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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	)	Subcase Nos. 01-00004, et al. (See attached Exhibit A)
	)	
	)	
Case No. 39576	)	POCATELLO'S RESPONSE TO SWC'S SECOND
_____	)	MOTION FOR SUMMARY JUDGMENT

The City of Pocatello ("Pocatello" or "City") submits its Response to the Surface Water Coalition's ("SWC" or "Claimant") Second Motion for Summary Judgment ("Second Motion"). The City opposes the SWC's Second Motion and requests it be denied. Pocatello also joins the Ground Water District's Response to the SWC's Second Motion for Summary Judgment and hereby incorporates that response herein with respect to all subcases that Pocatello has filed objections in.

INTRODUCTION

The predicate of the Second Motion is that the SWC's claims made in certain Exhibit A sub-cases reflect the terms and conditions of their stipulated rights arising under the Eagle

Decree accurately and completely; the SWC Motion also presumes that any objections to the SWC claims filed by parties to the Eagle Decree (such as Pocatello) are barred. This is not the law and SWC's Motion must be denied.

As the findings of fact in the Eagle Decree establish, the purpose of the decree was to divide "flood flows" for the benefit of certain Upper and Lower Valley surface diverters. *See, e.g.,* McHugh Aff., August 22, 2008, Ex. D at page 3, Ex. E at page 3 (Eagle Decree, FOF VI.c. and f.) The stipulated Eagle Decree apparently arose out of concern amongst some canal companies that "flood flows"—which had been diverted previously by some but not all of the claimant canal companies¹—would be stored by Palisades Reservoir.² The architects of the Eagle Decree also extended the stipulation to Palisades Contract holders (including the City of Pocatello), presumably in part in order to preclude contract holders in junior storage space from calling for the delivery of flood flows.³

The impact of the Eagle Decree on junior Palisades storage rights such as Pocatello's is obvious—if flood flows must be delivered downstream to the SWC, there is that much less water available for storage under the junior Palisades Reservoir priority. Nonetheless, Pocatello does not contest the existence of "rights" arising under the Eagle Decree, but only asserts as a party to the Eagle Decree, that such rights (and the claims filed in these sub-cases) should be limited to the terms of the Eagle Decree. Put another way, the SWC's claims filed in these sub-cases must be limited to deliveries of "flood flows". By contrast, awarding the SWC partial decrees consistent with their claims and without a remark qualifying the nature and extent of the rights

¹ *See*, Exhibit 10 to Mr. Harris's Affidavit: "...and the question as to whether there is any way in which a decree with a priority date ahead of Palisades can be worked out for the North Side Pumping Division of the Michaud Flats Project. The latter projects present a problem because there has been no use [of such flood water rights] up to this time..."

² *See*, Exhibit 20 to Mr. Harris's Affidavit ("...the question arose as to how flood water rights...could be protected as being prior to the Palisades Storage Right".)

³ *See*, Exhibits 22 and 23 to Mr. Harris's Affidavit.

would improperly expands the rights to allow SWC to demand deliveries of the water throughout the irrigation season. This expansion—and any resulting delivery call—could result in injury to Pocatello’s junior water rights.

Despite the limited nature of rights arising under the Eagle Decree, the SWC’s claims seek to avoid the “flood flow” nature of the original rights. Pocatello and the other objectors in this matter seek, through their objections, to ensure that SWC’s claims are consistent with the qualified nature of the rights under the stipulated Eagle Decree. Now, rather than explain how it can avoid the plain language of the underlying decree upon which its claims are allegedly based, the SWC’s Second Motion seeks instead to silence objections of Pocatello⁴ and other parties to the Eagle Decree on the theory that such objections to the SWC claims are a “collateral attack” and barred by various doctrines of preclusion. However, as detailed within, Idaho law does not foreclose parties to a prior decree from participating in the SRBA as objectors when claims are filed based on the prior decree. SWC’s Second Motion must be denied.

