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**DEPARTMENT OF
WATER RESOURCES**

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
DEC 11 2009	
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	)	Subcases 01-4, et al.
	)	(37 subcases, Attachment A)
	)	
Case No. 39576	)	ORDER ON MOTIONS FOR SUMMARY
	)	JUDGMENT and ORDER SETTING STATUS
_____	)	CONFERENCE

Background

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, IDWR Lower Basin 01* on May 15, 2006. The Director recommended 32 of the above 37 claims for between .19 cfs and 2,250 cfs or between 41,700 afy and 53,500 afy (Lake Walcott) from the Snake River for year-'round irrigation storage and irrigation from storage from March 15 to November 15 and to irrigate between 30.5 acres and 196,162 acres in Cassia, Jerome, Minidoka, Power and Twin Falls Counties between March 15 or April 1 and October 31 or November 15 with priority dates between February 6, 1895, and April 1, 1984, based on a decree, license or beneficial use. Five of the claims were recommended disallowed. The claimants are:

A&B Irrigation District
Amalgamated Sugar Company LLC
American Falls Reservoir District #2
Burley Irrigation District
Falls Irrigation District
Milner Irrigation District

Minidoka Irrigation District
North Side Canal Company, Ltd
Southwest Irrigation District
Twin Falls Canal Company
USDI/BOR

Objections, Responses and Amended Objections

Objections were filed between September 29 and October 6, 2006, by several claimants, plus the following:

Blackfoot Irrigation Company
Fremont-Madison Irrigation District
Idaho Ground Water Appropriators, Inc.¹
Independent Water Users of Mud Lake
Jefferson Irrigation District
Montevieu Canal Company
Mud Lake Water Users, Inc.
Producers Irrigation Company
United Canal Company (fka Danskin Ditch Co. & Trego Ditch Co.)
USDI/BLM
Unit A Association²
 Roy Abo
 Kevin D. Anderson
 R. Lynn and Brian Carlquist
 Tim Eilers
 Marlin and Barbara Evans
 Jerry Francisco
 Jerald L. Gochmour
 Ray Goff
 Eric, Larry, Kevin and Laybe Harper
 Hawley A. Harrison, Jr.
 Randall and Janice Koehn
 John and Christi Lamun
 Brooks Little
 Harold and Marilyn Marler
 Guy and Mildred Meuleman

¹ The Idaho Ground Water Appropriators, Inc., now the "Ground Water Districts," include: Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Carey-Valley Ground Water District, Jefferson Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District and North Snake Ground Water District. See May 29, 2008 *Order Granting IGWA's Motion for Substitution of Parties*.

² On May 23, 2007, Unit A Association was granted leave to substitute for 31 of its members listed above who filed objections. In the same *Order*, another six members' objections were dismissed on their motions. Martin and Lorraine Muecke's objection was dismissed on August 21, 2008, on their motion. On April 3, 2009, the Unit A Association withdrew its "objection regarding the place of use element" in subcase 01-14.

Leonard Mills
Steve, Martin and Lorraine Muecke
Mirla Norwood
Gary, John, Mark, Roxan and Mary Lou Ottman
Merrill D. Paslay
Ko, Ted and Becca Tateoka
Jan and Jerry Werner
Rulon Whitesides
Ray A. Young Family Trust

The City of Pocatello was granted leave to participate on March 26, 2008, and on January 13, 2009, the Special Master entered an *Order Clarifying City of Pocatello's Participation* in 31 subcases (Attachment L), "but limited to objections as currently amended." On January 13, 2009, the Ground Water Districts were granted leave to amend their *Objections* to "more clearly define the issues raised in the original objections" in 31 subcases (Attachment M). The same date, the State of Idaho filed its *Response to Amended Objection* in 30 subcases (Attachment H) on the issues of source, quantity, period of year, place of use other provisions necessary and explanatory material.

Motions for Summary Judgment

I. Surface Water Coalition

August 22, 2008 – the "Surface Water Coalition"³ filed their *Claimants' Joint Motion for Summary Judgment* in 20 subcases (Attachment B) stating "there are no genuine issues of material fact as to the 'source' element of their claims and that the objections filed by the Ground Water Districts, the Mud Lake Users⁴ and Fremont-Madison Objectors⁵ should be dismissed as a matter of law."

They argued the source of the claims is the Snake River, Idaho law does not parse out tributary supplies and the Upper Valley Irrigators are precluded from objecting to source. In

³ The Surface Water Coalition includes: A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

⁴ The "Mud Lake Water Users" includes: Montevue Canal Company, Producers Irrigation Company, Independent Water Users of Mud Lake, Jefferson Irrigation District and Mud Lake Water Users, Inc.

⁵ The Fremont-Madison Objectors ("Upper Valley Irrigators") includes: Fremont-Madison Irrigation District, Blackfoot Irrigation Company and United Canal Company.

support of their *Joint Motion*, the Coalition attached the *Affidavit of Travis L. Thompson* and *Memorandum in Support*.

