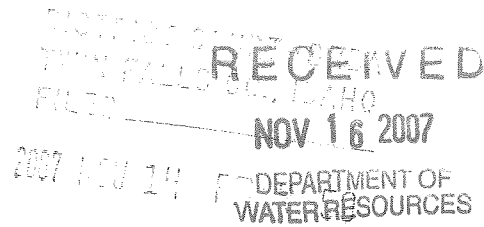


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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA:

Case No. 39576

)
) Subcase No. 63-3618
)
)
) **BOISE PROJECT BOARD OF**
) **CONTROL'S RESPONSE TO**
) **MOTIONS FOR PARTIAL**
) **SUMMARY JUDGMENT**
)
)

COMES NOW, the Boise Project Board of Control ("BOC"), by and through its attorneys of record, Barker, Rosholt & Simpson, LLC, and submits this *Response to Motions for Partial Summary Judgment*.

INTRODUCTION

Pending before the court are various motions for summary judgment, each addressing the nature of the ownership of uncontracted space in Lucky Peak Reservoir. According to the Director's recommendation for water right 63-3618, this space is to be used for "stream flow maintenance storage" and "stream flow maintenance from storage." This recommendation, however, leaves the Bureau of Reclamation ("Reclamation") devoid of the ability to comply with

its obligations to protect the property interests of the contracted space-holders. *See United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

Idaho Law, through the Minimum Stream Flow Act, I.C. §§ 42-1501, *et seq.*, provides that only the State, acting through the Idaho Water Resource Board, may hold a water right for instream flows. The Act does not allow the United States or any other person or entity to seek and hold such a right. This is the law in Idaho, and must be followed. Federal law does not trump state water law and, therefore, cannot grant such authority to Reclamation in the absence of authorization under state law. Idaho Law, not federal law, governs the issue of ownership. *See Pioneer Irr. Dist.*, *supra*.

BOC is not barred by *res judicata* and is not collaterally attacking water right 36-3618. As the Court made clear in *Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 157 P.3d 610 (2007), requests to clarify the ownership of a water right, in order to ensure that that right complies with Idaho State Law, are not barred.

I. No Party Argues that the Uncontracted Storage Space in Lucky Peak Reservoir Cannot be Used for Irrigation

Under the 1953 Memorandum of Agreement, Reclamation is obligated to use the uncontracted storage space in Lucky Peak Reservoir for irrigation purposes, whenever flood control actions prevent the filling of the upstream reservoirs. *See Affidavit of Paul L. Arrington in Support of Motion for Partial Summary Judgment* (“*Arrington Aff.*”) Ex. A. This obligation was confirmed and reiterated in the subsequent Supplemental Contracts Reclamation entered with each of the BOC irrigation districts. *Id.* at Ex. B. Under these contracts, Reclamation must make the uncontracted storage space in Lucky Peak available for irrigation whenever flood control activities have prevented the filling of the upstream reservoirs. Any decree entered by

this Court must allow Reclamation to continue to comply with these mandatory, non-discretionary, obligations.

BOC's involvement in this matter is consistent with its prior actions. In the 1950's, BOC objected to the possibility that Reclamation would use the storage water to irrigate lands in the Mountain Home area. This objection was resolved after Reclamation agreed that the irrigation component of the right would be limited to project lands already served by the existing Boise River reservoirs. Exhibit K, to the *Jarvis Aff.*, states: "This solution involves *confining the application of stored water* to lands now entitled to receive water in the Boise Valley." (Emphasis added). These arguments are consistent with the arguments now presented by the BOC. Just like in the 1950's, Lucky Peak storage water must be available for irrigation on Boise Valley lands.

In the 1980's, BOC again participated in relation to protests filed on water right 63-3618. Once again, BOC's interest in the proceedings was to ensure that Lucky Peak storage water were used for irrigation in the Boise Valley. In particular, BOC sought to ensure that the uncontracted storage could be used for irrigation during the time that Lucky Peak was drawn down for repairs. The Department agreed that the water could be used for irrigation.

Reclamation asserts that the Lucky Peak FERC proceedings somehow amount to BOC's approval of Reclamation's instream flow water right. The FERC licensing proceeding did not address the duty to provide irrigation water from uncontracted space, nor did it address the proper legal mechanism for water to be used for instream flow purposes. Furthermore, as FERC made clear in its final Order on the topic of flows from Lucky Peak, the BOC districts had no water right and no authority to release any water from Lucky Peak for instream flow purposes. *See Jarvis Aff.* Ex. U (FERC Order 39 FERC 62,146 (May 6, 1987)) (recognizing that the

licensees, COE and BR (i.e. Reclamation) “informed the Director ... the *licensees have no rights to stored water for maintaining the 150-cfs minimum flow release* needed to protect and enhance fish and wildlife resources during the non-irrigation season”) (emphasis added). FERC then removed any requirement that the Districts/licensees release water for instream flows and directed the licensees to cooperate with state and federal agencies in operation of Lucky Peak Dam. The BOC districts have no authority to release any water from Lucky Peak for instream flow purposes under the FERC license and have never contended to have such a right.