ARGUMENT

I. THE SWC SECOND MOTION MUST BE DENIED.

The proponent of a motion for summary judgment bears the burden of demonstrating that there is no issue of material fact and that the Motion should be granted as a matter of law. *Foster v. Traul*, 141 Idaho 890, 893, 120 P.3d 278, 281 (2005). Although the SWC Motion apparently seeks summary judgment for *all* the sub-cases in its Attachment 1 to the Second Motion, Attachment 1 lists all the “flood flow” claims brought by SWC in this matter even though not all

⁴ The Special Master’s January 13, 2009 Order granted Ground Water Districts and Upper Snake Users motion to file amended objections in the subcases listed in Exhibit A, and further ordered that Pocatello would be allowed to participate in the subject sub-cases, limited to the issues raised by other parties in the objections as amended. The Ground Water Districts amended objections requested a condition to reflect that these water rights are “high flow or “flood water” rights to reflect that these water rights are only available during early spring run-off, as explicitly described in the Eagle Decree. *See* Amended Objections of Ground Water Districts on file with the Court. Consistent with the GWD’s amended objections, Pocatello asserts the Eagle Decree limits the SWC’s reliance on the water rights adjudicated thereunder to “flood flow” conditions.

the listed sub-cases are related to the Eagle Decree, or even the Woodville Decree (a 1929 decree also dividing up “flood flows” based on priority dates of 1916 and earlier). The SWC Motion must be denied as a matter of law for the reasons described below, but whatever the outcome, to avoid confusion the Special Master should limit any order in response to the Second Motion to those sub-cases that are actually related to claims arising under the Eagle or Woodville decrees.

A. An objection to an SRBA claim based on a prior decree is not a “collateral attack” on the decree.

“Collateral attack” is a term of art used to describe an attack on a court order by a party to the order on the basis that the order was entered without jurisdiction or with such procedural defects as to have resulted in denial of due process of that party. *State v. Armstrong*, 146 Idaho 372, 195 P.3d 731, 735 (Idaho App. 2008) (internal citations omitted); *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 374, 597 P.2d 1058, 1064 (1979). In the SRBA, objections to claims based on the Eagle Decree would only amount to a collateral attack if the objection challenged the jurisdiction of the Eagle Decree court or the due process afforded other water users vis a vis the Eagle Decree proceedings. Pocatello’s objections cannot be described as a collateral attack on the Eagle Decree. Instead, as a party to the Eagle Decree, Pocatello is authorized to participate (and object) to claims allegedly based on the Eagle Decree in order to ensure that entry of the SRBA decree does not improperly expand the scope of the underlying rights to the detriment of Pocatello. Further, unwarranted expansion of the Eagle Decree-based rights will likely injure Pocatello’s junior ground water rights.

B. Doctrines of preclusion do not foreclose Pocatello’s objections (or any other parties’ objections) to the Eagle Decree

SWC argues that Pocatello is foreclosed from objecting to its claims allegedly based on the Eagle Decree because of the doctrines of res judicata and collateral estoppel (“doctrines of

preclusion”). Although the Second Motion describes in some detail Idaho law on the doctrines of preclusion, nowhere does the SWC describe the legal basis for applying doctrines of preclusion against parties to prior decrees who participate in the litigation of claims arising from prior decrees in the SRBA. In fact, the law is quite the contrary—there is no preclusive bar preventing parties to prior decrees from litigating claims arising from prior decrees in the SRBA⁵. Indeed, if the doctrines of preclusion barred re-litigation of prior decrees in the SRBA, the bar would extend to *all* parties to the prior decree, including the Claimants. Instead, the legislature recognized that claimants and objectors in the SRBA, the first *in rem* adjudication for Snake River water rights in Idaho, had to have the opportunity to review and modify as necessary prior decrees. In short, the SWC’s argument that res judicata and collateral estoppel bar Pocatello’s objections to SWC’s claims in the captioned sub cases must be rejected.