II. City of Pocatello and Ground Water Districts – Priority Dates

August 22, 2008 – the City of Pocatello and the Ground Water Districts filed their *Joint Motion for Summary Judgment on Priority Dates* in four subcases (Attachment C) seeking a “clarifying remark” regarding the priority dates claimed in the four subcases. They also lodged a *Memorandum in Support* and the *Affidavit of Sarah A. Klahn*.

However, on November 17, 2008, the City filed its *Notice of Withdrawal of City of Pocatello from Support of Joint Motion for Summary Judgment on Priority Dates* “because of Pocatello’s error in fact regarding it’s [sic] status as a signatory to the Eagle Decree and because that error may overshadow the more important question of the appropriate clarifying remark for administration of claimants[’] water rights.”

III. Ground Water Districts

August 22, 2008 – the Ground Water Districts filed their *Motion for Summary Judgment* in 29 subcases (Attachment D). They wrote: 1) two claims filed by the USDI/BOR, six claims filed by A&B Irrigation District and Amalgamated Sugar’s claim should be disallowed “because no water has ever been delivered under those rights”; 2) the remaining claims are “high water rights” and a condition limiting the season of use and clarifying the rights are necessary; and 3) because the claims are “high water rights”, there should be conditions clarifying the source of supply and barring the rights from making a delivery call against junior ground water rights. The Ground Water Districts also lodged a *Memorandum in Support* and *Affidavit of Anthony Olenichak, Ronald D. Carlson* and *Candice M. McHugh*.

IV. Upper Valley Irrigators

August 26, 2008 – the Upper Valley Irrigators filed their *Objectors Motion in Support of Ground Water Districts’ Motion for Summary Judgment* in 29 subcases (Attachment D) “insofar as said motion and memorandum relate to the Upper Valley Irrigators’ objections as to Source.”

V. Mud Lake Water Users

June 24, 2009 – the Mud Lake Water Users filed their *Motion for Summary Judgment* in 29 subcases (Attachment D) “to accurately document and decree the true character of the water rights . . . as flood water rights” consistent with language in the *Eagle Decree* and historical administration of the rights. That is, water rights from the Snake River with a priority date after April 1, 1939, “should be appropriately conditioned as a flood water right that is only available during periods of high flow.” The MLWU also lodged its *Memorandum in Support* and the *Affidavit of Robert L. Harris*.

VI. Upper Valley Irrigators

June 25, 2009 – the Upper Valley Irrigators filed their *Motion in Support of Summary Judgment Motion filed by Mud Lake Water Users, Inc., et al.*, in 29 subcases (Attachment D) supporting Mud Lake Water Users’ *Motion* “as if fully set forth herein.”

VII. Surface Water Coalition – Second Joint Motion

June 25, 2009 – the Surface Water Coalition filed their *Claimants’ Second Joint Motion for Summary Judgment* in 28 subcases (Attachment E) arguing:

1) *Objections* filed by Idaho Ground Water Districts, Mud Lake Water Users and Upper Valley Irrigators should be dismissed as a matter of law;

2) There should be a finding that the City of Pocatello and the Upper Valley Irrigators are barred from challenging the Surface Water Coalition’s claims since they were parties to the *Eagle Decree*;

3) Other objectors who had notice of the *Eagle Decree* proceedings are similarly barred from challenging the Coalition’s claims;

4) The seasons of use and priority dates for certain unobjected to elements should be decreed; and

5) The priority date for 01-2050 (MID) should be decreed as licensed (October 25, 1939).

The Surface Water Coalition supported their *Second Joint Motion* with a *Memorandum in Support* and the *Second Affidavit of Travis L. Thompson*.

VIII. Ground Water Districts – Amended Motion

June 25, 2009 – the Ground Water Districts effectively re-filed their earlier *Motion for Summary Judgment* with their *Amended Motion for Summary Judgment*, this time in 25 subcases (Attachment F). Their *Amended Motion* differed from their August 22, 2008 *Motion* in that 1) their objections to North Side Canal Company’s claims have been dismissed by agreement and 2) they no longer seek disallowal of claim 01-10034 (USDI/BOR) but rather its treatment as a high flow claim.

IX. Ground Water Districts – Priority Dates

June 25, 2009 – the Ground Water Districts also re-filed their earlier *Motion for Summary Judgment on Priority Dates* with their amended *Motion for Summary Judgment on Priority Dates* in four subcases (Attachment C), but now without the City of Pocatello. The Districts made the following arguments in favor of a clarifying remark regarding priority dates for the claims:

- 1) The recommended priority date of April 1, 1939, was negotiated and is not the date of actual diversions to beneficial use;
- 2) The Districts are not bound by the *Eagle Decree*; and
- 3) A clarifying remark is necessary to identify the actual diversions to beneficial use for purposes of administration against junior water users not parties to the *Eagle Decree*.