Reclamation suggests that BOC’s involvement in a 1982 meeting resulted in a workshop recommended plan for the Boise River, *see Jarvis Aff.* Ex. V, and constituted an endorsement of every conclusion that Reclamation has drawn in this matter. Such is not the case. First, attending a meeting with Reclamation does not imply agreement with anything discussed at that meeting. Furthermore, the meeting did not discuss the duty to deliver irrigation water from the uncontracted storage or whether or not the instream flow right would be held by the State and not Reclamation, which are the positions being advanced in this proceeding.

The fact that the 1953 Memorandum of Agreement and the Supplemental Contracts require Reclamation to use uncontracted storage space in Lucky Peak for irrigation when certain conditions are met is indisputable. No party to these proceedings attempts to refute this fact. Indeed, Reclamation has no other option than to use the uncontracted storage space, since, as the Supreme Court affirmed, in *Pioneer Irr. Dist., supra*, that storage right holders have a property right in their contracted storage space which Reclamation cannot simply give away. Accordingly, the Court should deny Reclamation’s Motion for Summary Judgment and order that “Irrigation From Storage” for Boise Project lands be included as a beneficial use for the uncontracted storage waters in Lucky Peak.

II. Only the State Can Hold an Instream Water Right

The Minimum Stream Flow Act (the “Act”), Idaho Code §§ 42-1501, *et seq.*, governs the acquisition of a water right to protect instream flows. Reclamation appears to concede this requirement in its Memorandum. The Act recognizes that stream flow maintenance may be a beneficial use when “*made pursuant to this act.*” I.C. § 42-1501 (emphasis added).¹ The statutes do not recognize stream flow maintenance as a beneficial use outside of the scope of the Act. The Act makes clear that it is the “Board” – defined as the “Idaho water resource board” – that has the authority to apply for and hold an instream flow water right. *See* I.C. §§ 42-1503 (“Whenever the *board* desires to appropriate a minimum stream flow of the unappropriated waters of any stream ...”) & 42-1504 (“Any person, association ... may, in writing, *request that the board consider the appropriation* of a minimum stream flow of the unappropriated waters of any stream”) (emphasis added). Furthermore, any rejection by the board of a request to apply for a stream flow maintenance right ends the matter and is not subject to review. *Id.* at § 42-1504.

In its brief, the City attempts to expand the Act by arguing that an applicant has the right to revive a rejected application. According to the City, providing a written request to the Board was nothing more than a hurdle that, when overcome, provided Reclamation with an unfettered right to apply for and hold a water right for stream flow maintenance. *City Br.* at 14-16. Such an argument is not consistent with the language of the Act. Indeed, the Act does not provide Reclamation, or any other person or entity, with the authority to revive a rejected application.

The City further argues that, since the “waters at issue are diverted, stored and released under a valid existing license,” they are not subject to the provisions of the Act. *City Br.* at 14-15. This argument is wrong. Under water right 63-3618, the *natural* flows of the Snake River

¹ The Act provides that “The preservation of the water of the streams of this state for such purposes *when made pursuant to this act* is necessary and desirable for all the inhabitants of this state, is in the public interest and is hereby declared to be a beneficial use of such water.” I.C. § 42-1501 (emphasis added).

are diverted into Lucky Peak to be used for “streamflow maintenance.” Essentially, the City’s argument is that, since Reclamation already has a license to do that which the Act forbids (i.e. hold a stream flow maintenance right), the provisions of the Act no longer apply to Reclamation. The question before this Court, however, is whether the Department has the authority to grant an instream flow right of any kind to a private party. Under Idaho Code § 42-1501, neither the Department nor the board have that right.

The City and Reclamation argue that the Board’s rejection of an application and subsequent failure to file a claim for stream flow maintenance is evidence that the Board interprets the Act as expansively as they do. This argument is without merit for a number of reasons. First, in light of the Board’s refusal to file an application in the 1980’s, it is not surprising that it has, once again, refused to file a claim on this water. Continued refusal to file a claim on this water does not, in and of itself, constitute any sort of endorsement for the City’s and Reclamation’s interpretation of the Act.

Furthermore, the City fails to address the applicable rule for judicial deference. *See Pearl v. Bd. Of Prof. Discipline of Idaho State Bd. Of Medicine*, 137 Idaho 107, 44 P.3d 1162 (2002). There is a four prong test for determining whether an agency’s interpretation of a statute is subject to judicial deference. *Id.* The four prongs are: (1) “the agency must be entrusted with the responsibility to administer the statute;” (2) the interpretation must be reasonable; (3) the language of the statute must “not treat the precise issue;” and (4) rationales underlying the rule must be present. *Id.* The City only addresses the final prong. The City’s interpretation of the Act is not reasonable because the Act, in clear and certain terms, provides the only statutorily recognized method for acquiring a stream flow maintenance water right.