1. Doctrines of preclusion arise out of a need for finality in judgments, but the Eagle Decree was not a final judgment when entered

Even when entered the Eagle Decree did not constitute a final determination of the rights therein. The Eagle Decree was part of a summary supplemental adjudication and expressly authorized pursuant to section 42-1405 of the Idaho Code (previously codified at C.S. 7036). At the time of the Eagle Decree, section 42-1405 stated that any decree entered pursuant to the statute “shall not be deemed adjudicated, but prima facie evidence merely, and may be attacked by suit... at any time by any person deeming himself aggrieved thereby” (emphasis added). Exhibit B. to T. Thompson’s Second Affidavit. Indeed, the Idaho Supreme Court held that the language section 42-1405 “makes a decree thereunder merely prima facie evidence, and subject to collateral attack.” *Union Central Life Ins. Co. v. Albrethsen*, 50 Idaho 196, 294 P. 842, 846 (Idaho 1930). Further, the prima facie presumption in section 42-1405 was repealed in

⁵ So long as their objections are not “collateral attacks” as that term is defined under Idaho law and described above.

1981, while the legislature left the remainder of the statute (providing for summary supplemental adjudication procedures) in place. Act of April 7, 1981, ch. 265, § 3, 1981 Idaho Sess. Laws 561; *see also State v. Hagerman Water Owners, Inc.*, 130 Idaho 736, fn.3, 947 P.2d 409, fn. 3 (1997) (discussing repeal and recognizing that the current statutory scheme does not provide that prior decrees constitute prima facie evidence of a water right).

2. Doctrines of preclusion do not apply where, as here, the Legislature and Idaho Supreme Court have authorized the SRBA Court to re-examine prior decrees.

The SRBA Court is granted jurisdiction to undertake “a comprehensive determination of the nature, extent and priority of the rights of all users of surface and ground water” in the Snake River basin. I.C. § 42-1406A(1). The SRBA Court must, as part of the general adjudication, determine the priority dates, use and places of use of all appropriators as well as all the essential elements of a water right. *See* I.C. § 42-1401A(5); *See also Nettleton v. Higginson*, 98 Idaho 87, 96, 558 P.2d 1048, 1057 (1977) (Bakes, J., dissenting). However, the legislature’s actions also acknowledged that the SRBA, while one of the first general adjudications in Idaho, was preceded by numerous private adjudications. The reality of prior decrees meant the legislature had two options: it could either require the SRBA to presume all prior decrees to be valid and not subject to re-examination or it could provide the means for re-examination. The legislature initially chose the first path, and provided that: “a prior decree adjudicating a tributary stream or sub-basin within the basin shall be presumed correct....” I.C. § 42-1416(3) (1993). However, the legislature repealed this provision after the SRBA court found it unconstitutionally vague⁶.

⁶ *Memorandum Decision and Order on Basin-Wide Issue No. 1, Constitutionality of I.C. §42-1416 and I.C. §42-1416A, as Written*, February 4, 1994, 1 SRBA 27, at 27.11. The SRBA Court noted that the statute raised serious constitutional questions, as “[a] statute requiring a collective determination of the effect of a prior judgment raises serious due process concerns.” *Id.*

While the legislature re-enacted certain provisions of section 1416, it notably did *not* reenact the presumption of validity for prior decrees.⁷

This is consistent with the view of the Idaho Supreme Court, which has held that a prior decree is not conclusive proof of a claimant's water right and does not insulate the claim from re-examination. *State v. Hagerman Water Users, Inc.*, (“*Hagerman*”), 130 Idaho 736, 947 P.2d 409 (1997). In *Hagerman*, the Court addressed the issue of prior decrees: “Nowhere in Title 42 is the Director obligated to accept a prior decree issued in a private adjudication as being conclusive proof of the nature of a water right.” *Id.* at 414, 741 (internal quotations omitted). The Court, in accord with the legislature, noted that this must be its conclusion “in light of the longstanding decisions in Idaho that decreed water rights, although protected like any other water right, are not insulated from re-examination by the court...” *Id.*, citing to *Graham v. Leek*, 65 Idaho 279, 287-88, 144 P.2d 475, 479 (1943) (prior decree did not afford user unalterable right to water where there was no evidence of beneficial use or definite quantity of use by user after decree issued); *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924) (res judicata does not preclude a court from examining the beneficial use of a water right listed in a prior decree) (other internal citations omitted). As such, there is no basis to conclude that the Eagle Decree must simply be adopted by the SRBA Court, or that parties are ineligible to litigate the proper terms and conditions of claims arising under the Eagle Decree.