The District wrote they do not claim the rights have never been diverted – “only that the rights were not diverted for beneficial uses on or before the claimed priority date.” The *Motion* was supported by the *Memorandum* and *Affidavit of Candice M. McHugh*.

Responses

I. City of Pocatello

July 29, 2009 – Pocatello filed its *Response to and Joinder in MLWU’s Motion for Summary Judgment* in 21 subcases (Attachment G) arguing in favor of a clarifying remark that the water rights have been historically administered as “high” or “flood” water rights so as not to injure other parties’ rights.

II. City of Pocatello

July 29, 2009 – Pocatello filed its *Response to and Joinder in Groundwater Districts' Amended Motion for Summary Judgment* in 21 subcases (Attachment G) simply arguing the Ground Water Districts' *Amended Motion* be granted.

III. City of Pocatello

July 29, 2009 – Pocatello filed its *Response to Claimants' Joint Motion for Summary Judgment* in 21 subcases (Attachment G) arguing the Surface Water Coalitions's *Joint Motion for Summary Judgment* should be denied.

IV. City of Pocatello

July 29, 2009 – Pocatello filed its *Response to the SWC's Second Motion for Summary Judgment* in 21 subcases (Attachment G) arguing the Surface Water Coalition's *Second Motion* should be denied because objections to the claims arising from the *Eagle Decree* are properly before the SRBA Court and are not barred.

V. State of Idaho

July 29, 2009 – the State of Idaho filed its *Response Brief* in 30 subcases (Attachment H). It provided a comprehensive summary of proceedings to date and then urged the Court to avoid any requirement that the watermaster distinguish between “base flows” and “high flow runoff and spring snowmelt” in the Snake River channel. To do so would “impose an undue and novel burden upon the Water District:”

Water right holders who acquired their rights subsequent to the issuance of the *Eagle Decree* are not prevented from challenging the water right elements decreed therein as a matter of law.

The Director's inclusion of a date-inclusive irrigation season does not preclude the application of additional explanatory remarks to the period of use element.

Any potential “flood water right” remark should not require the watermaster to distinguish between “base flows” and “flood flows” in the Snake River channel.

Conjunctive management rules authorize the IDWR Director to consider seasonal variability of source flows in determining material injury in delivery call proceedings.

The State also submitted the *Affidavit of Anthony Olenichak in Support of the State of Idaho's Response Brief*.

VI. Surface Water Coalition

July 29, 2009 – the Surface Water Coalition filed their *Claimants' Joint Response to Ground Water Districts' August 22, 2008 Motion for Summary Judgment* in 29 subcases (Attachment D). They argued there is no legal or factual basis to distinguish and define the source and season of use elements for the Coalition's water rights. No clarifying remarks are necessary since the water rights have been subject to administration, both as against other surface and ground water rights. And finally, because state law requires water rights to be administered in priority, it would be error to subordinate the Coalition's senior water right to all hydraulically connected junior ground water rights. The Coalition also submitted the *Third Affidavit of Travis L. Thompson* and the *Affidavit of Norman C. Young in Support of Claimants' Joint Responses to Summary Judgment Motions*.

VII. Surface Water Coalition

July 29, 2009 – the Surface Water Coalition filed their *Claimants' Joint Response to MLWU's Motion for Summary Judgment* in 30 subcases (Attachment I). They argued the terms of the *Eagle Decree* are clear and unambiguous; hence, the Mud Lake Water Users' effort to condition or re-define the Coalition's water rights must fail as a matter of law.

VIII. Amalgamated Sugar Co.

July 29, 2009 – the Amalgamated Sugar Company filed its *Response to Objectors' and Ground Water Districts' Motions for Summary Judgment* in 30 subcases (Attachment H). It reported it “is entering into a settlement regarding Water Right 1-10483 which will include language in either the source or priority date element to the effect that 1-10483 will not exercise its 1926 priority date against ground water users tributary to the Snake River above Milner Dam.”

IX. Mud Lake Water Users

July 30, 2009 – the Mud Lake Water Users filed their *Response to Claimants' Second Joint Motion for Summary Judgment* in 29 subcases (Attachment D). They argued three points:

The water rights at issue have been previously decreed and recognized as flood water rights.

Water rights established by a supplemental adjudication are not deemed to be adjudicated and may be attacked at any time by any person aggrieved thereby.

Res judicata does not bar the objections raised by MLWU.

X. Upper Valley Irrigators

July 29, 2009 – the Upper Valley Irrigators filed their *Motion in Support of MLWU & Pocatello Responses to Claimants' Second Joint Motions for Summary Judgment* in 29 subcases (Attachment D). They supported the Mud Lake Water Users' and Pocatello's *Responses* "with the sole exception that Objectors' United Canal Company and Blackfoot Irrigation Company recognize their participation in the original Eagle Decree and therefore would join in support of the arguments made by the City of Pocatello in its *Response to SWC'S Second Motion for Summary Judgment and Response to MLWU Motion for Summary Judgment* as if fully set forth herein."