Reclamation relies on various actions of the department and board in the licensing proceedings to justify its position that the United States can hold an instream flow right. While a court will generally defer to an agency on matters within its expertise, it is the courts which are the experts on the law *not the agency*. In recent proceedings over the Swan Falls agreement, Justice Schroeder (sitting as hearing officer) faced with similar arguments made this abundantly clear. “Regardless of historical belief and understandings,” the Act is the law in Idaho and must be followed. *See Order Granting in Part & Denying in Part Joint Motion for Summary Judgment & Motion for Partial Summary Judgment*, In the Matter of Distribution of Water to Water Rights Nos. 36-2356A, 36-7210 & 36-7427, *et al.*, at 11 (Nov. 14, 2007) (Attachment A). BOC is not objecting to the release of water for instream flows. Rather, BOC asserts that the instream flow rights must be held by the State of Idaho (or Reclamation must recognize a property interest in the State of Idaho for such instream flow purposes). Otherwise it is not a beneficial use consistent with state law.

III. State Law Governs ownership of Water Rights

Both the City and Reclamation cite to federal law to support their theory that Reclamation is authorized to hold a water right for streamflow maintenance in Idaho. *See Bureau Br.* at 19 (Federal law authorizes uses of water from Lucky Peak reservoir for purposes other than irrigation and flood control”); *City Br.* at 16 (“federal law does recognize stream flow maintenance as an authorized use of Lucky Peak Dam and Lake”). Such arguments are irrelevant. Idaho law governs the issues presented in the summary judgment motions. *See* 43 U.S.C. § 383 (“Nothing in this [Reclamation] Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation”); *Pioneer Irr. Dist.*, 144 Idaho 106,

157 P.3d 600 (state law governs the issue of ownership of a water right). Furthermore, as discussed above, Idaho law does not authorize any person or entity, other than the Idaho Water Resource Board, to hold title to a water right for stream flow maintenance.

IV. The Irrigators' Challenge to the Recommendation is not a Collateral Attack

BOC's motion seeking to have its ownership interest in the storage rights recognized is not an impermissible collateral attack on water right 63-3618. This Court put Reclamation's arguments to the contrary, *see Bureau Br.* at 15-16, to rest in earlier proceedings involving water right 63-3618. *See Memorandum Decision & Order on Cross-Motions for Summary Judgment*, Consol. Subcase 91-63 (Sept. 1, 2004); *see also Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (affirming in part this Court's decision). This Court recognized that a challenge to the Director's failure to recognize the District's ownership interests in a water right is not an impermissible collateral attack on a license. Such is especially the case here, where the BOC is attempting to have "Irrigation from Storage" included as a beneficial use so that Reclamation may comply with mandatory obligations it has had since the early 1950's, without impairing the property interests of contracted space holders.

V. Res Judicata does not Bar the Irrigator's Challenge to the Recommendation

The City's *res judicata* argument misses the point. The City cites to prior proceedings involving water right 63-3618 and asserts that any objectors are barred from raising "*all the arguments they make in this case.*" *City Br.* at 18 (italics in original). This argument must fail. First, had the City's argument been correct, the space-holders' prior challenges to the ownership of these rights would have been barred. *See Bray v. Pioneer Irr. Dist.*, 144 Idaho 116, 157 P.3d 610 (2007). This case, like the prior proceedings, is seeking to clarify the ownership of water right 63-3618. Second, as indicated above, BOC's involvement in this matter has always been to

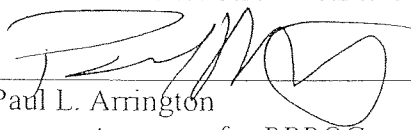
ensure that the water is available to be used for irrigation in the Boise Valley and that the uncontracted storage space be used in conjunction with Reclamation's obligations to the space holders. Nothing in any of the prior proceedings called into question Reclamation's ability to meet these obligations.

CONCLUSION

The Director's recommendation for water right 63-3618 fails to provide Reclamation with the authority to meet its contractual obligations without placing the vested property interests of the contracted space holders at risk. Reclamation's motion to have this recommendation adopted without recognizing this interest must be denied. The Recommendation failed to recognize that Reclamation is obligated to use the uncontracted space in Lucky Peak for irrigation releases when flood control practices prevent upstream reservoirs from filling. No party challenges this fact. Furthermore, Reclamation is not authorized under Idaho law to hold a stream flow maintenance permit and nothing in federal law changes that fact. As in prior proceedings involving the ownership of these water rights, a challenge to the ownership of the uncontracted space in Lucky Peak is not a collateral attack on a license and is not barred by *res judicata*. Accordingly, the Court should deny the City's and Bureau's motions for summary judgment.

Dated this 14th day of October, 2007.