While a number of elements of the SWC claims arising under the Eagle Decree are at issue, perhaps the most hotly contested issue is the qualification of the rights as “flood flows”. The SWC disagrees with this condition, and as evidenced by the current dispute between the parties, arguably the term “flood flow” is not completely defined in the Eagle Decree. The

⁷ For a discussion of the legislative history of 42-1416 and the SRBA order ruling the provision unconstitutionally vague, see *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456-57, 926 P.2d 1301, 1303-04 (1996).

legislature has noted that prior decrees may contain undefined elements that are subject to re-examination by the SRBA Court:

Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established.... the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.

I.C. § 42-1427(1)(b) (emphasis added). The SRBA court has held that this provision applies where a prior decree not only fails to define an element of a water right, but also where a term in the prior decree is vague.⁸ By its terms, this statutory provision forecloses the legal argument that prior decrees are res judicata binding the world, or that parties to prior decrees are bound by collateral estoppel regarding all claims that could have been litigated.

As the Mudd Lake Water User's Motion for Summary Judgment and accompanying affidavit of Mr. Harris demonstrate, it is possible to examine contemporaneous correspondence and other documents to understand that the intention of the holders of these "flood flow" rights was to limit the rights to being supplied by waters that otherwise would have been stored in Palisades as a result of snowmelt. Important here is that the legislature specifically intended that this type of examination of claims brought pursuant to an underlying decree and provided specific statutory provisions addressing how prior decrees are to be considered in an SRBA claim case:

⁸ *Order on Motion for Summary Judgment and Motion In Limine, Subcases Nos. 36-00006, 36-00007, 36-00008, 36-00022, 36-00023, 36-00047, 36-00068, 36-00069, 36-00099, 36-00100, and 36-00106*, March 31, 1999, 3 SRBA 3 at 3.8-12.

- I.C. §42-1427(2) (when a prior private decree is missing required elements the Director is mandated to include the missing elements in the Director's Report upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication);
- I.C. §42-1427(1)(b) (where a prior decree does not define an element of an existing water right those unidentified elements shall be determined by conditions existing upon the date of commencement of the adjudication);

The proper conclusion to be drawn from the SRBA authorizing legislation and procedures is that objections to the SWC's claims arising under the Eagle Decree—whether brought by a party to the Eagle Decree or entities that were not party to the Eagle Decree—are properly before the SRBA Court and doctrines of preclusion are not applicable to foreclose them.

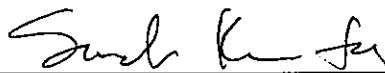
CONCLUSION

For the reasons described herein, the SWC Motion for Summary Judgment should be denied.

Dated this 29th day of July, 2009.

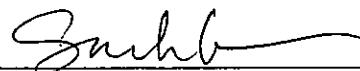
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ATTACHMENT A – “HIGH WATER” aka “SOURCE OBJECTION” subcases

Subcase Nos.:

01-00004
01-00005
01-00006
01-00007
01-00008
01-00009
01-00010
01-00014
01-00016
01-00017
01-00212
01-00213
01-02050
01-02061
01-10034
01-10225
01-10237
01-10238
01-10240
01-10241
01-10482

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on this 29th day of July, 2009, a true and correct copy of **Pocatello's Response to SWC's Second Motion for Summary Judgment for SRBA Surface Water Coalition Water Rights Cases [High Water aka Source Objection Subcases]** 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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