

DEPARTMENT OF
WATER RESOURCES

COMES NOW, Claimant, James E. Riggan, by and through its attorney of record, Jerry
by, of Rigby, Andrus, & Moeller, Chartered, hereby petitions the court to approve water
claim number 74-5861, and to find that said claim is not precluded by the Lemhi Decree.

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STATEMENT OF THE CASE

A. Nature of the Case

This is a trial regarding the adjudication of water rights claimed in the Snake River Basin Adjudication. At issue is whether claimants in the Lemhi Basin should be precluded from making beneficial use claims as a result of the not having made such claim in the so-called "Lemhi Adjudication". Claimant, Jim Riggan, claims that the Lemhi Decree should not preclude him from making a beneficial use claim in the Snake River Basin Adjudication. The Idaho Department of Water Resources currently uses the Lemhi Decree to preclude water users in the Lemhi Basin from receiving a Director's Reports which recommends any more than what they originally received in the Lemhi Adjudication.

B. Course of Proceedings Below.

Claimant filed an amended beneficial use claim (74-15015) on May 14, 2007, to correct the amount of acres irrigated and the rate originally claimed and filed in the Snake River Basin Adjudication. The Director of the Idaho Department of Water Resources issued an Amended Director's Report on September 25, 2007, refusing to change amount of c.f.s. or acreage irrigated. Claimant filed an objection on October 17, 2007. A pre-trial conference was set for July 17, 2008, and a trial date was set for July 24, 2008. Claimant then filed a late notice of claim (74-15861) which had been prepared by IDWR agent, Nate Arave. This claim is for 1.24 c.f.s., which would make up the difference between the recommended 74-15015 (0.34 cfs) and the historical use IDWR could recognize but for the Lemhi Adjudication limitation.

C. Statement of the Facts

The Shennon Decree was issued in 1906. This decree gave Mr. Riggan's predecessors in

interest 0.36 cfs under an 1897 priority date. Mr. Riggan's mother, his immediate predecessor in interest, for whatever reason failed to file in the Lemhi Adjudication. She received the same water right she received under the Shennon Decree even though she had historically put more water to use than what the Shennon Decree provided for. When Mr. Riggan made a claim in the Snake River Basin Adjudication for the amount historically put to beneficial use, the Idaho Department of Water Resources denied the claim on the basis of res judicata, claiming that Mr. Riggan was precluded by the Lemhi Decree from claiming any more than he received in the Shennon Decree.

ARGUMENT

A. Summary of the Argument

The Lemhi County District Court lacked subject matter jurisdiction to enter a final decree in the Lemhi Adjudication because the Snake River Basin Adjudication had commenced and all jurisdiction to adjudicate water rights within the Snake River Basin was vested in the Snake River Basin District Court. Because the Lemhi Court lacked subject matter jurisdiction, its "final decree" should be voided - at least as far as it is being used by IDWR to bar Mr. Riggan's beneficial claim is concerned. As such, the final decree entered is not binding on Mr. Riggan or others in the Lemhi basin, and it cannot be used to preclude them from making beneficial use claims for water rights in the Snake River Basin Adjudication. Further, even if the Lemhi Decree were valid for all purposes, Idaho has historically supplemented its water right decrees and has not applied claim preclusion to supplemental claims. Finally, the policy of the Snake River Basin Adjudication is to determine accurately the water rights within the Snake River Basin, and precluding Mr. Riggan from making a beneficial use claim based on historical beneficial use

violates that policy.

**THE LEMHI DECREE CAN ONLY BE REGARDED AS A PARTIAL DECREE
BECAUSE THE LEMHI COUNTY DISTRICT COURT LACKED SUBJECT MATTER
JURISDICTION TO ISSUE A FINAL DECREE.**

A. Lack of Subject Matter Jurisdiction by the Lemhi County District Court.

The Lemhi Decree can best be regarded as a partial decree because the Lemhi County District Court lacked subject matter jurisdiction to issue a final decree. A partial decree for the Lemhi adjudication was entered on December 30th, 1982. A final decree was entered on October 14th, 1992. However, the Snake River Basin Adjudication (SRBA) had commenced in November of 1987. With the commencement of the SRBA, jurisdiction to resolve all of the water right claims within the scope of the general adjudication was placed uniquely in the SRBA court. *Walker v. Big Lost River Irr. Dist.* 124 Idaho 78, 81, 856 P.2d 868, 871 (1993). In *Walker*, a trial court granted a writ of mandate and a permanent injunction compelling the Big Lost River Irrigation District to deliver stored water outside of their boundaries to claimant Walker. This took place in 1990, after the commencement of the SRBA. Both parties had also filed in the SRBA. It was really a case about a change in place of use, which is essentially an adjudication of the water rights. The Idaho Supreme Court held that the trial court did not have subject matter jurisdiction over the claim as it would have adjudicated the water right. The jurisdiction to do so was only found in the SRBA.

