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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 Numbers: See Attachment
A**

**CITY OF POCATELLO AND
GROUNDWATER USERS'
MEMORANDUM IN SUPPORT OF
JOINT MOTION FOR SUMMARY
JUDGMENT ON PRIORITY
DATES**

The City of Pocatello ("Pocatello") and the Aberdeen American Falls
Groundwater District, Bingham Groundwater District, Bonneville Jefferson Groundwater
District, Carey Valley Groundwater District, Jefferson Clark Groundwater District,
Madison Groundwater District, Magic Valley Groundwater District, and North Snake
Groundwater District, (collectively referred to herein as "Groundwater Users") hereby
submit this Memorandum in Support of their Joint Motion for Summary Judgment.

INTRODUCTION

Attachment C reflects certain water rights claimed in the SRBA with priority dates set by stipulation under the Henry Eagle Decree.¹ Various objections have been filed by the Groundwater Users and others to the claimed priority dates. The priority dates claimed in these sub-cases are evidenced only by the Eagle Decree stipulation, rather than evidence of beneficial use. A clarifying remark is necessary to facilitate administration of these rights. I.C. §42-1411(2), (3); *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-947 (1998). Administration on the basis of a priority date that is unrelated to the date water was diverted for beneficial use is inconsistent with Idaho law.

BACKGROUND

In 1968, a group of water users in Water District 01 got together and stipulated to the distribution of certain amounts of water believed to be in the stream as a result of additional Bureau of Reclamation projects. Eagle Decree, Ex. 3 to Attachment B, ¶¶IV(b)-(k). Rather than litigate the priority date of these new junior rights, the parties to the decree (including certain of the party claimants of the sub-cases referenced herein) negotiated a priority date. *See id.*, ¶¶ IV(c), (f). Neither Pocatello nor the Groundwater Users are parties to that decree and neither movant is bound by the decree through privity with any parties to the decree. As such, there is no preclusive bar to re-examination of the claimed priority dates insofar as they are based on the Eagle Decree.

Because the claimed priority dates in these sub-cases are the result of a stipulation, they do not necessarily reflect beneficial use of the water right in question. There is no material dispute of fact that the origin of these priority date claims is the stipulated Eagle Decree. Nor is there any dispute that the claimants have yet to produce

¹ Attachment C includes relevant excerpts from the Notices of Claims that rely upon the Eagle Decree.

evidence of beneficial use as of the claimed priority dates. Pocatello and the Groundwater Users do not contend that the claimed rights have never been diverted, only that the rights were not diverted for beneficial uses on or before the claimed priority date. Pocatello and the Groundwater Users are entitled to summary judgment that, given the paucity of information supporting the claimed priority dates, and under I.C. § 42-1411(2)(j), a clarifying remark should be added to the partial decrees in order to facilitate accurate administration of these rights. *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-947 (1998)².

STATEMENT OF UNDISPUTED FACTS

1. The water rights numbered 1-7, 1-8, 1-9, and 1-14 have a claimed priority date of April 1, 1939. *See* Attachment A & C.
2. Both the April 1, 1939 priority date and the March 30, 1921 priority were the subject of a stipulation between parties to a private decree entered May 14, 1968 in the Fifth Judicial District Court (hereinafter "Eagle Decree"). *See* Attachment B, Affidavit of Sarah A. Klahn.
3. On the issue of priority date, the Eagle Decree provides, in relevant part:

That in connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties Plaintiff to agree among themselves, and avoid extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using, or were making plans to construct projects and perfect rights to use, the so-called "Flood Water Rights", being those waters of the river which were only available during periods of high flow; and which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were constructed; and that the parties Plaintiff did at such time agree on a common priority date of April 1, 1939, for such rights, which said agreement has been acted upon by all of the parties. Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.

² Note that in *State v. Nelson*, a general provision was at issue, rather than a clarifying remark. *Id.* at 16, 946 (discussion of "remarks" in the context of general provisions under I.C. 42-1411 and 42-1412). The legislature has not distinguished between these two partial decree provisions. Further, the Court's reasoning in *Nelson* setting forth the test for whether a general provision should be added to a partial decree is equally applicable when considering the propriety of adding a clarifying remark.

