loss component of an irrigation right. The materials the District obtained during discovery in this matter regarding the Kennewick Irrigation District illustrate that point:

⁶ Notably, the Kennewick Irrigation District owned the water rights and certain facilities until it transferred the rights to the same to the United States in exchange for certain consideration. Nevertheless, Kennewick Irrigation District remained a partial owner. Ex. 21 to Second Campbell Affidavit.

It is important to note that the water supply for delivery of the Kennewick Irrigation District at the outlet end of the river siphon at Chandler is dependent on the capabilities of the direct-connected hydro powered pump units in the Chandler plant. ***In brief, there must be enough water available, in addition to irrigation requirements, to provide the necessary power water to pump the District's contract rights.*** . . . expressed in instantaneous flow, to furnish full flow in the 500 c.f.s. Kennewick Irrigation Canal (capacity including proposed Extension Development) requires an additional power water flow of 625 c.f.s., or total flow of 1,125 c.f.s in the Chandler Canal.

Ex. 20 to Second Campbell Affidavit (emphasis added). That passage shows that water to drive direct-connect pumps is really akin to conveyance or transmission loss water, rather than a hydroelectricity water right.

C. The Doctrine Of Quasi-Estoppel Does Not Apply

The Bureau argues that quasi-estoppel should operate to bar the District from asserting its claim (under SRBA Claim Number 65-11412A) and its objection (to SRBA Claim Number 65-11412). However, quasi-estoppel is inapplicable in this case.

Quasi-estoppel is an affirmative defense. Therefore, the burden is on the party asserting it (*i.e.*, the Bureau) “to prove the elements of quasi-estoppel by a preponderance of the evidence.” *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 358, 48 P.3d 1241, 1247 (2002). It cannot meet that burden. As an equitable doctrine, it is not lightly applied; in fact, it has been characterized as a “last-gasp theory.” *Id.* at 357, 48 P.3d at 1246.

Idaho appellate courts have repeatedly set forth the elements of quasi-estoppel:

The doctrine of quasi-estoppel requires that the offending party must have [1] gained some advantage or caused a disadvantage to the party seeking estoppel; [2] induced the party seeking estoppel to change its position to its detriment and, [3] it must be unconscionable to allow the offending party to maintain a position

which is inconsistent from a position from which it has already derived a benefit.

Id. (Bracketed material added.) Stated slightly differently, “Quasi-estoppel prevents a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions.” *Belk v. Martin*, 136 Idaho 652, 659, 39 P.3d 592, 599 (2001). The Bureau has not proven, nor can it prove, those elements.

1. The District Did Not Gain An Advantage

The Bureau argues or implies that the District gained the benefit of its contract with the Bureau by not asserting ownership of the water rights at issue here. Bureau’s Brief in Support, p. 17. However, there is nothing in the record to show that ownership of the hydro pump water rights was a precondition or an inducement to the District entering into the contracts with the United States. Instead, as both sides have argued, and as the record reflects, there were mutual benefits stemming from the Black Canyon facilities and the various contracts related thereto. *See* Section II(C), *supra*, and Section II of the District’s Memorandum in Support. The District’s position as to ownership of the water rights did not lead to the arguable advantage of entering into contracts with the Bureau. In fact, the District actually placed itself at a considerable disadvantage by not affirmatively asserting ownership early: the risk that the Bureau might decide to transfer the water right to some other purpose. The Bureau cannot satisfy this element of quasi-estoppel.

2. The Bureau Was Not Put At A Disadvantage By The District’s Failure To Claim Ownership Of The Hydro Power Pumps Earlier

The Bureau argues that “EID’s action places the United States at a disadvantage; it forces the United States to litigate a previously closed question, and should the United States

lose, would deprive the United States of a property right previously decreed to it.” Bureau’s Brief in Support, p. 17. First, the District did not “force” the Bureau to litigate this question; with few exceptions inapplicable here, everyone with a claim to a water right within the Snake River Basin was required to file a claim in the SRBA. Commencement Order, p. 6. Ex. 22 to Second Campbell Affidavit. As to the specific issue of ownership, it was not a “previously closed question.” The District discussed that fact in their Memorandum in Support of Summary Judgment; the Payette Adjudication Court had no authority to render any decrees in the Payette Adjudication after the commencement of the SRBA. *See* District’s Memorandum in Support, pp. 25 - 27, and authorities cited therein. Therefore, any decrees rendered in the Payette Adjudication after 1987 were void as a matter of law. As the District also noted in its Memorandum in Support, the Bureau was well aware that it would have to refile its claim in the SRBA. Moreover, as the claimant of a water right, the Bureau bears the ultimate burden of persuasion as to each and every element of its water right.

