

OCT 14 2008
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - 328A
Fifth Judicial District
County of Twin Falls - State of Idaho

OCT 10 2008

By _____ Clerk _____

Deputy Clerk _____

**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

**ORDER ON MOTION TO DISMISS
OBJECTIONS AND REQUEST FOR
ATTORNEY FEES**

**SUBCASE NOS.: 37-494, 37-495,
37-577BU, 37-577BV, 37-657B, 37-833K,
AND 37-2623**

I. PROCEDURAL HISTORY

The claimant in these subcases is the Valley Club, Inc. The Valley Club filed claims for these water rights in Basin 37, and the Idaho Department of Water Resources recommended rights 37-494, 37-495, 37-577BU, 37-577BV, 37-657B, 37-833K, and 37-2623. The Big Wood Canal Company filed timely *Objections* to the *Director's Report* recommendations for these water rights. The original *Objections* were primarily to the elements of purposes of use and quantity. In the original *Objections*, the Big Wood Canal Company stated that “aesthetic, wildlife and recreation uses are not beneficial uses authorized by the Idaho legislature or constitution to be held in the names of private individuals. . . .” Subsequently, the Big Wood Canal Company filed a *Motion to Amend Objections*, seeking to object to quantity, volume, measuring devices, and water quality.

The Valley Club filed a *Motion to Dismiss Objections and Request for Attorney Fees* related to the proposed *Amended Objections*. Multiple parties represented by James Speck joined in the *Motion* including: Barker Living Trust; Chaney Creek Ranch, LLC; Charles L. Matthiesen; Charles T. Foley; Eagle Creek Irrigation Co.; ECD Inc.; Elise G. Lufkin; Gimlet Property Owners Association; Gregory Ranch, LLC; Lake Creek Meadows Homeowners; Michael E. Willard; Michael Engl; Myer Berlow; Ralph W. & Kandi L. Girton; River Rock Ranch, LP; Rivers Edge Associates, LLC; Roy R. Woods; Steven D. Holzman Trust; the Gulch Trust; the R. Daniel Olmstead

Trust; and William B. Gordon. The *Motion to Dismiss* was brought under Idaho Rule of Civil Procedure 12(b) asserting that: 1) the SRBA court lacks subject matter jurisdiction; 2) the Big Wood Canal Company's *Objections* are an impermissible collateral attack on IDWR administrative decisions; and 3) the SRBA court is statutorily barred from hearing Big Wood Canal Company's *Objections*.

The Valley Club's arguments relate to the procedural history of these rights. All seven water rights were the subject of transfer applications which were previously ruled on by the Idaho Department of Water Resources. Thus, the Valley Club argues that Big Wood Canal Company cannot state a valid claim in the *Objections* because they attempt to overturn the transfer decisions. The *Motion to Dismiss Objections* also seeks attorney fees and costs.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 12(b) sets forth defenses a party may assert by motion when seeking to dismiss a pleading. Rule 12(b)(1) allows a party to seek dismissal for lack of jurisdiction over the subject matter. Rule 12(b)(6) allows a party to seek dismissal if the pleading fails to state a claim upon which relief can be granted.

A court reviews motions to dismiss under I.R.C.P. 12(b)(6) by looking only at the pleadings, and all inferences are viewed in favor of the non-moving party. *Owsley v. Idaho Industrial Comm'n*, 141 Idaho 129, 133, 106 P.3d 455, 459 (Idaho 2005)(citing *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002)). A court reviews motions to dismiss under I.R.C.P. 12(b)(1) under the same standard if the motion presents a facial challenge to the court's jurisdiction. *Id.* (citing *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990)). The court draws all inferences in the non-moving party's favor and then decides whether the non-movant has alleged sufficient facts in support of the claim that would entitle him to relief. The court does not determine whether the non-movant (Big Wood Canal Company) will prevail, but looks at whether that party is entitled to offer evidence to support the claim. *Id.* 137 Idaho at 104, 44 P.3d at 1159.

III. ANALYSIS

A. Transfers

The water rights at issue were originally used for irrigation purposes. The water rights were all subject to administrative transfer proceedings in front of IDWR. The transfer applications sought changes to the elements. The administrative transfer proceedings resulted in determinations of the purpose of use and quantity elements. The transfers approved an aesthetic and recreational purpose

of use for ponds and interconnected streams used for hazards on a golf course. The proceedings also determined quantity. The remaining portion of the rights were to be utilized to irrigate a large acreage consisting of golf course tees, fairways, rough, and greens.