XI. Ground Water Districts

July 29, 2009 – the Ground Water Districts filed their *Response to Claimants' Joint Motion for Summary Judgment* in 15 subcases (Attachment J) arguing two points:

The "source" element of the SWC water rights should be clarified consistent with the intent of the Eagle Decree and their historic availability to show that the rights are supplied by flood water available only during times of high spring runoff.

The "Connected Sources" general provision does not preclude the SRBA Court from inserting necessary conditions in individual water right decrees.

The Districts then requested "clarifying remarks or conditions on the Surface Water Coalition's water rights' source identifying them as flood water rights that should not be allowed to demand water from junior ground water users."

XII. Ground Water Districts

July 29, 2009 – the Ground Water Districts filed their *Response to Claimants' Second Joint Motion for Summary Judgment* in 20 subcases (Attachment K). Here, they provided more details of their arguments in outline form (numbers and letters have been deleted to avoid confusion; some parts have been omitted):

The Ground Water Districts are not precluded from requesting that clarifying remarks be added to the source element on the water rights that were decreed in the Eagle Decree.

The Ground Water Districts are not barred by the Doctrine of *Res Judicata*.

Ground Water Districts were not parties to the Stipulation or prior decrees.

The Eagle and Foster Decrees were private decrees and could not bind non-parties or future water right holders.

Idaho statutes at the time of the Eagle and Foster Decrees limited the decrees' application to non-parties and further [future?] water users.

The Idaho legislature has demonstrated that it does not intend prior decrees to bind all water rights holders who acquired subsequent water rights.

Taking water rights subsequent to a prior decree does not preclude the Ground Water Districts from challenging the water rights in the SRBA.

The facts support the Ground Water Districts' objections that the source, season of use and/or other remarks are necessary on the SWC's water rights.

Water right nos. 1-4, 1-6, 1-7, 1-8, 1-9, 1-10, 1-13, and 1-14 were actually recognized in the Eagle Decree as "flood water rights."

Water rights with priority dates of 1916 and junior have always been considered flood water rights.

Water District 01 delivery records show that water rights junior to 1900, but senior to 1915 have not been delivered for an entire irrigation season or at the very least, there is a genuine issue of material fact regarding those water rights.

Current statutes require that the SRBA partial decree contain conditions that are necessary to clarify an element of the water right or are needed for the administration of the water right.

The decrees in the SBA must be based on the historic extent of beneficial use and not enlarge the use of previously decreed water rights.

The recommended "Standard Season of Use" of 3/15 to 11/15 is incorrect and should end in late June or early July.

The Ground Water Districts also submitted the *Second Affidavit of Candice M. McHugh* with their *Response*.

XIII. United States

July 29, 2009 – the United States filed its *Response to the Summary Judgment Motions of the Ground Water Districts and the Mud Lake Water Users Association* in

30 subcases (Attachment H). It argued:

The Ground Water Users' arguments and the deposition testimony of their Affiants demonstrate that there is no basis for the condition they seek.

The remarks the Ground Water Users seek are unnecessary.

Even if a "high water" remark could be justified, water right 01-10034 for storage in Lake Walcott is not a "high water" right.

The Ground Water Districts' motion must be denied with respect to water right 01-10482 because the right has been beneficially used for decades.

The United States also submitted *Affidavits* of Don Bowden, Jerry H. Fredrickson and David A. Jarvis.

XIV. Surface Water Coalition

July 29, 2009 – the Surface Water Coalition filed their *Claimants' Joint Response to Ground Water Districts' Motion for Summary Judgment on Priority Dates* in four subcases (Attachment C). They argued the Districts cannot collaterally attack the priority dates of the Coalition's decreed water rights and no remarks are necessary for administration of those rights.

Replies

I. Surface Water Coalition

August 19, 2009 – the Surface Water Coalition filed their *Claimants' Reply in Support of Joint Motion for Summary Judgment* in 28 subcases (Attachment E). They argued the source of the Coalition's water rights is the Snake River; the objectors cannot circumvent the Connected Sources general provision; the City of Pocatello was a party to the *Eagle Decree* and is bound by its terms; and prior licenses are binding on IDWR and the parties. The Coalition also submitted the *Affidavit of Paul L. Arrington*.

II. Surface Water Coalition

August 19, 2009 – the Surface Water Coalition filed their *Claimants' Reply in Support of Second Joint Motion for Summary Judgment* in 28 subcases (Attachment E). They argued again the objectors are barred from attacking the Coalition's surface water rights defined in the *Eagle Decree*; the source of the Coalition's water rights is the Snake River, not limited by a new flood

or high flow classification; no limiting remarks or subordination are appropriate or necessary for administration; and the standard season of use and priority dates were properly recommended.

