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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 74-15015 and 74-15861
	)	(Riggan)
Case No. 39576	)	
	)	SPECIAL MASTER REPORT
_____	)	AND RECOMMENDATION

Findings of Fact

Background

James E. Riggan's parents, Clark and Harriet Riggan, filed the original claim in the SRBA as 74-209, re-numbered as 74-15015 because of a split, for .36 cfs to irrigate 28 acres from a single point of diversion from Wimpey Creek based on a decree.

The Director of the Idaho Department of Water Resources filed his *Director's Report, Reporting Area 23, IDWR Basin 74* on January 23, 2006. The Director recommended claim 74-15015, to James E. Riggan, 267 Highway 28, Salmon, Idaho, 83467, for .34 cfs from Wimpey Creek to irrigate 27 acres in Lemhi County from March 15 to November 15 with a priority date of May 1, 1897, based the Lemhi Decree. Mr. Riggan filed an *Objection* on June 23, 2006, objecting to quantity, points of diversion and place of use.

Mr. Riggan was granted leave to amend his claim on July 19, 2007, seeking 2.16 cfs with three points of diversion to irrigate 72 acres. IDWR then filed its *Amended Director's Report, Subcase No. 74-15015* on September 21, 2007, but with no changes from its original recommendation because it considered the legal doctrine of *res judicata* bars reconsideration of the nature and extent of all water rights previously adjudicated, citing I.C. § 42-1420. Mr. Riggan filed his second *Objection* on October 17, 2007, objecting to the same elements.

In anticipation of trial, the Special Master requested from IDWR an I.R.C.P 706 report concerning the underlying facts and data upon which it based its recommendation, plus an “alternative recommendation” in the event Mr. Riggan’s claim is allowed as amended.

IDWR filed its *Supplemental Director’s Report Regarding Subcase No. 74-15015* on July 11, 2008. It found water right 74-209 was decreed in the Lemhi Adjudication for .34 cfs with a single point of diversion off Wimpey Creek to irrigate 27 acres with a priority date of May 1, 1897, based on the 1906 Shenon Decree.¹

Based on documents of historic use of the water and a follow-up examination of Mr. Riggan’s place of use, IDWR suggested he file a late beneficial use claim for the additional acreage, quantity and points of diversion.² On May 28, 2008, Mr. Riggan filed his *Motion to File Late Notice of Claim* in subcase 74-15861 and on July 18, 2008, SRBA Presiding Judge John M. Melanson entered his *Order of Reference Appointing Special Master Terrence A. Dolan*.

IDWR concluded its *Supplemental Director’s Report* by stating 74-15015 and 74-15861 could be recommended as overlapping claims 1) if late beneficial use claim 74-15861 is allowed to proceed by order of the Presiding Judge and 2) if 74-15861 is not barred by *res judicata*:

Based on the site exam and review of other information provided, it is the Department’s position that what Riggan seeks from water right no. 74-15015 cannot be recommended because water right no. 74-15015 is based on the Shenon and Lemhi Decrees. Instead, it is the Department’s position that, but for *res judicata*, water right no. 74-15861 could be recommended as a beneficial use claim. . . . Based on the site exam and other information reviewed and were it not barred by *res judicata*, March 15, 1907 is the earliest priority date the Department would be willing to recommend for water right no. 74-15861 because it postdates the Shenon Decree and is based on evidence of beneficial use.

¹ On April 10, 1906, District Judge J. M. Stevens entered a document entitled *Decreed Water Rights, Wimpey Creek, Lemhi County, Judgment*, a quiet title action to a single stream. The parties were Minnie M. Shenon, et al., v. Nellie Albertson, et al. The Decree did not specify acreage or points of diversion.

² In its *Supplemental Director’s Report*, IDWR wrote:
[Mr.] Riggan provided the Department with an aerial photo dated September 1939 which shows irrigation on the place of use. . . . Additional evidence exists suggesting an even earlier priority date. The long-term historic use is supported, in part, by the presence of 100+ year old cottonwood trees and tree stumps.

Because 74-15015 and 74-15961 are overlapping claims, if both claims are allowed, the Department would have to amend its recommendation of 74-15015 to reflect the combined use limits and additional points of diversion for the overlapping claims.

Hearing on Motion to File Late Claim / Trial

The hearing on Mr. Riggan's *Motion to File Late Notice of Claim* and trial on the issue of *res judicata* was held on July 24, 2008, at the SRBA Courthouse in Twin Falls Idaho. For the convenience of Mr. Riggan and other claimants represented by his attorney, the issue of *res judicata* was argued together with subcase 74-10146, *et al.* (Carlson). Jerry R. Rigby appeared for Mr. Riggan and Andrea L. Courtney appeared for IDWR, along with senior water resource agent Nathaniel Arave.