BARKER ROSHOLT & SIMPSON, LLP


Paul L. Arrington
Attorneys for BPBOC

CERTIFICATE OF SERVICE

I certify that on November 14, 2007, I served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL'S RESPONSE TO MOTIONS FOR PARTIAL SUMMARY JUDGMENT** via first class mail, postage paid, and addressed:

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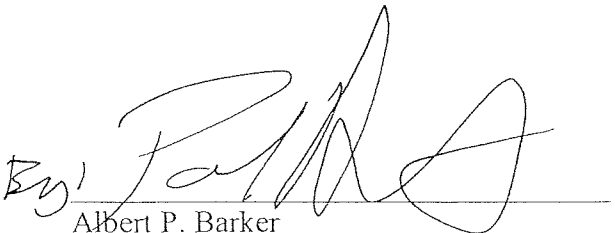
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Attachment A

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER)	)	ORDER GRANTING IN PART
TO WATER RIGHTS NOS. 36-02356A, 36-07210,	)	AND DENYING IN PART JOINT
AND 36-07427	)	MOTION FOR SUMMARY
	)	JUDGMENT AND MOTION
(Blue Lakes Delivery Call)	)	FOR PARTIAL SUMMARY
_____	)	JUDGMENT

IN THE MATTER OF DISTRIBUTION OF WATER)	)
TO WATER RIGHTS NOS. 36-04013A, 36-04013B,	)
AND 36-07148 (SNAKE RIVER FARM); AND TO	)
WATER RIGHTS NOS. 36-07083 AND 36-07568	)
(CRYSTAL SPRINGS FARMS)	)
	)
(Clear Springs Delivery Call)	)
_____	)

The Spring Users, consisting of Blue Lakes Trout Farm, Inc. (Blue Lakes) and Clear Springs Foods, Inc. (Clear Springs), filed a joint motion for summary judgment. The Ground Water Users (IGWA) filed a motion for partial summary judgment. The motions were heard November 2, 2007. The motions address issues arising from the Director's 2005 orders on the Spring Users delivery calls and claims presented by IGWA in its petition for reconsideration and the designation of issues in this proceeding concerning the Director's orders. The motions call into question the effect of the partial decrees entered by the SRBA Court determining the Spring Users' water rights.

The Director's orders arose in the course of the Idaho Department of Water Resources' responsibilities in the Snake River Basin Adjudication (SRBA) authorized by the Idaho Legislature, chapter 14, Title 42, Idaho Code, to determine the nature and extent of all water rights within the Snake River Basin and thereby provide the basis for the future administration of those rights in accordance with chapter 6, Title 42, Idaho Code, and other applicable laws, including the State Constitution. As the SRBA has proceeded the legal relationship between

ground water and surface water rights has become a central issue. The phase of the SRBA addressed in the present motions concerns the particular relationship between the holders of decreed rights for aquaculture, fish propagation, in the Thousand Springs reach and the ground water users whose rights are junior in priority to those of the Spring Users.

I BACKGROUND

On April 10, 2000, the SRBA District Court issued partial decrees for Blue Lakes' water rights 36-07210 and 36-07427. Water right 36-07210 has Alpheus Creek as its source for a quantity of 45.00 cfs and a priority date of 11/17/1971. Water right 36-07427 has Alpheus Creek as its source for a quantity of 52.23 cfs and a priority date of 12/28/1973.

On April 10, 2000, the SRBA District Court entered partial decrees for Clear Springs rights 36-04013A, 36-04013B and 36-07148. Water right 36-04013A has Springs, aka Clear Springs, as its source for a quantity of 15 cfs and a priority date of 9/15/1955. Water right 36-04013B has Springs, aka Clear Springs, as its source for a quantity of 27.00 cfs and a priority date of 2/04/1964. Water right 36-07148 has Springs, aka Clear Springs, as its source for a quantity of 1.67 cfs for fish propagation and 0.04 cfs for domestic rest area and a priority date of 1/31/1971.

The Spring Users rights in issue are for fish propagation and are for the entire year. Each decreed right contains the following provision:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the court at a point in time no later than the entry of a final unified decree. Section 42-1412(6) Idaho Code.

On May 19, 2005, the Director issued an order in response to the Blue Lakes delivery call. On July 8, 2005, the Director issued an order in response to the Clear Springs delivery call. The parties contest various aspects of those foundational orders and subsequent implementation orders.

There are multiple purposes defined for the SRBA. A threshold stage has been identifying and cataloguing existing rights, including source, purpose, location, quantification and priority. The sum of this process has been the memorialization of this information in partial decrees, which may include other provisions necessary for definition or administration of the water right. See Idaho Code section 1411. The partial decrees contain Rule 54 (b) certificates

pursuant to the Idaho Rules of Civil Procedure, rendering them appealable and rendering the determinations in the partial decrees final if not disturbed on appeal. The partial decrees for the Spring Users' water rights have not been appealed.

