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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	)	Subcases: 36-02048, 36-02703, 36-04013A,
	)	36-04013B, 36-04013C, and 36-07568
Case No. 39576	)	
	)	ORDER DENYING MOTION TO FILE
	)	LATE OBJECTIONS

I. PROCEDURAL BACKGROUND

This matter is before the court on a *Motion to File Late Objections* filed by the North Snake Ground Water District (NSGWD). The claims were filed by Clear Springs Foods, Inc. (Clear Springs). The only timely objections were filed by Clear Springs. After trial on the objections filed by Clear Springs, the court entered its *Findings of Fact and Conclusions of Law (Facility Volume)* (Feb. 24, 1998). NSGWD filed a *Motion to Alter or Amend* June 26, 1998. A hearing on NSGWD's *Motion to Alter or Amend* was held September 28, 1998. On the same date as the hearing on the *Motion to Alter or Amend*, NSGWD filed this pending *Motion to File Late Objections*.

II. DECISION

Between the time the Director's Report for these water rights was filed, nearly six years expired until the water rights were actually tried.¹ Between 1992 and the current date, NSGWD alleges that a case of forfeiture for these water rights ripened. In order to pursue a case of forfeiture, five years of nonuse of water must be established. I.C. § 42-222. At the time the original objection

¹ The Director's Report for these water rights was filed on November 2, 1992.

period expired in 1993, only one year had expired from the date the Director's Report for these water rights was filed. At that time, NSGWD either elected not to object to the water rights or, in the alternative, it asserts that a case of forfeiture was not yet ripe. If 1992 is the beginning date, NSGWD states that a case of forfeiture was established in 1997, long after expiration of the time limit to file objections as a matter of right.

If the *Motion to File Late Objections* is not granted, NSGWD alleges that they are prejudiced because preclusion principles would prevent them from pursuing a case of forfeiture against these water rights for the years 1992 through 1998. NSGWD's concern is resolved by evaluating the essence of claim preclusion theories. Both *res judicata* and collateral estoppel apply to matters that were "actually decided." *Gubler v Brydon*, 125 Idaho 107, 110, 867 P.2d 981(1994); *Western Industrial and Environmental Services, Inc. v. Kaldveer Associates, Inc.*, 126 Idaho 541, 544, 887 P.2d 1048 (1994). The inquiry before the court is to decide what was "actually decided" for these water rights.²

The Director's Report constitutes *prima facie* evidence of a water right. Unlike most presumptions, the presumption raised in the Director's Report is more than a legal fiction. The Director's Report for a particular water right is the product of an actual investigation of that water right, I.C. §§ 42-1410 and 42-1411, and is to be weighed as evidence along with all other evidence. *In Re: SRBA Case No. 39576 (24 Hagerman Subcases)* 130 Idaho 736, 746, 947 P.2d 409 (1997). The Director's Report covers the use of a water right from the date it was established to the date the Director's Report is filed. Logically, the presumptive effect of any given Director's Report cannot cover the use of the water rights for time periods past the date the Director's Report is filed because there has been no investigation conducted by IDWR.

Here, for those elements of the water rights where no objections were filed, this court did not "actually decide" anything with respect to the water rights' use after 1992. There was no evidence before the court for the quantity element for these water rights after 1992. As previously stated, the

² In addition to matters that were "actually decided," *res judicata* also applies to issues that "could have been" litigated as part of the same transaction. *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980). In this case, NSGWD attempted to inject issues relating to the use of the water right prior to 1992, the year the Director's Report for these water rights was filed. Because NSGWD failed to file timely objections to these rights, it would be precluded under *res judicata* from litigating the use of these water rights prior to the date the Director's Report was filed. However, the use of the water rights after the date of the Director's Report is not before the court. Therefore, NSGWD would not be precluded under any subpart of *res judicata* from litigating the use of the water rights after 1992.

Director's Report for these water rights, on the uncontested elements, did not cover the use of the rights past 1992. Likewise, the claimant, not having objected to any element other than facility volume, did not present any independent evidence concerning the use of these water rights. Therefore, because the court did not "actually decide" anything with respect to the use of these water right after 1992, NSGWD may pursue a claim of forfeiture based on the use of these water rights after 1992 by filing an independent action contesting these water rights for that time period.

If NSGWD is allowed to intervene in these water rights after the trial is complete, then no water right up to the date of the final decree will ever be immune from being re-tried. To avoid this problem in cases where the water right has been tried, the better method of contesting water rights which have been recommended is to file an independent action contesting the use of the water right past the date of the Director's Report. Under this method, claimants would not be subject to multiple trials establishing their water right, and objectors would not be unfairly precluded from contesting the use of water rights after the date of the Director's Report.

For these reasons, the *Motion to File Late Objections* is **DENIED**.

V. CONCLUSION

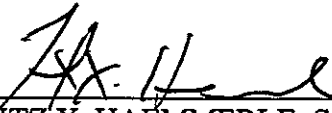
NSGWD's strategy in these cases is troublesome. At no time did NSGWD file a timely objection or response to these water rights after the Director's Report was originally filed. NSGWD had a second chance to file objections or responses as a matter of right when IDWR was removed as a party. *Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative Order 1* (July 28, 1995). Regardless, NSGWD made a strategic decision not to become involved. Therefore, the water rights proceeded to trial on the issues that were timely raised by Clear Springs. After the trial was completed and the court had entered its findings, NSGWD attempted to inject issues into the case which were never directly or indirectly raised. Parties who are concerned about other water rights must file timely objections or responses. The objection and response procedures are designed so that parties may fairly become involved in subcases and raise issues that concern them. **It is entirely unfair for a party to make an election not to become involved during the trial phase of a case, sit back and see how a case develops, and then intervene in a motion to alter or amend only if the outcome of the trial or settlement process does not suit that party.** If parties do not become timely involved in the subcase, they take

the case as it stands at the time judgment was entered. *First Sec. Bank of Idaho, N.A. v. Webster*,
119 Idaho 262, 805 P.2d 468 (1991).

NSGWD's *Motion to File Late Objections* is **DENIED**.

IT IS SO ORDERED.

DATED February 12, 1999.


FRITZ X. HAEMMERLE, Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the *Order Denying Motion to File Late Objections*
was mailed on February 12, 1999, with sufficient first-class postage prepaid, to the following:

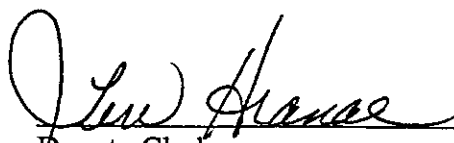
Director of IDWR
P O Box 83720
Boise, Idaho 83720-0098

Patrick D. Brown
812 Shoshone Street East
Twin Falls, Idaho 83303

John Hepworth
Hepworth, Lezamiz & Hohnhorst
P O Box 389
Twin Falls, Idaho 83303-0389

Beeman & Hofstetter
PO Box 1427
Boise, ID 83701-1427

D. Craig Lewis
College of Law
University of Idaho
Moscow, ID 83843


Deputy Clerk