At trial, counsel for IDWR said it does not oppose Mr. Riggan's *Motion to File Late Notice of Claim* in 74-15861 and requested the claim be tracked together with 74-15015. IDWR noted there were two errors in its draft recommendation of 74-15861 (Attachment D to *Supplemental Director's Report*) if the claim is allowed – the priority date should be March 15, 1907, instead of May 1, 1897, and the quantity stated under “purpose and period of use” should be 1.24 cfs, not .34 cfs.

Counsel for Mr. Riggan offered no witnesses but argued as follows: 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 [sp] Decree even though she had historically put more water to use than what the Shennon Decree provided for.

....

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 judgment 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.

Claimant's Pre-Trial Memorandum, lodged June 26, 2008.³

³ For a more complete review of Mr. Riggan's arguments concerning the issue of *res judicata*, see *Special Master Report*, subcase 74-50A, *et al.* (Carlson), dated September 24, 2008.

At trial, counsel for Mr. Riggan said that if the late beneficial use claim (74-15861) is allowed, he will probably withdraw claim 74-15015. Counsel for IDWR hinted that if the late beneficial use claim is allowed, there will likely be objectors.

Conclusions of Law

Under I.R.C.P. 60(b)(6), a court may relieve a party from a final judgment for any reason justifying relief from the operation of the judgment, but any motion for relief must be made within a reasonable time.

These two claims present unique circumstances – one claim, 74-15015, neatly fits with a water right decreed in two separate adjudications, while the second claim, 74-15861, represents the complete historical beneficial use of the water. There was no reason given why Mr. Riggan's parents failed to file a claim in the Lemhi Adjudication; nevertheless, their water right was decreed, probably because it was decreed earlier in the Shenon Decree. It was not until the SRBA came along that Mr. Riggan tried to correct an apparent discrepancy by having the water right decreed as the water has been historically used.

The record supports Mr. Riggan's beneficial use claim in subcase 74-15861 and he has stated sufficient reason justifying relief from the operation of District Judge Arnold T. Beebe's December 30, 1982 *Partial Decree Pursuant to Rule 54(b), I.R.C.P.* in the Lemhi Adjudication. Mr. Riggan's *Objections* were timely filed and it would not be fair to deny his claim in the SRBA based on *res judicata* given the opportunity to correct oversights in describing the actual historic use of the water.

That being said, the Court is left with the choice of how best to correct the record. If Mr. Riggan's late beneficial use claim is allowed and adjudicated as an overlapping claim with 74-15015, both water right descriptions will need to be amended by IDWR filing a second supplemental director's report for the two rights. If, on the other hand, 74-15861 is allowed and Mr. Riggan chooses to withdraw 74-15015, IDWR will have to file a second supplemental director's report for 74-15861. The main purpose in each event is to provide ample notice via docket sheet because of IDWR's last minute amendments of which other SRBA claimants may not be aware.

If the Presiding Judge allows Mr. Riggan's late beneficial use claim (74-15861) and no one objects to IDWR's second supplemental director's report, the claim can be decreed. But if an objection is filed, the matter can be referred back to the Special Master.

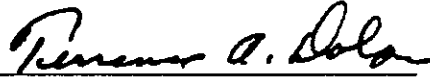
For the record, there was a valid final judgment in the Lemhi Adjudication. See Judge Melanson's May 25, 2004 *Order Re: In the Matter of the General Determination of the Right to the Use of Surface Waters and Tributaries from Whatever Source of the Lemhi Drainage Basin (Lemhi Adjudication) and Special Master Report*, subcase 74-50A, et al. (Carlson), dated September 24, 2008, fn 4. On the issue of how the State and the SRBA can best serve the policy of accurately determining water rights within the Snake River Basin, the following recommendations will accomplish that goal.

Recommendation

THEREFORE, IT IS RECOMMENDED that:

1. The Presiding Judge grant Mr. Riggan's *Motion to File Late Notice of Claim* in subcase 74-15861, and
2. IDWR be ordered to prepare and file with the SRBA Court alternative second supplemental director's reports – one report if Mr. Riggan's late beneficial use claim is allowed as an overlapping claim with 74-15015 and a second report if Mr. Riggan chooses to withdraw 74-15015.

DATED September 24, 2008.


TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER REPORT AND RECOMMENDATION was mailed on September 24, 2008, with sufficient first-class postage to the following:

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