Transfer 3742 was approved in March 1991. This transfer allowed changes to surface water rights 37-577, 37-494, 37-495, and 37-833K. This transfer changed the place of use, point of diversion, and the nature of use. The nature of use was determined to be aesthetic and recreation use on a golf course owned by The Valley Club.

Transfer 3743 was approved in March 1991. This transfer made changes to ground water right 37-02623. The transfer changed the purpose of use. The purpose of use was determined to be aesthetic and recreation use on the golf course.

Transfers 3742 and 3743 were intended to integrate the surface and ground water rights on the golf course. Each application included a cross-reference to the other transfer. The two transfers asked for changes to the water rights to move the point of diversion, to change the place of use to the land developed as a golf course, and to change the nature of use of a portion of these water rights to allow aesthetic and recreational uses.

IDWR published notices of the applications for **Transfers 3742 and 3743** as required under Idaho Code § 42-222. The manager of the Big Wood Canal Company filed a protest to **Transfer 3742**, but did not protest **Transfer 3743**. The protest raised to **Transfer 3742** was that the change “could be detrimental to the delivery of water of the BWCC.” In August 1990, the Big Wood Canal Company withdrew the protest to **Transfer 3742** by letter. The letter stated that the withdrawal depended on a flow meter and measuring device being a condition of the transfer. IDWR approved **Transfers 3742 and 3743** in 1991, but did not require a flow meter or measuring device. The Big Wood Canal Company did not challenge the transfers or seek judicial review, even though the measuring device was not required as a Condition of Transfer.

Transfer 71721 asked for similar changes to water right 37-657B for land that was to be developed as an adjacent nine-hole extension of the golf course. **Transfer 71721** sought to change the place of use, point of diversion, and nature of use for a portion of water right 37-657B to mitigate evaporation from proposed aesthetic and recreational water features. IDWR published notice of the applications in July 2005. No protests were filed. The transfer was approved by IDWR on **October 24, 2005**. The transfer decision authorized the requested change for purpose of use to aesthetic and recreational uses and made a decision on quantity.

The elements of these water rights were recommended in the *Director's Report* with the same elements as those determined in the transfer decisions.

B. The Valley Club's Argument

The Valley Club argues that Big Wood Canal Company's proposed *Amended Objections* are subject to dismissal under Rule 12(b) because they fail to state a claim for which there is a valid cause of action. In addition, the Valley Club asserts the SRBA Court lacks subject matter jurisdiction to hear an IDWR administrative appeal.

The Valley Club's argument relies on the transfers which apply to each of these subcases. It argues that the Big Wood Canal Company cannot attack or appeal in the SRBA those elements which were already decided in the transfer proceedings. The Valley Club asserts that IDWR's administrative decision cannot be appealed in the SRBA because this court lacks subject matter jurisdiction of such appeals. If the Big Wood Canal Company's proposed *Amended Objections* do not appeal the transfer decisions, the law of the case in the SRBA disallows collateral attacks on administrative decisions.

C. Big Wood Canal Company's Argument

The Big Wood Canal Company asserts that its proposed *Amended Objections* are not collateral attacks of IDWR's transfer decisions. The Big Wood Canal Company argues that it was misled by promises that **Transfer 3742** would include conditions requiring pumping and measuring devices. Therefore, the Big Wood Canal Company argues it did not have an opportunity to challenge the elements recommended in the SRBA.

In addition, the Big Wood Canal Company argues that it was not a party to **Transfers 3743** and **71721** and, should not be bound by these transfers. The Big Wood Canal Company argues, "There is simply no case law or statute that provides such a broad application of the doctrine of collateral estoppel."

D. Analysis of Transfers

1. Unclean Hands

The Big Wood Canal Company asserts that the Valley Club is not entitled to rely on the transfer decision. The *Response to Motion to Dismiss Objections and Request for Attorney Fees* says merely, "Collateral estoppel is an equitable remedy and he who seeks equity must do equity." The *Response* apparently asserts that the claimant comes to court with "unclean hands." "[T]he Valley Club, or its predecessors in interest, deceived Dick Oneida [of Big Wood Canal Company] by

indicating, through their engineer, that certain things would be done and that the water would only be used for irrigation. . . .”

The court notes that these assertions by the Big Wood Canal Company were not supported by facts of record. The Claimants assert that their engineer was candid and straightforward with Mr. Oneida. Based on the evidence of record, there is no showing that the Valley Club has “unclean hands.” Consequently, there is no basis to bar the Valley Club from asserting the law of the case in the SRBA which disfavors collateral attacks on administrative proceedings.