The process of memorializing water rights in partial decrees will ultimately lead to a final decree which will serve as the authority for the administration of water in times of shortage when not all rights can be fully honored. A primary purpose of the adjudication is to provide certainty in times of shortage so those with early priority dates will know what they will receive and those with later priority dates will know the likelihood of curtailment. *Legislative Council Committee on the Snake River Basin Adjudication Report to the 1995 Idaho Legislature*. The Idaho Supreme Court commented on the need for conjunctive management of surface and ground water rights in *A&B Irrigation v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1998), referencing the 1994 Interim Legislative Committee Report on the Snake River Basin Adjudication. The Committee Report noted that if issues of source and priority were not addressed in the SRBA a major objective of the adjudication would not be fulfilled. *Id.* This case reaches beyond the concerns of source and priority to the application of those rights defined in a partial decree when actual harm and benefit to particular parties is involved. Parties who have acted in good faith and invested heavily in their enterprises may either suffer greatly or be assured of economic opportunity depending upon the application of principles that are often easy to articulate but difficult to apply.

II

PRIORITY AND CONJUNCTIVE MANAGEMENT

As early as 1892 the Idaho Supreme Court rejected the concept of a "common right" whereby priority would be ignored and water apportioned among users as common property, balancing one need with another. *Kirk v. Bartholomew*, 3 Idaho 367, 29 Pac. 40 (1882). Instead, Idaho Code section 42-106 provides that "[a]s between appropriators, the first in time is first in right." The question is how much of the adjudicated amount in the partial decree does a senior right holder receive and how much does a junior groundwater user surrender through curtailment in times of shortage? The direct relationship of curtailment that might be seen in surface water to surface water connections is attenuated when the seniors are surface water users and the juniors are ground water users. Regardless, conjunctive management between ground and surface water rights is mandated.

Following *A&B* the SRBA Court heard cross motions for summary judgment and determined that “[a]t present, all water sources within the Snake River basin, unless otherwise recommended by IDWR are presumed to have a common source.” Parties seeking to show otherwise were to have an opportunity to do so by a preponderance of the evidence at a future time.” In the aftermath of the SRBA Court’s decision denying the cross motions for summary judgment the parties reached an agreement on language for a “connected sources” general provision which was incorporated in the Court’s *Memorandum Decision and Order for Partial Decree, entered February 27, 2002*. The Partial Decree provided that unless “otherwise specified above, all other water rights within Basin 36 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.” No exceptions were specified.

On January 8, 2002, the SRBA Court granted the State of Idaho’s Motion for Order of Interim Administration and Motion for Order Expediting Hearing, finding that the water supply in basins 35, 36, 41, and 43 was not adequate at that time and was projected to be inadequate at times in the future to satisfy all water rights. The SRBA Court concluded that interim administration in accordance with the Director’s reports and partial decrees was “reasonably necessary to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law.”

This proceeding centers on the Director’s Orders which determined that there must either be curtailment of designated junior ground water users or a mitigation plan to satisfy the senior rights of the Spring Users. The Director relied upon the partial decrees, the ESPAM model developed for determining the interconnection between surface and ground water uses, the IDWR’s Conjunctive Management Rules, and the Director’s interpretation of the State Constitution, state statutes and judicial decisions. Neither the Spring Users nor the Ground Water Users are fully satisfied with the Director’s determinations. The joint motion for summary judgment filed by the Spring Users and the motion for partial summary judgment filed by IGWA seek determinations on various elements of the May 19, 2005 foundational order and subsequent implementation orders. This opinion addresses both the Spring Users’ joint motion and IGWA’s partial motion.

III

STANDARD OF REVIEW

“Summary judgment is appropriate if ‘the pleadings 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.’ *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied.” *American Falls Reservoir v. Dept. of Water*, 143 Idaho 862, 869, 154 P.3d 433, 470 (2007).

IV

RES JUDICATA

According to the Supreme Court, “*res judicata*” covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel).” *Ticor Title Co. v. Stanion, II*, 144 Idaho 119, 157 P.d 613, 617 (2007). The doctrine is intended to avoid the disrespect that would follow if the same matter were relitigated with inconsistent results and to protect the courts and the parties from repetitious litigation. *Id.* The elements that are required for issue preclusion are that the party who will be precluded on an issue had a full and fair opportunity to litigate the issue in the earlier case; the issue decided in the earlier case was identical to that asserted in the subsequent action; the issue was decided in the prior litigation; there was a final judgment on the merits in the prior case; and, the party who will be precluded from asserting the issue was a party or in privity with a party to the litigation. *Id.* 618. Issue preclusion extends to those matters “which might and should have been litigated in the first suit.” *Id.* 620.

The partial decrees that were entered in this case meet the standards of issue preclusion. They defined the Spring Users’ water rights. The SRBA Court entered I.R.C.P. 54(b) certificates on the partial decrees rendering them appealable. Those decisions have not been disturbed on appeal. They are final and conclusive as to the matters determined in them. To hold otherwise would tempt relitigation of matters already settled in a decades long process.