...

That it was **necessary to agree** that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called flood water rights with said priority date of April 1, 1939, and that said legislation was achieved, and said projects were authorized and have been developed, on the basis of such understanding as to their water rights, **and that such projects have used water from the Snake River under such claimed priority date as promptly as they were able to do so, dependent upon the construction of their facilities."**

Ex. 3 to Attachment B, ¶¶ IV(c), (f) (emphasis added).

4. The Eagle decree is the only evidence of priority date relied upon by claimants.
5. For water right number 1-7, claimed by the Burley Irrigation District, the available evidence suggests that the first date of diversion was not April 1, 1939, but May of 1955. *See*, Affidavit of Sarah Klahn & Ex. 2 to Attachment B.
6. For water right number 1-8, claimed the Minidoka Irrigation District, the available evidence suggests that the first date of diversion was not April 1, 1939, but May of 1955. *See*, Affidavit of Sarah Klahn & Ex. 2 to Attachment B.
7. For water right number 1-9, claimed by the Milner Irrigation District, the available evidence suggests that the first date of diversion was not April 1, 1939, but May of 1955. *See*, Affidavit of Sarah Klahn & Ex. 2 to Attachment B.
8. For water right number 1-14, claimed by the A&B Irrigation District, the available evidence suggests that the first date of diversion was not April 1, 1939, but May of 1957. *See*, Affidavit of Sarah Klahn, Ex. 2 to Attachment B, Ex. 1 to Attachment B, Water Management and Conservation Report for A&B Irrigation District.
- 9.

BACKGROUND

On May 15, 2006, the Director filed his recommendations for the above-listed water rights with this Court in the SRBA Basin 01, Part I Irrigation and Others Director's Report. The Director recommended these water rights be decreed with the claimed priority dates.

On October 4, 2006, the Groundwater Users³ and the United States, among other objectors, filed timely objections to these water rights alleging, *inter alia*, these rights had not been delivered and thus should be disallowed. *See* Objections on file in the subject sub-cases. Pocatello filed a Motion to Participate on November 14, 2007. Following briefing and argument, Pocatello was allowed to participate as an objector in these subcases under the Special Master's Order of April 1, 2008. While the exact issue of priority date was not raised in objections filed in this matter, by raising the issue of whether the right should be allowed, issues such as the propriety of the priority date (or, as in the case of the Groundwater Users' Motion for Summary Judgment raising source and period of use issues) are put at issue.

SUMMARY OF ARGUMENT

The rights put at issue through this Motion are not claimed pursuant to an IDWR license. Instead, they are beneficial use rights that rely for their priority date not on evidence of actual diversion for beneficial use, but instead on a stipulated prior decree, providing, *inter alia*,

That it was **necessary to agree** that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called flood water rights with said priority date of April 1, 1939, and that said legislation was achieved, and said projects were authorized and have been developed, on the basis of such understanding as to their water rights, **and that such projects have used water from the Snake River under such claimed priority date as promptly as they were able to do so, dependent upon the construction of their facilities."**

Ex. 3 to Attachment B, ¶¶ IV(f) (emphasis added)

³ On May 29, 2008, the Court issued its order *Granting IGWA's Motion for Substitution of Parties* which substituted the Ground Water Districts for IGWA.

Under I.C. § 42-1411, the Director's mandate in the SRBA is to determine the elements of a water right, including the name of the owner, source, quantity, priority date, period and place of use, and the Recommendation shall include "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." If the director cannot make an independent finding of the date of priority, a prior private decree "does not obligate the Director to make a recommendation contrary to his findings." *State v. Hagerman Water Rights Owners*, 130 Idaho 727, 741, 947 P.2d 400, 414 (1997).

Under the Eagle decree, there is not even an allegation that the rights *were* diverted and used on or before the claimed priority date. Quite the contrary, the Eagle decree only states that the rights *may* have been diverted as of the claimed priority date, and that the parties agreed to the dates as a basis to avoid litigation. The Director's Recommendation that the claimed priority date is adequate for purposes of the partial decree is in error. A clarifying remark identifying a priority date for purposes of administration based on evidence of date of first diversion for beneficial use is appropriate here. I.C. §42-1411(2)(j).