To further substantiate its finding, the *Walker* court cites I.C. § 42-1404(1), which prevents a claimant from filing for a private adjudication when a general adjudication such as the SRBA has commenced. While this was not directly on point in *Walker* or the current case before the court, it evidences the legislature's intent to place jurisdiction of the adjudication of water

rights in the Snake River Basin solely in the SRBA court.

In the case *State of Idaho v. Idaho Conservation League*, the Idaho Supreme Court raised the subject matter jurisdiction issue in dicta, but declined to rule on it as that issue was not in question. 131 Idaho 329, 955 P.2d 1108 (1998). This case dealt with the validity of the General Provision 2 of the Director's Report for the Reynolds Creek Basin. As it did not call into question the validity of the Reynolds Creek Decree itself, the Supreme Court decided they were not required to decide that specific issue. However, the Court did say that if called upon to decide the validity of the decree, it would have to confront that issue. In saying so, the court cited and quoted the ruling from *Walker*, reiterating that the subject matter jurisdiction for the general adjudication of all water rights in the Snake River Basin is found only in the SRBA court.

B. Judgements made by courts with no jurisdiction are void.

A judgment made by a court which has no jurisdiction or authority over the matter is void. *Andre v. Morrow*, 106 Idaho 455, 680 P.2d 1355, 1359 (1984). The *Andre* court also reaffirmed from earlier cases the principle that "a void judgment is a nullity, and no rights can be based thereon: it can be set aside on motion or can be collaterally attacked at any time." The Lemhi final decree is void because the district court had no jurisdiction over the matter. Because it is void, no rights can be based on it as a "final decree". This would include use of the Lemhi Decree by the Idaho Department of Water Resources, (IDWR or the Department) to adjudicate water rights. Specifically, this should preclude IDWR from basing any denial of a Recommendation in the SRBA upon the Lemhi Decree only, or it should at least keep IDWR from citing claim preclusion as a valid reason for disallowing beneficial use claims in the Lemhi

Basin. The Lemhi Decree can only be viewed as a partial decree as the last valid judgment issued by the Lemhi County District Court in this matter.

While it is clear that the final decree issued by the Lemhi District Court is invalid and void, it should be noted that Mr. Riggan does not wish to overturn the partial decree issued by the Lemhi District Court. However, that partial decree should not preclude him from being granted a right based upon constitutional beneficial use. He has taken the necessary steps to file a beneficial use late claim based on his historical use of water on the lands he and his predecessors have owned.

RES JUDICATA IS INAPPLICABLE TO THE LEMHI DECREE

A. Res Judicata is inapplicable to the Lemhi Decree because there is no valid final judgment.

At the core of the Idaho Department of Water Resources' reasoning for not recommending Mr. Riggan's water right is the doctrine of res judicata. The Department claims that in Mr. Riggan's case, he is precluded from making a beneficial use claim for more than what he received in the Lemhi Decree because the predecessor of his water right did not file in the Lemhi Adjudication. Because they did not file they only received the amount they were decreed under the Shennon Decree of 1907. As set forth in the brief above, the problem with IDWR's argument is no true final decree was valid, and therefore, there can be no claim preclusion. One of the more important principles of res judicata requires that there be a final judgment on the merits of a case in order for a claim to be precluded. *Systems Associates, Inc. v. Motorola Communications and Electronics, Inc.*, 116 Idaho 615, 778 P.2d 737, 739 (1989). However, as has been shown, there was no valid final judgment or final decree in the Lemhi Adjudication. At best, the Lemhi Decree can only be looked upon as a partial decree since that was the last valid

judgment on this matter by the Lemhi County District Court.

A partial decree is not a final order within the meaning of I.R.C.P. 54(b). A judge may revise his order at any time prior to a final adjudication of all claims. *Baker v. Pendry*, 98 Idaho 745, 572 P.2d 179, 182 (1977). In *Baker*, a divorced husband brought a partition action against his former wife for division of two parcels of real property, and the wife filed a cross complaint. The court granted the husband's motion to vacate a partial decree on one of the parcels of property and the wife appealed. The Idaho Supreme Court held that the trial court had power to revise its partial decree after it was entered. This shows that partial decrees made by the court are in no way final and may be altered. Furthermore, Mr. Riggan has no problem with the partial decree insofar as it addresses what was decreed in the original Shennon Decree. Mr. Riggan's present late claim is for a beneficial use claim that would be "in addition to" or "added to" the decreed amount with its own water right number and its own elements, all based upon beneficial use.