III. Ground Water Districts

August 19, 2009 – the Ground Water Districts filed their *Ground Water Users' Reply to Claimants' Joint Response and United States' Response to Summary Judgment Motions* in 25 subcases (Attachment F). They repeated their earlier points by arguing the SRBA Court is the proper forum to determine the Surface Water Coalition's water rights; the burden is on the Coalition to prove their beneficial use claims; and the season of use should be reflect historical development of the right. The same date, the Districts lodged the *Third Affidavit of Candice M. McHugh in Support of Ground Water Users' August 22, 2008 Motion for Summary Judgment*.

IV. Ground Water Districts

August 19, 2009 – the Ground Water Districts filed their *Ground Water Users' Reply to Claimant's Joint Response to Motion for Summary Judgment on Priority Dates* in four subcases (Attachment C). They offered one argument: the priority date must reflect the application of water to beneficial use.

V. Mud Lake Water Users

August 20, 2009 – the Mud Lake Water Users filed their *Reply to the State of Idaho's Response Brief* in 29 subcases (Attachment D). They agreed the watermaster should not be required to distinguish between water sources in the Snake River channel but they believe inclusion of a flood water remark would be relevant in an administrative call situation.

VI. Mud Lake Water Users

August 20, 2009 – the Mud Lake Water Users filed their *Reply to United States' Response to MLWU Motion for Summary Judgment* in 29 subcases (Attachment D). They wrote they expect to withdraw their objection to storage water right 01-10034 (USDI/BOR), but irrigation water right 01-10482 (USDI/BOR) must have a flood water remark.

VII. Mud Lake Water Users

August 20, 2009 – the Mud Lake Water Users filed their *Reply to Claimants' Joint Response to MLWU's Motion for Summary Judgment* in 29 subcases (Attachment D). They argued the entire *Eagle Decree* (“Stipulation,” “Findings of Fact and Conclusions of Law” and “Supplemental Decree”) points to the flood water nature of the water right.

VIII. Upper Valley Irrigators

August 20, 2009 – the Upper Valley Irrigators filed their *Fremont Madison, et. al.'s Support of MLWU Reply to United States and Claimants' Joint Response to MLWU's Motion for Summary Judgment* in 29 subcases (Attachment D) supporting the Mud Lake Water Users' *Replies* “as if fully set forth herein.”

Hearing on Motions for Summary Judgment

Order of Argument

On August 24, 2009, the parties filed their *Recommendations Regarding Order of Argument of Various Summary Judgment Motions* proposing the following sequence:

- 1) Surface Water Coalition's *Claimants' Second Joint Motion for Summary Judgment* (filed 6/25/09)
- 2) Surface Water Coalition's *Claimants' Joint Motion for Summary Judgment* (filed 8/22/08)
- 3) Ground Water Districts' *Amended Motion for Summary Judgment* (filed 6/25/09)
- 4) Mud Lake Water Users' *Motion for Summary Judgment* (filed 6/24/09)
- 5) Ground Water Districts' *Motion for Summary Judgment on Priority Dates* (filed 6/25/09)

Hearing

The hearing on motions for summary judgment was held on August 27, 2009, at the SRBA Courthouse in Twin Falls, Idaho. The following counsel appeared:

- 1) Surface Water Coalition:

- C. Thomas Arkoosh** (American Falls Reservoir District #2)
Travis L. Thompson and Paul L. Arrington (A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Co. and Twin Falls Canal Co.)
W. Kent Fletcher (Minidoka Irrigation District)
Roger D. Ling (A&B Irrigation District, Burley Irrigation District and Falls Irrigation District)
- 2) City of Pocatello:
Sarah A. Klahn
Mitra M. Pemberton
- 3) Ground Water Districts:
Candice M. McHugh
Randall C. Budge
- 4) Mud Lake Water Users – **Robert L. Harris**
- 5) State of Idaho – **David I. Stanish**
- 6) United States:
David W. Gehlert
Matt J. Howard
E. Gail McGarry
- 7) IDWR – **Garrick L. Baxter**

Discussion

The nine motions for summary judgment filed in these 37 subcases present the Court with a somewhat unique situation. The parties filed their motions in 11 different groups of subcases (Attachments B-L) leaving bewildering and overlapping choices where resolution of any one issue may apply to some subcases and parties but not others. And there is the dilemma where pending objections are left for another day. Instead of a discrete number of claims as test cases for a particular issue, the Court is faced with an amorphous list of multiple disputes.

With those thoughts in mind, it seems clear that there are two central issues – source and priority date. All others issues resolve around those two and neither can be resolved independent of the other. None of the 37 subcases should be considered settled in this *Order*. How resolution of those two issues applies in any particular subcase will be left for review with the parties during a future status conference.