STANDARD OF REVIEW

Summary judgment is appropriate where two conditions are met: (1) "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and (2) "the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). *See Sorenson v. Saint Alphonsus Reg'l Med. Ctr.*, 141 Idaho 754, 118 P.3d 86, 90 (2005) ("[s]ummary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law"); *State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348, 349, 79

P.3d 707, 708 (2003) (“[a] summary judgment is properly granted when the moving party shows there is no genuine issue of material fact and is entitled to judgment as a matter of law”). To withstand a motion for summary judgment, the opposing party’s case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 853, 727 P.2d 1279, 1281 (Ct. App. 1986).

I. CLAIMANTS HAVE NOT PROFFERED EVIDENCE THAT CAN MEET THEIR BURDEN OF PROVING UP THEIR CLAIMED PRIORITY DATE AND A CLARIFYING REMARK IS THEREFORE APPROPRIATE TO FACILITATE LAWFUL ADMINISTRATION

Water in Idaho shall be administered “first in time, first in right,” and the “IDWR cannot require subordination of legal water rights to nonexistent illegal water uses.” Special Master Haemmerle, *Recommendation on Basin-Wide Issue 5A*, dated April 11, 1996 at p. 51-10. The claimants in the referenced sub-cases are not “non-existent illegal water users” but appear instead to be “non-existent water users” as of their claimed priority date. To be clear: Pocatello and the Groundwater Users do not contend that the claimed rights have *never* been diverted; only that the rights were not diverted for beneficial uses on or before the claimed priority date. As reflected in the Eagle Decree, the priority date of April 1, 1939 was the result of a stipulation to avoid the cost and effort of litigation. Ex. 3 to Attachment B, ¶IV(c). While this is a laudable way to resolve conflict, it cannot stand in the place of actual diversion for beneficial use to establish an administrable priority date. As such, a clarifying remark by the Special Master is necessary to authorize IDWR to administer these rights by reference to a date reflecting actual first diversion to beneficial use. I.C. 42-1411(2)(j); *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-947 (1998).

- A. Idaho law vests a priority date based on the first diversion for beneficial use or on the date a permit was sought from IDWR. An agreement on priority date made in order to avoid litigation cannot be the basis of administration of the water right.**

In Idaho there are two methods of appropriating water: the statutory method in which the claimant applies for a permit, and the constitutional method, which covers those water rights based on valid, though unadjudicated appropriations. *Id.* Const. Art. XV, Sec. 3; I.C. § 42-201 et seq. Under the former, the priority date is the date of filing; under the latter, the priority date attaches to the date of actual diversion for beneficial use. There is no way to acquire a priority date, however, by a “stipulation” method, the basis for the claims at issue here. Parties cannot stipulate to a waiver of the constitutional requirements of diversion for beneficial use in order to acquire a priority date for a water right.

The relevant language of the Eagle Decree establishes that some or all of the stipulated rights had *not* been put to beneficial use as of the priority date agreed to by the decree parties.⁴ This is not a situation where the prior decree includes recitation to findings of fact and evidence taken by the Water Master or judge that support the decree terms.

This court has previously rejected water rights claims based on prior decrees in which the parties stipulated to the validity of a water right, but which was missing an essential element necessary for a water right Special Master Haemmerle,

⁴ In 1968, the Eagle Decree provided: “That it was necessary to agree that additional projects authorized by the Congress of the United States as an integral part of the Palisades Reservoir legislation would have their proportionate rights in said so-called flood water rights with said priority date of April 1, 1939, and that said legislation was achieved, and said projects were authorized and have been developed, on the basis of such understanding as to their water rights, and that such projects have used water from the Snake River under such claimed priority date as promptly as they were able to do so, dependent upon the construction of their facilities.” Ex. 3 to Attachment B, ¶VI(f) (emphasis added). The dates of actual diversion for beneficial use could be any time prior to the 1968 decree, but without evidence of actual use, it is impossible to rely on the stipulated dates for purposes of administration.

