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DEPARTMENT OF
WATER RESOURCES

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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: 01-00007, 01-
00008, 01-00009, 01-00014

**GROUND WATER DISTRICTS'
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT ON PRIORITY
DATES**

The Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville Jefferson Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District, (collectively referred to herein as "Ground Water Districts") hereby submit this Memorandum in Support of their Motion for Summary Judgment on Priority Dates.

INTRODUCTION

Water Right Nos. 01-00007, 01-00008, 01-00009, 01-00014 are water rights claimed and recommended in the Snake River Basin Adjudication (“SRBA”) with priority dates set by stipulation in the case of *Burley Irrigation Dist. v. Eagle*, (5th Jud. Dist. 1968). The Stipulation, Findings of Fact and Conclusions of Law and Supplemental Decree entered in that case are referred to herein collectively as the “Eagle Decree” and are attached as Ex. C1, D1, and J1 to the Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment Motion on Priority Dates (“McHugh Aff.”).¹ Various objections have been filed in the SRBA by the Ground Water Districts and others to the claimed priority dates. The priority dates claimed in these subcases 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. § 42-1411(2)(j); *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-947 (1998). The recommendations for these water rights recommend a priority date that is unrelated to the date water was diverted for beneficial use is inconsistent with Idaho law and inconsistent with the Director’s duty to determine the extent of beneficial use under these water rights. I.C. § 42-1401B

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

¹ McHugh Aff., Ex. E1-H1 include the Director’s Report and Recommendations for the water rights at issue in this matter.

additional Bureau of Reclamation projects. Ex. C1 ¶¶IV(b)-(k) to McHugh Aff. 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). The Ground Water Districts are not parties to that decree and therefore they are not bound by the decree through privity with any parties to the decree. Because the claimed priority dates in these subcases are the result of a stipulation, they do not 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 evidence of beneficial use as of the claimed priority dates. The Ground Water Districts 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. The Ground Water Districts are entitled to summary judgment that, given the lack of information supporting the claimed priority dates, and under I.C. §§ 42-1401B and 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.

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.

STATEMENT OF UNDISPUTED FACTS

1. The water rights numbered 1-7, 1-8, 1-9, and 1-14 have a claimed and recommended priority date of April 1, 1939. Although the Director's Report and Recommendations are already part of the record herein, copies of the Director's report are attached for the Court's convenience as Ex. E1, F1, G1 and H1 respectively to McHugh Aff.
2. The April 1, 1939 priority date was the subject of a stipulation between parties to the Eagle Decree. Ex. C1 to McHugh Aff.
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.

...

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. C1 ¶¶ IV(c), (f) to McHugh Aff. (emphasis added).

4. The Eagle Decree is the only evidence of priority date relied upon by the claimants and the Director in recommending the priority dates for these water rights.
5. The claimants in these subcases are part of the Surface Water Coalition and participated at the administrative hearing in the SWC Delivery Call case. These claimants submitted evidence in that case that summarized the delivery records for these water rights. That evidence shows that these water rights were not first diverted for beneficial use on April 1, 1939, but that water was actually diverted years later by the various entities. Ex. A1 and B1 to McHugh Aff.
6. For water right number 1-7, claimed by the Burley Irrigation District, the available evidence shows that the first date of diversion was not April 1, 1939, but May of 1955. Ex. B1 at.4-5 to McHugh Aff.
7. For water right number 1-8, claimed the Minidoka Irrigation District, the available evidence shows that the first date of diversion was not April 1, 1939, but May of 1955. Ex. B1 at. 2-3 to McHugh Aff.
8. 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. Ex. B1 at 10-11 to McHugh Aff.
9. 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. Ex. B1 at. 6-7 to McHugh Aff. Furthermore, A&B Irrigation District did not exist until 1950 when then United States Congress authorized the Northside Pumping Division as part of the Minidoka Project. Ex. A1 at 1. McHugh Aff.

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 of April 1, 1939.

On October 4, 2006, the Ground Water Districts³ 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 subcases. A Joint Motion for Summary Judgment on Priority Dates was filed by the City of Pocatello and the Ground Water Districts on August 22, 2008, together with the supporting affidavits and memorandum. On November 17, 2008, the City of Pocatello filed a *Notice of Withdrawal of City of Pocatello from Support of Joint Motion for Summary Judgment on Priority Dates*.

The Ground Water Districts re-submit this Motion for Summary Judgment on Priority Dates without the City of Pocatello. This Motion for Summary Judgment on Priority dates is filed in compliance with the *Stipulation Regarding Summary Judgment Briefing Schedule* entered into by the parties and filed with the Court on June 3, 2009.

SUMMARY OF ARGUMENT

The rights at issue in this Motion are not claimed pursuant to an IDWR license. Instead, they are water rights that rely for their priority date on a stipulated prior decree not on evidence of actual diversion for beneficial use. The stipulated prior decree provides *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.”**

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.

Ex. D1 at ¶¶ IV(f) to McHugh Aff. (emphasis added).