The first and key issue begins with IDWR's recommendation that the source of the 37 claims is the Snake River. Some objectors maintain that in certain subcases, the source element must be clarified by designating the claims as "high water rights," that is, only available during periods of high flows. That would have two results: first, it would limit the season of use, and second, it would bar the claimants from making a delivery call against junior water rights except

during times of high flows. The Ground Water Districts conceded that certain of the high water rights have actually been diverted. Their only argument is that the claimed priority date does not match the claimed priority date. The Surface Water Coalition understood that argument to mean their senior water rights could never call junior water rights.

The objectors to the recommended source base their arguments on language in the 1968 *Supplemental Eagle Decree*⁶ and historical administration of the rights. The history behind the *Eagle Decree* is lengthy.⁷ In that case, the plaintiffs who sued Water District No. 36 watermaster Henry Eagle “comprise[d] all persons diverting water from, and claiming or asserting rights to divert water from, the Snake River and its tributaries above Milner Dam and within the boundaries of said Water District No. 36.” *Stipulation to Eagle Decree*, at 2.⁸ Notice of the lawsuit was filed in newspapers of general circulation in nine counties. Their goal was to create “a common fair, equitable and just plan designed to result in the most efficient, fair and complete beneficial use of all the waters of the Snake River and its tributaries.” *Stipulation*, at 3.

To that end, the plaintiffs in the *Eagle Decree* planned to seek Congressional authorization and appropriation to construct Palisades Reservoir and related irrigation projects. But to establish water rights for the reservoir,

[I]t 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

⁶ *Burley Irrigation District, et al. v. Henry Eagle*, July 10, 1968, Judge Theron W. Ward, Fifth Judicial District, Twin Falls County. Other “prior valid decrees” referenced in the *Eagle Decree* include: *Rexburg Irrigation Co., v. Teton Irrigation Canal Co.*, December 16, 1910, Judge J.M. Stevens, Sixth Judicial District, Fremont County; *Twin Falls Canal Co. v. Charles N. Foster*, June 20, 1913, Judge William A. Babcock, Eleventh Judicial District, Twin Falls County; *Woodville Canal Co. v. Clark & Edwards Canal & Irrigation Co.*, June 25, 1929, Judge Charles C. Cavanah, U.S. District Court, Idaho; and *Milner Low Lift Irrigation District v. Lynn Crandall*, April 29, 1931, Judge William A. Babcock, Eleventh Judicial District, Twin Falls County.

⁷ Fifth Judicial District Judge Theron W. Ward, who entered the 1968 *Supplemental Eagle Decree* was honored later as the namesake of the Theron W. Ward Judicial Building in Twin Falls.

⁸ Copies of the *Supplemental Eagle Decree* and *Stipulation* are attached to the Ground Water Districts’ August 22, 2008 *Affidavit of Travis L. Thompson in Support of Joint Motion for Summary Judgment* and marked Exhibits A and R

acted upon by all the parties Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.

Stipulation, at 3.

First off, the plaintiffs agreed the provisions of all prior decrees of “the waters of Snake River and its tributaries above Milner Dam” are binding upon them. *Stipulation*, at 1. Then, the common priority date of 1939 was agreed on for flood water rights diverting at or above Milner Dam which were acquired by the plaintiffs *after* the 1910 *Rexburg Decree*, the 1913 *Foster Decree*, the 1929 *Woodville Decree*, “and all other prior valid decrees of such water.”

Stipulation, at 1-3.

The 1939 priority date was integral to construction of additional projects authorized by Congress and 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 upon the construction of their facilities.” *Stipulation*, at 4. More importantly for this discussion, the parties agreed they have already “constructed, operated, and now control and maintain all necessary diversion dams, canals, laterals and distribution systems adequate to divert and distribute to the proper lands all of the waters herein stipulated to be decreed to them, in addition to all other water rights owned by the said parties.” *Stipulation*, at 6.

The plaintiffs in the *Eagle Decree* agreed the flood water rights 1) were for agricultural crops and associated domestic uses on certain described lands, 2) were non-transferrable, 3) were supplemental to all other existing water rights and 4) “shall not in any way change, alter, vary, or diminish any and all other water rights possessed or owned by the parties hereto” *Stipulation*, at 6. They also agreed listing water rights in a single decree would greatly aid and assist State officials and watermasters to handle, manage and distribute “the waters of the Snake River and its tributaries above Milner Dam.” *Stipulation*, at 6.

Finally, the parties to the *Eagle Decree* agreed:

That the award of so-called flood water rights to parties Plaintiff to this action claiming them with a uniform priority date of April 1, 1939, will not injure or impair the rights of any other parties and is intended to be a valid and binding settlement of all the claims of the right, title, and interest of the various parties Plaintiff herein and to the said waters.

Stipulation, at 7.