The fact that the partial decrees are final and conclusive as to the matters determined in them does not end the inquiry. In *American Falls Reservoir v. Dept. of Water*, 143 Idaho 862, 876, 154 P3d 433, 447 (2007), the Supreme Court analyzed a challenge to the Conjunctive Management Rules, including CMR 42 which lists factors the Director may consider in determining whether water right holders are suffering material injury and using water efficiently

and without waste. “Such factors include the system, diversion and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion.” *Id.*

American Falls argued that the Director must deliver the full quantity of the decreed water right according to priority rather than re-evaluate and potentially negotiate water rights administration with the senior right holder as to the amount of water delivered. The Supreme Court responded:

Clearly...the Director may consider factors such as those listed above in water rights administration....If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. *Id.*

Consideration by the Director of beneficial use is not a readjudication. Further the Director’s consideration of whether there is waste is not a readjudication. *Id.* 448. The Supreme Court noted that “a partial decree need not contain information on how each water right on a source physically interacts or effects other rights on the same source.” *Id.* Consequently, the question of whether a junior groundwater user’s pumping has an effect upon a senior surface water user’s decreed right is not a readjudication. Further, there may be consideration of the amount of water needed under a call.

The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine “how the various ground and surface water sources are interconnected, and how, when, and where and to what extent the division and use of water from one source impacts [others].” *A&B Irrigation Dist. 131 Idaho at 422, 958 P.2d at 579.* Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some constitutionally permissible way, the senior’s call. *Id.* 449.

Idaho Code section 42-1420 addresses the binding effect of a decree: “The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water right in the adjudicated water system...” From this language and the determinations of the Supreme Court it is clear that the Director cannot go behind the partial decrees on those matters decided in the decrees. But it is also clear that in responding to a call the Director may consider information bearing on whether the water can or will be put to a beneficial use, whether there will be waste,

whether the call is futile, the amount of curtailment necessary or whether there is any other reason recognized within State law that would preclude responding to the call as made.

V

THE SPRING USERS' WATER RIGHTS ARE SURFACE WATER RIGHTS AND THE MEANS OF DIVERSION REASONABLE

There is a question of whether the Spring Users are subject to the special rules for ground water administration, e.g., the “reasonable pumping level” requirement in Idaho Code section 42-226. IGWA acknowledges in briefing that the Spring Users’ rights were adjudicated as surface water rights, but according to IGWA the Spring Users are obligated to “chase” their water supply to a reasonable pumping level prior to the curtailment of junior ground water appropriators. This is a position that has historical support in the opinions of respected experts in the administration of water rights. Ronald Carlson, a long time water administrator has testified, “The state’s position was, if you were a fish producer and needed more water, you have the right to collect it, or if necessary, drill a well.” *Carlson direct testimony* at 16, 22. It appears this view was shared by former IDWR Director Kenneth Dunn and is reflected in the 1976 Idaho State Water Plan and the 1982 and 1986 Water Plans. CJM Rule 42.h references the construction of wells or the use of existing wells from an area having a common ground water supply. The position that the Spring Users must pursue other means of diversion cannot be rejected lightly. *Article XV, section 7* of the *Idaho Constitution* authorizes the creation of the State Water Resource Agency

...which shall have the power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

The spring waters in this case are ground water and were adjudicated as such in the partial decrees that were entered. *Idaho Code* section 42-230(a) defines ground water: “Ground water” is all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” The Spring Users diversions are of water that has emerged from the ground, not by pumping or other artificial means. The partial decrees identify Alpheus Creek and Springs as the sources of the Spring Users’ water. The points of diversion are locations after the water has left the ground. Treating the decreed water rights as ground water rights would be

contrary to statute and would constitute a collateral attack on the partial decrees. However, the classification does not answer the question of whether the Spring Users have an obligation to pursue other methods of diversion. The legal and factual record in this case establishes the answer to be, no.

IGWA has asserted deficient means of diversion by the Spring Users. However, there is no evidence that the diversion works are out of date or function inefficiently as they exist, following correction of a defect observed by the Director. IGWA's position in this regard is premised on the claim that the Spring Users should be required to pursue additional water by drilling, as noted, a belief expressed by persons of considerable authority. However, the partial decrees that were entered did not condition the rights to water upon pursuing it in a different manner, and there is no basis in the record to add this condition to the partial decrees. There is conjecture that the Spring Users could drill, but there are no facts establishing that they could fulfill their water rights in this manner without interfering with other rights. There is no genuine issue of material fact to dispute the Director's finding that the Spring Users' means of diversion are reasonable.

Whether the Spring Users have the right to "chase" water, as opposed to an obligation to do so, is not an issue presented in these proceedings. It may become one if the Spring Users cannot obtain the full amount of the adjudicated rights through curtailment.