Since the Lemhi Decree can only be looked upon as a partial decree, a court with proper jurisdiction may revise what was decreed by the Lemhi Court. The only court with proper jurisdiction over the matter now is the SRBA Court. As such, it is not bound by what the Lemhi Court decided, and it may change or add to what the Lemhi Court decreed. In Mr. Riggan's case, the SRBA court has the authority to grant him a beneficial use claim for more than what was given his predecessor in the Shennon Decree and the Lemhi partial decree.

B. Idaho has not been strict in the application of Res Judicata to decreed water rights.

Further, even if the Lemhi Decree were a valid final judgment, Idaho has not necessarily been strict in its application of Res Judicata to decreed water rights. An example is the Rexburg

Decree. It was issued in 1910. However, since then it has been amended by supplementary proceedings such as the Eagle Decree in the Aberdeen-Springfield Canal Company v. Henry Eagle case. Furthermore, the Rexburg Decree was supplemented with water rights which were not decreed in the original decree. When the Fremont Madison Irrigation District was formed, a list of all decreed rights within the Fremont Madison's boundaries was compiled. Most of the water rights within the list were from the Rexburg Decree. However, several water rights are listed as "supp.", and are not found in the Rexburg Decree. Examples include the Arnsberger right with a priority date of June 1, 1891 and the Ellis right with a priority date of June 1, 1888. These rights arguably should have been adjudicated in the Rexburg Decree but were not. (Note: there are likely many other rights like these in the supplemental decrees such as the Eagle decree.)

If Idaho had strictly followed the doctrine of Res Judicata with these rights with the same exactness it is attempting to use with the Lemhi Decree, these rights should not have been recognized. However, these rights were granted and similarly, Mr. Riggan's beneficial use rights should be recognized in the SRBA.

**THE POLICY AND GOALS OF THE SRBA AND IDWR WILL BE BETTER MET BY
ALLOWING MR. RIGGAN'S CLAIM.**

A. To accurately determine the water rights in the Snake River Basin, Mr. Riggan's beneficial use claim should be allowed.

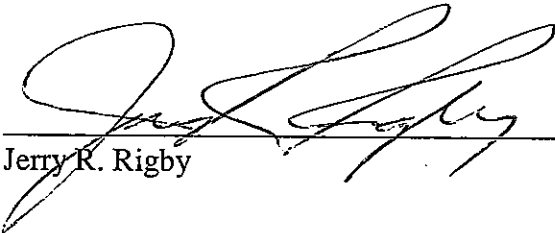
As a matter of policy, Mr. Riggan's beneficial use claim should be allowed in the SRBA and should not be precluded by the Lemhi Decree. IDWR's mission in its involvement with the SRBA is to "accurately determine the water rights in the Snake River Basin Adjudication."

<http://www.idwr.idaho.gov/water/srba/mainpage/>. One of the goals of the SRBA is to make a final determination of all of the rights within the Snake River Basin. Mr. Riggan and his predecessors have clearly put water to a beneficial use on his land since 1897. In the interest of accuracy, IDWR should recommend his beneficial use claim for the amount IDWR can reasonably determine has been historically used. To deny Mr. Riggan's claim because his predecessor in interest did not file in the Lemhi Adjudication alone would not accurately determine what water rights have been historically used and are still required to irrigate his grounds. Further, it seems inequitable to deny him the water he has historically used, required and historically impacted all other water right holders simply because his predecessor did not file in the Lemhi Adjudication.

CONCLUSION

Mr. Riggan should be allowed to make a beneficial use claim for the amount of water he has historically put to use on his lands. IDWR's recommended position that Mr. Riggan's claim should be precluded by res judicata is unworkable because there is no valid final judgment or decree for the Lemhi Adjudication. The fact that there is no final judgement should leave this issue open for the SRBA court to make a decision as to the amount of water and priority date Mr. Riggan is entitled to. Finally, the goals of the State of Idaho and IDWR in the SRBA would be better met by allowing Mr. Riggan to file on his historical use of water.

DATED this 25th day of June, 2008.


Jerry R. Rigby

CERTIFICATE OF MAILING

I certify that on June 25, 2008, I mailed the original and copies of Claimant's Pre-Trial Memorandum, including all attachments, to the following persons:

1. Original to:
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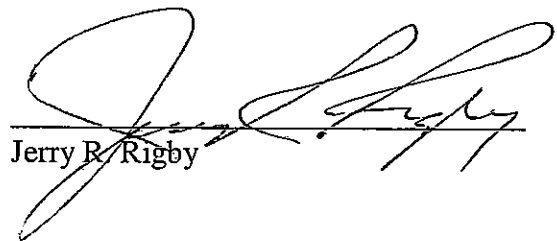
2. Copies to:

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