The parties provided ample histories of irrigation development of the Upper Snake River Basin as well as descriptions of the Snake River and its tributary or connected sources.⁹ Like most major rivers, the Snake River is defined by its tributary mountain streams, creeks, rivers, spring sources, irrigation return flows and reach gains and losses. The river flows 69 miles from its headwaters at Jackson Lake until it crosses the Wyoming/Idaho state line and then into Palisades Reservoir. From Jackson Lake to Milner Dam is about 370 miles.

Anyone with irrigation experience in southern Idaho knows about the variability of the Snake River's flows, whether seasonal or caused by rain or snow or the lack of such moisture. One year may be a banner year of runoff while the next year may be called a drought. In any event, the flows of the river all along its reach are uncertain at best. For those reasons, western states like Idaho are left with administration of water rights according to priority of appropriation and such measures as conjunctive management where hydraulically connected groundwater rights are considered. The necessary result is that administration of the river requires that the river be considered as a whole whatever the source of the water. For instance, higher than normal flows resulting from a thunderstorm at Palisades Reservoir cannot be weighed separately from base flows – whatever that means in any given year. It's all part of the hydrologic cycle where senior appropriators may see their full measure of water and junior appropriators may see less. It would be convenient if higher than normal flows of water were colored blue while base flows were colored red, but that is not the case. It's all Snake River water subject to administration in priority including such rules as material injury and futile call. The State was correct when it suggested requiring the watermaster to distinguish between base flows and high flow runoff and spring snowmelt in the Snake River channel “would impose an undue and novel burden upon the Water District.” In the Court's view, such a requirement would also create a legal nightmare.

When Judge Ward entered the *Eagle Decree* in 1968, he and the parties agreed the plaintiffs comprised everyone diverting water or claiming rights to divert water from “the Snake River and its tributaries above Milner Dam and within the boundaries of said Water District No. 36.” They also agreed the plaintiffs comprised everyone who is or will be affected by entry of

⁹ For example, see “Development of Snake River Irrigation,” Henry C. Eagle, attachment J to the Ground Water Districts' July 29, 2009 *Second Affidavit of Candice M. McHugh*, and the Surface Water Coalition's August 22, 2008 *Claimants' Memorandum in Support of Joint Motion for Summary Judgment*, at 11-12.

the *Decree*. Judge Ward specifically noted that the plaintiffs acquired their rights by multiple decrees as far back as 1910 and in some cases, after the latest 1931 decree.

A fair reading of the *Eagle Decree* and *Stipulation* leads to one conclusion concerning the source issue – Judge Ward and the parties intended to describe *all* waters of the Snake River and its tributaries above Milner Dam in a single decree regardless of source. While they referred to flood waters available only during periods of high flow, they clearly viewed such water as the source for storage at Palisades Reservoir. In other words, when excess or high flows were available, that water could be stored for later use when the river flows dropped. That meant all parties who held “rights to the use of the waters of said Snake River and its tributaries with points of diversion at Milner Dam or above”, had to adjust their rights which included flood water. It did not mean the parties agreed to limit certain diversions to high flows or restrict the periods during which they could use the water (season of use). The term “flood water rights” was no more than a short hand way to describe excess water that would remain in the Snake River if not diverted or stored for future use.

In the *Stipulation* to the *Eagle Decree*, the parties used language suggesting some claims to flood water were for future uses, implying actual diversions and beneficial uses were yet to happen. They referred to “plans to construct projects” or “planning to use as projects were constructed.” Nevertheless, the parties agreed on a common priority date of April 1, 1939. But at the same time, the *Eagle Decree* parties agreed 1) they “had been using [flood water] to the best of their ability and to the extent of their irrigation works”, 2) “deliveries have been made in accordance [with the 1939 priority date]” and 3) all the parties “have constructed, operated, and now control and maintain all necessary diversion dams, canals, laterals and distribution systems adequate to divert and distribute to the proper lands all of the waters herein stipulated to be decreed to them, in addition to all other water rights owned by the said parties.”

Viewed in its entirety, the *Eagle Decree* properly decreed a 1939 priority date for certain of the rights because Judge Ward viewed the water to have been validly appropriated by the parties’ prior use even as their diversion works were being expanded and modified. There is no sound basis to assert the claims were for some future use with a later priority date. In fact, in some cases, the parties may have been entitled to an even earlier priority date based on their earlier project work, but to “avoid extensive, expensive and delaying litigation”, the parties compromised and agreed on the common priority date.

There is no legal reason to suggest water rights decreed by Judge Ward must be subordinated to hydraulically connected junior water rights, regardless of the source. When the parties to the *Eagle Decree* agreed their water rights were supplemental to all other existing water rights and “shall not in any way change, alter, vary, or diminish any and all other water rights possessed or owned by the parties hereto”, they did not agree to any such subordination. They were clearly referring to protecting *existing* water rights as of the date of the *Decree*, 1968. That amounts to no more than a restatement of Idaho’s laws of prior appropriation.