VI

THE DIRECTOR MAY USE HISTORICAL INFORMATION TO DETERMINE CURTAILMENT

The Director's use of historical information to determine the extent of curtailment, if any, of junior groundwater users to supply water to the Spring Users is not a readjudication of the partial decrees. The Director is called upon to make a determination of whether the water will be put to a beneficial use or whether there will be a waste of the water. Inferences may be drawn from historical data as to water use and need. If the Spring Users have filled the raceways with water and produced healthy and marketable fish in the past without the use of the fully adjudicated water rights, it is information the Director may consider as to need, beneficial use and waste of water provided by curtailment. This does not impair the use of the maximum amounts decreed when available without curtailment, assuming it can be put to a beneficial use. Preclusion of the use of historical data could lead to an anomalous result. In times of drought and

stress on the entire Eastern Snake River Plain a senior user might make a call and secure more water than the senior user has used in times of plenty.

Whether the Director has properly utilized the historical information he has considered is a question of fact that will be resolved at hearing.

VII

THE DIRECTOR'S SEASONAL VARIATION LIMITATION

The Spring Users object to the provisions in their respective orders recognizing seasonal variations in the springs discharge rates and limiting the calls to seasonal conditions that existed at the times the appropriations were initiated. This is a slippery situation, because in this instance it appears that the historical information has been used to modify the partial decrees. Aquaculture differs from the propagation of plants in fields in that it apparently is a pursuit that is or can be operated 365 days of the year. The partial decrees recognize that and do not stipulate any differences season to season in the decreed rights of the Spring Users, unlike the specification of irrigation seasons for field crops. This is not a condition that falls under the umbrella of the general provision in the partial decrees. To the extent that the Director's Orders import a seasonal condition they are in error. It is a fine line because seasonal conditions may limit or expand the availability of water throughout the Eastern Snake River Plain. There may be times when there is not enough water to meet the needs of water users whether junior or senior and the Director can consider the conditions, but attaching a seasonal limitation as such is contrary to the adjudicated water rights. The same principles are applicable to the Spring Users calls and any defenses to those calls regardless of the time of the year. If it was not the Director's intent to engraft a seasonal condition on the adjudicated rights, that language must be clarified.

VIII

THE PRIORITIES OF THE SPRING USERS' WATER RIGHTS APPLY TO ALL CONNECTED WATER SOURCES

IGWA maintains that incidental recharge, seepage, or "waste water," as that term is used by IGWA, is not subject to conjunctive management to satisfy senior rights. The rules of conjunctive management incorporated in Idaho Code section 42-226 and CJM Rule 50 dictate otherwise. Water in the aquifer is subject to conjunctive management regardless of its source, so long as hydraulically connected. See CJM Rule 40.01.

It is not directly on point, but the logic of *Shaub v. District Court of the Fifth Judicial District*, 96 Idaho 924, 926, 539 P.2d 277, 279 (1975), is applicable:

It is well settled in Idaho that an adjudication of water rights to a main stream also adjudicates rights to all tributary streams and other sources of supply to the main stream.

This reasoning dates back to *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). See also *Martiny v. Wells*, 91 Idaho 215, 218, 419 P.2d 470, 473 (1966). Facts about the source may be informative as to whether shortages are the result of weather or pumping, but once water enters the aquifer and river channels of the Eastern Snake River Plain from whatever source it is subject to administration by priority. That is the essence of conjunctive management.

IX

THE 10% UNCERTAINTY

The Spring Users Challenge the Director's refusal to subject certain junior ground water right in Water District 130 to administration unless those rights had a depletive effect on the Buhl Gage to Thousand Springs reach of 10% or more of their total diversions. This decision is tied to the 10% uncertainty attributed to the ground water model. The legal underpinnings of this decision are not clear. This is an issue that requires further explanation. Consequently, the issue is reserved for hearing for hearing when a representative of IDWR can explain more thoroughly the legal and factual theories for the decision.

X

THE PHASED IN CURTAILMENT

The Spring Users challenge the phased in curtailment of ground water users over five years as being untimely, inadequate and contrary to law. Spreading the impact of curtailment over the five year period was done to "lessen the economic impact of immediate and complete curtailment." *Clear Springs Order*, p. 34, paragraph 32; *Blue Lakes Order*, p. 27, paragraph 31. On its face the Director's decision seems to run contrary to statutory and case law once material injury to a senior water user is established. E.g., Idaho Code section 42-607, watermaster's duty to "shut or fasten" junior diversions when necessary to supply senior rights. AFRD#2 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call."). Against this thinking is language in AFRD#2 that the Director may consider, among

other factors, fully economic development. 154 P.3d, 447. The Rules for Conjunctive Management anticipate phased in curtailment under some circumstances.

There are both legal and factual elements in this issue. The factual question is whether immediate curtailment would accomplish satisfaction of the Spring Users' call or whether the call would be futile, at least in part. The legal question is the degree to which economic impact may be considered. That is, can there be a weighing of financial gain and loss if the gain to those making the call is limited and the loss to those curtailed is catastrophic? It is a matter of importance to allow full development of a record in this regard to inform any reviewing court and perhaps the Legislature and Executive. Summary judgment on this issue is inappropriate.