Recommendation on Basin-Wide Issue 5A, dated April 11, 1996 at p. 51.4-9. In that sub-case, parties stipulated to the existence of rights to certain ‘excess’ waters in a prior decree, but the decree failed to define the priority date or quantity of those ‘excess’ water rights. *Id.* at 51.4. This Court held that the decree did not constitute evidence of the excess water rights because it was missing the elements required by §§ 42-1409 and 42-1427(2), and denied the inclusion of the general provision relating excess flow on Reynolds Creek. *Id.* at 51.10-11. After remand of this matter from the Idaho Supreme Court in the *A&B v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998), water right holders in Reynolds then filed individual water rights based on beneficial use for their “excess” flow claims. Reliance on the stipulation that the claimants had rights to “excess” water was insufficient to support a claim. Similarly, reliance on the Eagle Decree stipulation to support a priority date without concomitant evidence of actual diversion for beneficial use on or prior to the priority date claimed should be found to be insufficient to support the claimed date.

B. A clarifying remark is necessary to facilitate lawful administration of the rights in question.

As in the Reynolds Creek sub-cases, the claimants herein are claiming a priority date based on a prior decree that does not definitively establish a fundamental element of a right, the date of first beneficial use. Given the uncertainty regarding date of first diversion for beneficial use created by the stipulated priority date, it is appropriate to add a clarifying remark to the partial decrees to establish the priority date based on first diversion for beneficial use for purposes of administration. The WD01 records, as summarized by in Exhibit 2 to Attachment B, are undisputed facts that establish the actual date of diversion for beneficial use.

Under I.C. §§ 42-1412(6), 1411(2)(j) and (3), the elements of a partial decree are specified including, *inter alia*, “such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for the administration of the right by the Director.” To allow the Eagle Decree to establish a priority date for purposes of administration of the water rights in the underlying subcases would result in a “sweet heart” decree, a result that this Court has declared repugnant to its statutory duties. Judge B. Wood, *Memorandum Decision and Order on Challenge, Order Granting State of Idaho’s motion for the Court to Take Judicial Notice of Adjudicative Facts, Order of Recommitment with Instructions to Special Master Cushman*, dated November 23, 1999 at p. 13-30. By contrast, a clarifying remark that includes the date of first diversion for beneficial use as a basis under which the Director may exercise his discretion to administer these rights would be consistent with Idaho law.

In *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-947 (1998), the Idaho Supreme Court discussed the considerations in adding clarifying remarks or general provisions. The Court determined that review of the clarifying remarks (or general provisions) was a mixed question of law or fact:

The factual question involves defining the proposed General Provision and the circumstances under which it is applied. The legal question involves whether the provision will facilitate the efficient administration of water rights in a decree.

Id. at 15, 946. In this case, the legal question raised by Justice Silak in *Nelson* can be answered in the affirmative: a clarifying remark will facilitate the efficient and accurate administration of these water rights by reference to a priority date associated with actual first diversion to beneficial use.

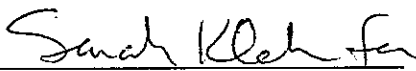
As laid out in the undisputed facts section above, Justice Silak's factual question can be answered as well. The SWC's information submitted during the SWC Delivery Call case⁵, demonstrates the dates of first diversion of the water rights claimed here. An appropriate remark may be: "The water rights decreed herein have a priority date under the Henry Eagle Decree of _____. However, for purposes of administration, and based on evidence of actual first diversion to beneficial use, the priority date for purposes of administration shall be _____."

CONCLUSION

Because the claimed priority dates are based on a stipulation between parties to a prior decree, and because the decree term itself establishes that the actual date of first diversion for beneficial use is uncertain, Pocatello and the Groundwater Users respectfully move for summary judgment that a clarifying remark (similar to that suggested above) is necessary to establish the proper priority date for purposes of administration of the water rights in these referenced sub-cases.

Respectfully submitted, this 22nd day of August, 2008.

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ATTORNEYS FOR POCATELLO

⁵, *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefits of A&B Irrigation District, American Falls Reservoir District, North Side Canal Company and Twin Falls Canal Company,*

ATTACHMENT A

Subcases Nos:

01-00007

01-00008

01-00009

01-00014

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of August, 2008, a true and correct copy of **XXX for SRBA Surface Water Coalition Water Rights Cases** was served by email to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:



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