Likewise, there is no legal reason to clarify the source or season of use elements of any of the water rights, whether decreed with a priority date before, on or after April 1, 1939. As the State suggested, the rights will be administered in priority and in accord with Idaho’s conjunctive management rules which authorize the IDWR Director to consider seasonal variability of source flows in determining material injury in delivery call proceedings.

Having said all that, there are three remarks the IDWR Director may determine should be added to each flood water right because they were agreed upon by parties to the *Eagle Decree* and “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(3). The remarks are that the waters 1) are supplemental, 2) to be used for production of agricultural crops and associated domestic uses upon certain described lands, and 3) are non-transferrable.

Order

THEREFORE, IT IS ORDERED that:

1. The source of water for all rights listed in the *Supplemental Eagle Decree* is the Snake River not limited by classification as flood or high flow;
2. The priority dates decreed in the *Eagle Decree* are valid;
3. Flood water rights are not subordinated to junior hydraulically connected water rights;
4. The season of use for flood water rights should be IDWR’s standard season of use; and
5. Remarks that may be added to the flood water rights are that the waters a) are supplemental, b) to be used for production of agricultural crops and associated domestic uses upon certain described lands, and c) are non-transferrable.

IT IS FURTHER ORDERED that a status conference shall be held on **Thursday, March 11, 2010, 11:30 a.m.**, at the SRBA Courthouse, 253 3rd Avenue N., Twin Falls, Idaho, to review what issues remain unresolved in the above 37 subcases. Parties may participate by telephone by dialing the number 1-225-383-1099 and when prompted entering code 654400. If you have any difficulty connecting to this call, call the SRBA Court immediately at 208-736-3011.

DATED December 11, 2009.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

ATTACHMENT A

01-4	Twin Falls Canal Co. (TFCC)	12/22/1915	Decree
01-5	North Side Canal Co., Ltd (NSCC)	12/23/1915	Decree
01-6	American Falls Reservoir District #2	3/30/1921	Decree
01-7	Burley Irrigation District (BID)	4/1/1939	Decree
01-8	Minidoka Irrigation District (MID)	4/1/1939	Decree
01-9	Milner Irrigation District (Milner)	4/1/1939	Decree
01-10	TFCC	4/1/1939	Decree
01-13	Falls Irrigation District	4/1/1939	Decree
01-14	A&B Irrigation District (A&B)	4/1/1939	Decree
01-16	NSCC	8/6/1920	Decree
01-17	Milner	11/14/1916	Decree
01-23A	Southwest Irrigation District	2/6/1895	Decree
01-209	TFCC	10/11/1900	Decree
01-210	NSCC	10/11/1900	Decree
01-211A	USDI/BOR	3/26/1903	Decree
01-211B	BID	3/26/1903	Decree
01-212	NSCC	10/7/1905	Decree
01-213	NSCC	6/16/1908	Decree
01-214A	USDI/BOR	8/6/1908	Decree
01-214B	BID	8/6/1908	Decree
01-219	USDI/BOR	12/14/1909	Decree
01-2040	USDI/BOR (disallowed - recommended as 01-6)		
01-2050	Milner	7/11/1968	B/U
01-2060	USDI/BOR (disallowed - recommended as 01-14)		
01-2060A	A&B (disallowed - recommended as 01-14)		
01-2061	USDI/BOR	6/11/1956	Licen.
01-4060	USDI/BOR (disallowed - recommended as 01-10237, 01-10238, 01-10239, 01-10240, 01-10241 and 01-10225)		
01-10034	USDI/BOR	3/15/1911	B/U
01-10189	MID (disallowed - recommended as 01-10034)		
01-10225	A&B	4/1/1984	B/U
01-10237	A&B	7/11/1968	B/U
01-10238	A&B	7/11/1968	B/U
01-10239	A&B	7/11/1968	B/U
01-10240	A&B	7/11/1968	B/U
01-10241	A&B	4/1/1978	B/U
01-10482	USDI/BOR	4/1/1940	B/U
01-10483	Amalgamated Sugar Co.	5/18/1926	B/U

NOTE: The above list of 37 subcases includes all subcase numbers listed on Attachments B through M to various orders, 9 motions for summary judgment, 14 responses and 8 replies.

ATTACHMENT B

01-00004
01-00005
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01-00214B
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ATTACHMENT C

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01-00014

ATTACHMENT D

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ATTACHMENT E

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ATTACHMENT F

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ATTACHMENT G

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ATTACHMENT H

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ATTACHMENT I

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ATTACHMENT J

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ATTACHMENT K

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ATTACHMENT L

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ATTACHMENT M

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND ORDER SETTING STATUS CONFERENCE was mailed on December 11, 2009, with sufficient first-class postage to the following:

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