XI

THE SWAN FALLS AGREEMENT

IGWA maintains that the Swan Falls Agreement precludes a delivery call by the Spring Users. In sum the position is that the protection to the Spring Users is in the maintenance of the minimum flows due Idaho Power. This ties to the argument that if the Spring Users need more water they must "chase" that water and develop a different method of securing the water than from simply capturing what comes out of the springs. Again, there is a historical basis for this belief that precedes the Swan Falls Agreement. *1976 Idaho State Water Plan – Part Two* at 118; *1982 Idaho State Water Plan* at 44. The argument reaches beyond the Swan Falls Agreement but has another focus if the Agreement is determined to create a flow that provides a protection to the Spring Users for some water but also limits them if less than their adjudicated rights are met. This understanding was set forth in the 1986 Idaho State Water Plan which commented that "minimum flows for the Murphy Gauging Station should provide an adequate supply of water for aquaculture...." Policy 5G at 38. See *Affidavit of Kenneth A. Dunn*, paragraph 6 at 3-4.

Regardless of historical belief and understandings of many concerned interests, the Spring Users were not parties to the Swan Falls Agreement, and nothing in this record indicates that they agreed to the understanding. The Agreement does not explicitly address the issue. Further, of significance, the partial decrees entered in this case do not reflect any conditions or limitations attributable to the Swan Falls Agreement. On the present record the claim that the Swan Falls Agreement precludes the Spring Users from making a call is rejected, and the Spring Users are entitled to partial summary judgment.

If a decision is reached in an action in District Court concerning this issue contrary to this ruling, this decision will be revisited.

XII

THE FAILURE TO CONVENE A LOCAL GROUND WATER BOARD

IGWA maintains that in the event the Spring Users are granted a right to curtail ground water development, a local ground water board must be convened prior to any such curtailment, relying on I.C. sec. 42-237b:

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affect by one or more user[s] of ground water rights of later priority...such person, as claimant, may make a written statement under oath of such claim to the director of the department of water resources.

Upon receipt of such statement, if the director or the department of water resources deems the statement sufficient and meets the above requirements, the director of the department of water resources shall issue a notice setting the matter for hearing before a local ground water board....

Idaho Code section 42-237d next provides:

Whenever a written statement of claim as provided in section 42-237b hereof is filed with the director of the department of water resources, if the statement of the claimant is deemed sufficient by the director of the department of water resources and meets the requirements of section 2-237b, the said director of the department of water resources shall forthwith proceed to form a local ground water board for the purpose of hearing such claim.

Idaho Code section 42-237c provides:

If the board finds that the use of any junior right or rights so affect the use of the senior rights, [then] it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine.

The Spring Users respond that the provision in 42-237b that a claimant “may make a written statement under oath of such claim to the director of the department of water sources” is optional and is only applicable if the process is initiated by a senior in the first place. This is not persuasive. A senior is never obligated to make a claim. The question is whether, when the senior has a grievance, this is the process that must be followed.

The question is whether the provisions concerning the use of a local ground water board have been superseded by the creation of water districts and the definition of the Director’s and

watermaster's rights and responsibilities. Idaho Code section 42-237a (g)(2) provides in part the "[t]he administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of Title 42, Idaho Code, as the same have been or may hereafter be amended." Idaho Code section 42-602 defines the powers of the Director:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water with water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

The Spring Water Users and the Ground Water Users are all in a water district. The provisions for the mandatory use of a local ground water board have been superseded so far as resolution of this dispute is concerned. The procedure for use of a local ground water board had obvious due process components built into it, and it may be the Director could utilize that process. Regardless, the Director is not required to do so. Whether due process was met in the procedures that were actually utilized appears to be a remaining question.

XIII

THE PARTIAL DECREES DO NOT CREATE A GUARANTEED MINIMUM WATER SUPPLY

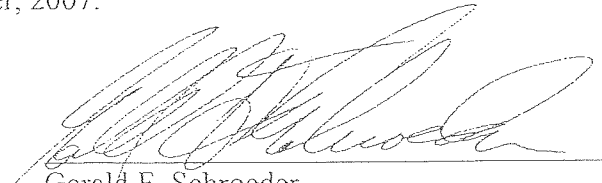
The partial decrees define the amount of water that a water user is entitled to when available and can be applied to a beneficial use. It is a maximum amount, not a guaranteed amount. It is subject to variables, including weather and the rights of prior appropriators. These general principles do not tell much about a result in this case. To justify curtailment there must be a relationship between the use by the junior water right holder of water and a shortage by the senior water right holder of water that could be put to a beneficial use. There are potential defenses to the Spring Users calls that must be addressed at hearing.

CONCLUSION

This opinion outlines the conclusions that can be reached on the issues presented by the Spring Users' Joint Motion for Summary Judgment and the Ground Water Users' Motion for

Partial Summary Judgment. Each motion is granted in part and each is denied in part as set forth in the subsections of this opinion.

DATED this 14 day of November, 2007.



Gerald F. Schroeder
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2007, the above and foregoing, was served by the method indicated below, and addressed to the following:

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