2. Collateral Attack

The law of the case in the SRBA is that a party may not subsequently challenge elements or conditions decided in a license where the party was involved in the original proceeding. The SRBA Court has not expressly applied the ruling on collateral attacks to a case involving an administrative **transfer**. Therefore, it is instructive to compare the two processes.

The licensing and transfer procedures are similar. IDWR prepares a notice of application for both licenses and permits (I.C. § 42-203A(1)) and transfers (I.C. § 42-222(1)). Any party seeking to protest a permit or transfer decision has ten days from the last publication of notice to file a protest. If a protest is filed on either a permit or transfer application, a hearing must be held by IDWR. I.C. § 42-203A(5) and I.C. § 42-222(1). After the administrative hearing, a party may seek judicial review of either a transfer or a license. I.C. § 42-203A(5) and § 42-1701A(4).

The notice requirements, hearing procedures, and subsequent reviews for licenses and transfers are very similar. There are no apparent distinctions between the two processes that would suggest a different outcome on the issue of collateral attacks. Therefore, collateral attacks of transfers should be disfavored in the SRBA just as collateral attacks of licenses. The SRBA has held that parties to licensing proceedings are prohibited from collaterally attacking these decisions.

The SRBA Court has also prohibited nonparties from collaterally attacking licensing decisions if they had an opportunity to protest the license, but failed to do so. The SRBA Court’s decision about a water right claimed by Ruby Springs Water Company is illustrative. Ruby Springs obtained the water right after the transfer of a licensed water right in 1976. Objectors had not been parties to the licensing or transfer proceedings and objected to elements which had been determined in license and transfer proceedings. The SRBA Court prohibited the Objectors from relitigating the licensing decisions:

The Special Master entered lengthy findings about [the Ruby Springs license] and its

several transfers leading up to its issuance to Ruby Springs Water Co. The Adamses' had the opportunity to protest the License transfer at the time of issuance which they failed to do. They waived any challenge to the issuance of the License. The SRBA is not a [Court] authorized to revive lost challenges to licensing decisions.

Order Adopting Special Master's Report and Recommendation, (Subcase No. 36-7092A) (Dec. 10, 1997).

Accordingly, the *Amended Objections* of Big Wood Canal Company would be dismissed under I.R.C.P. 12(b) if the only issues raised were decided by prior transfers. Collateral attacks on **licenses or transfer decisions** are not appropriate in the SRBA. However, a party may raise issues based on facts which occur **after** the administrative decision if they impact the elements of a water right. Therefore, the proposed *Amended Objections* are **not dismissed** because Big Wood Canal Company may raise issues relating to facts which occurred after Transfers 3742, 3743, and 71721.

3. Status of IDWR/ Facts after Transfers

The Valley Club correctly points out that IDWR was removed as a party to the SRBA. Since IDWR functions in the SRBA as a technical expert without party status, the SRBA does not review IDWR administrative decisions.

The SRBA court is thus not the proper venue for appeals of IDWR administrative decisions. However, the SRBA does have jurisdiction to determine the elements of water rights and to determine the legal significance of prior administrative decisions. In addition, the SRBA determines the legal significance of facts which occur after an administrative decision. For example, determinations of whether rights were forfeited or abandoned after transfers are properly before this court. Thus, the SRBA has jurisdiction to hear evidence on the proposed *Amended Objections* to the extent they raise issues after the transfers. Therefore, **the proposed *Amended Objections* are not dismissed**.

4. Quantity and Volume

Where the Big Wood Canal Company's proposed *Amended Objections* on quantity and volume relate to facts occurring after the transfer decisions, they state claims on which relief may be granted, and this court has jurisdiction to decide the elements. Where the Big Wood Canal Company's proposed *Amended Objections* seek to appeal administrative transfer decisions, the SRBA is not the proper venue, and the proposed *Amended Objections* would be dismissed for failure to state a claim on which relief may be granted.

4. Water Quality

IDWR did not include water quality standards for these rights in the *Director's Report and Recommendations*. Objectors seek to litigate the inclusion of a remark which would impose water quality standards.

The water used under said right when discharged back to a natural channel should comply with Idaho Water Quality Standards. The monitoring of the standards should be allowable and conducted by the Idaho Department of Water Resources and/or the Idaho Department of Environmental Quality.

Proposed *Amended Objection* at 3.