The role of the director in the SRBA is to perform “as an independent expert and technical assistant to assure that claims to water rights . . . are accurately reported [and to make] recommendations as to the extent of beneficial use and administration of each water right under state law. . . .” I.C. § 42-1401B. He is to perform that duty in keeping with state policy to conserve, develop and optimize the state’s water resources. I.C. § 42-1775. 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 736, 741, (1997). The Director is not obligated to accept a prior decree as “conclusive proof of the nature and extent” of a water right. *Id.*

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 correct for purposes of the partial decree is in error. A clarifying remark identifying a priority date for purposes of

administration based on evidence of the date of first diversion for beneficial use is appropriate for these subcases. I.C. §§ 42-1401B and 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).

ARGUMENT

Claimants have not proffered evidence that can meet their burden under I.C. § 41-1411(5) to prove that their claimed and the recommended priority date is correct. Water in Idaho shall be administered “first in time, first in right,” and “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 subcases are not “non-existent illegal water uses” but appear instead to be water users who are benefitting from a claimed priority date that

does not comport with the requirements of Idaho law. To be clear, the Ground Water Districts 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. C1. ¶VI(c) to McHugh Aff. 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 against water users who were not parties to the prior decree. As such, a clarifying remark by the Special Master is necessary to authorize IDWR to administer these rights by reference to a priority date reflecting actual first diversion to beneficial use. I.C. §§ 42-1401B and 42-1411(2)(j); *State v. Nelson*, 131 Idaho 12, 15-16, 951 P.2d 943, 946-947 (1998).

- 1. 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 against water users who were not party to the agreement.**

In Idaho there are two methods of appropriating water:⁴ 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. While parties to the prior action could agree to stipulate to a certain priority date (that pre-existed beneficial use) for use in administration of their own water rights, the parties

⁴ The posted notice procedure was in place at one time, but the water rights at issue in this case do not claim as their basis the posted notice process and further, the posted notice process still hinges on timely putting the water to actual beneficial use.

cannot use that stipulated priority date to the detriment of parties who were not bound by that stipulation and decree – in this case ground water users.

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.⁵

This court has previously rejected water right 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, *Recommendation on Basin-Wide Issue 5A*, dated April 11, 1996 at 51.4-9. In that sub-case, parties stipulated to the existence of water 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 I.C. §§ 42-1409 and 42-1427(2), and denied the inclusion of the general provision relating to 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 to the Reynolds Creek decree 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,

⁵ 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. D1 at ¶VI(f) to McHugh Aff. (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.

reliance on the Eagle Decree stipulation alone 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 priority date.

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

As in the Reynolds Creek subcases, 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 the claimants in Exhibit B1 attached to McHugh Aff., are undisputed facts that establish the actual date of diversion for beneficial use. In fact, the claimants have admitted that WD01 records are the best evidence to establish that fact.⁶

Under I.C. §§ 42-1411(2)(j), 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

⁶ See Ex. C to Affidavit of McHugh in support of August 22, 2008 Motion.

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 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.

The same logic should apply to adding remarks that are necessary for the definition of the water right, the clarification of any element of a water right or the administration of the water right by the director under I.C. § 42-1411(2(j)). In this case, the legal question raised 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, the factual question is answered. The SWC's information submitted during the SWC Delivery Call case⁷, demonstrates the dates of first diversion of the water rights claimed here.

⁷ Ex. B1 to McHugh Aff. are documents submitted by the claimants in the SWC Delivery Call in the administrative matter before the Department *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*. Ex. A1 to McHugh Aff. was entered into evidence in the A&B Irrigation District Delivery Call *In the Matter of the Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area*.

CONCLUSION

The undisputed facts establish that: 1) the claimed priority dates are based on a stipulation between parties to a prior decree, 2) the Ground Water Districts were not parties to the decree, 3) the decree itself establishes that the actual date of first diversion for beneficial use was not determined in the decree, and 4) the date the water was first diverted for beneficial use by the claimants is not the date that is currently recommended.

Based on the forgoing, an appropriate remark may be: “For purposes of administration involving junior users who were not parties to the Eagle Decree, including junior ground water users, and based on evidence of actual first diversion to beneficial use, the priority date for purposes of administration involving shall be [date water was first put to beneficial use].”

Therefore, the Groundwater Districts respectfully move for summary judgment that a clarifying remark is necessary to establish the proper priority date for purposes of administration of the water rights in these subcases against junior water users who were not parties to the Eagle Decree.

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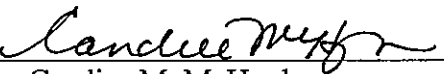
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Dated, this 23rd, day of June, 2009.

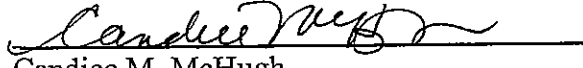
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By 
Candice M. McHugh

*ATTORNEY FOR GROUND WATER
DISTRICTS*

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of June, 2009, a true and correct copy of **Ground Water Districts' Memorandum in Support of Motion for Summary Judgment on Priority Dates** was served by email to those with email addresses and U.S. Mail, postage pre-paid and addressed to the following:


Candice M. McHugh

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