Any assertion that the District caused the Bureau to have to defend its water right (including ownership thereof) in the SRBA simply rings hollow. The Bureau was legally required to participate in the SRBA regardless of the District’s position, or risk losing its water right. The purported disadvantage was not occasioned by the District. *See, e.g., Eastern Idaho Agricultural Credit Ass’n v. Neibaur*, 133 Idaho 402, 411, 987 P.2d 314, 323 (1999) (stating that Neibaur’s alleged previous inconsistent position had “no bearing on EIACA’s obligation to comply with the statutory notice provisions of the [Agricultural Credit] Act.”).

The Bureau also complains that should it lose, it would be deprived of a property right previously decreed to it. With all due respect, that is a risk that *everyone* with a previously

decreed or licensed right runs in the SRBA. In addition, water rights are always subject to loss due to forfeiture, abandonment, or adverse possession; the rights are not untouchable. Finally, from a logical standpoint, should the SRBA court decree the District to be the full or beneficial owner of the SRBA Claim Number 65-11412A or 65-11412, respectively, then the Bureau was not entitled to the property right anyway.

3. The Bureau Has Not Shown How It Has Changed Its Position To Its Detriment

The Bureau has not argued that it has changed its position to its detriment based upon the District's allegedly inconsistent previous position. It is difficult to see how the Bureau could have done so at any rate because the Bureau was required to file an SRBA claim.

Therefore, the Bureau has not satisfied this element of quasi-estoppel.

4. It Is Not Unconscionable To Allow The District To Maintain Its Position That It Is The Owner Of The Water Right Used To Drive The Hydro Power Pumps

The Bureau has not met its burden of proving the other elements of quasi-estoppel. However, even if it had, the Bureau cannot meet its burden of showing that it is unconscionable to allow the District to maintain its current position. In fact, the Bureau presents absolutely no argument on that point.

Even if it had, unconscionability stems from extreme conduct. *See Black's Law Dictionary*, 7th Ed. (stating that unconscionability is "extreme unfairness," and that an unconscionable act or transaction is one "showing no regard for conscience; affronting the sense of justice, decency, or reasonableness."). The Idaho Supreme Court held that it was not unconscionable for a board of equalization to revoke an exemption, because such action was

authorized under law. *Community Action Agency v. Board of Equalization of Nez Perce County*, 2002 WL 31375646 at *6 (Idaho 2002).

In this case, the District was only taking the action authorized by the Idaho Legislature, the Idaho Supreme Court (in its decision in *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993)) and the SRBA District Court when it filed the claim and objection at issue; a claim which is reasonably supported by applicable United State Supreme Court authority. Such action cannot be deemed unconscionable by any stretch of the imagination.

IV.

CONCLUSION

The legal authorities and particular factual circumstances inherent in the hydro pumps located at Black Canyon Dam show that the District is at least the beneficial owner of SRBA Claim Number 65-11412, if not the full owner. Therefore, the District respectfully requests that the Special Master deny the Bureau's motion for summary judgment and grant that of the District.

DATED this 14th day of March 2003.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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CERTIFICATE OF SERVICE

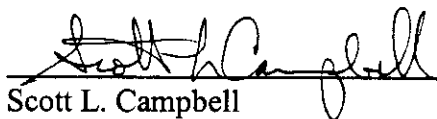
I HEREBY CERTIFY that on the 14th day of March 2003, I caused a true and correct copy of the foregoing **EMMETT IRRIGATION DISTRICT'S RESPONSE TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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