The issue of whether seeking a water quality standard in the SRBA states a claim for which relief may be granted is problematic. The SRBA has not included water quality as an element in *Partial Decrees*, except where a water quality condition was contained in a previously issued license or transfer. Idaho's water statutes do not refer to water quality as an element of a water right. I.C. § 42-1411(2). The statute provides:

(2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of year when water is used for such purposes;
- (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;
- (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
- (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of the right, or for administration of the right by the director.

I.C. § 42-1411(2). Water quality is not a statutory element of a water right.

The District Court acknowledged the limits to water quality issues in the SRBA in *Order on Challenge (Consolidated Issues) of "Facility Volume Issue" and "Additional Evidence" Issue* (Subcase No. 36-02708) (Dec. 29, 1999). In that decision, Judge Barry Wood recognized the Idaho Supreme Court's view of IDWR's limited role in water quality.

IDWR's duty with respect to water quality was outlined by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). In that case, the Supreme Court held that the primary function of "policing water quality" rests with the Department of Health and Welfare [now DEQ and EPA], not with IDWR. *Id.* at 341. The Supreme Court held that "Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet the mandatory water quality standards." *Id.* However, once the facility is complete, "later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare." In these subcases before the Court, the water rights are not in the permit stage. All the water rights have ripened into licenses, or were beneficial use claims. Since the water rights have vested and the structures are complete, it is not the current function of IDWR to police water quality. Water quality is policed by DEQ and EPA. As such, if there were to be a legitimate remark in either a permit or a license relative to water quality, it would not be directed to the existing size of the facility, but rather would be directed that the facility, regardless of its size, would be managed to meet required water quality standards."

Id. at 11-12.

Applicable state and federal laws generally apply to water rights even if a restatement of the law is absent from a decree. The SRBA Court generally does not embellish *Partial Decrees* with restatements of existing law. However, Judge Melanson has allowed such statements of law in limited instances.

The Court generally views it as unnecessary because parties have the right to rely on the backdrop of existing law for the definition and administration of their water right.

The exception is when the application of the existing law is at issue. Without clarification of applicable law, the issues raised here potentially make the decree ambiguous without a clarifying remark. In such cases the Court allows a clarifying remark so as to avoid future controversy.

Memorandum Decision on Cross-Motions for Summary Judgment (Case No. 91-63) (Sept 2, 2004) at 29-30.

In short, water quality standards are not statutory elements of water rights in Idaho. The SRBA disfavors embellishing *Partial Decrees* with restatements of existing law. If Objectors seek to merely restate the law, it is likely unnecessary to litigate whether to include the proposed remark

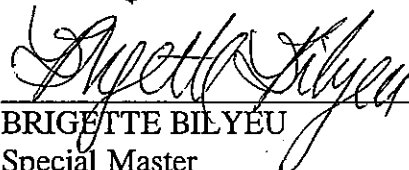
on water quality. However, the Objectors should be allowed to show that such a remark is appropriate as a Condition of Approval from an underlying transfer. Additionally, Objectors should be allowed to argue that such a remark restating existing law is necessary to “avoid future controversy.” Accordingly, **the *Motion to Dismiss Objections* addressing water quality is denied.**

IV. CONCLUSION

The elements of these water rights were determined in administrative transfer proceedings before IDWR. Big Wood Canal Company was a party to **Transfer 3742** and had notice of **Transfer 3743**. The Big Wood Canal Company was not a party to **Transfer 3743** and **Transfer 71721**, but IDWR published notice of those transfers, and the Big Wood Canal Company could have become a party to those proceedings. Accordingly, the Big Wood Canal Company will presumably be barred from challenging the determinations made in those transfer proceedings. However, the Big Wood Canal Company is entitled to bring objections on the elements of these rights which rely on facts which occurred after the transfer decisions. Accordingly, the court cannot yet say that Big Wood Canal Company’s *Objections* fail to state a claim. Thus, the *Motion to Dismiss Objections* is denied.

Prior SRBA decisions on the affect of prior licensing decisions are clear. However, the court has apparently not applied this analysis to transfers. Therefore, the court declines to award attorney fees at this time.

Dated: October 10, 2008.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO DISMISS OBJECTIONS AND REQUIRES FOR ATTORNEY FEES was mailed on October 10, 2008, with sufficient first-class postage to the following:

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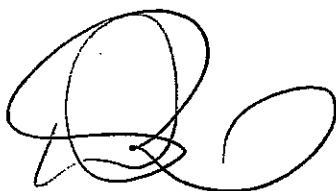
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Page 2 10/10/08

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