

DEPARTMENT OF
WATER RESOURCES

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consulted with the Idaho Department of Water Resources (IDWR) regarding these claims prior to filing them. Supplemental, beneficial use water rights have been recognized and recommended by IDWR, and decreed by this Court in similar circumstances.

The Court determined that the Claimants had satisfied the “excuse” element of the good cause standard for the late filing of the claims. The Court referred the motions to Special Master Booth for further proceedings to determine prejudice, if any, to other parties and whether the claims present a meritorious position. Valley Sun entered an appearance and filed briefs in opposition to the motions. The Special Master did not find that the filing of the late claims caused prejudice to any party. To the contrary, the Special Master recommended that the motions to file late claims for water rights appurtenant to lands not identified in the 1938 *Gossi Decree* be granted. The Special Master recommended that the remaining motions to file late claims be denied based solely on his interpretation that the *Gossi Decree* injunction prohibits *Gossi Decree* right holders, including the Claimants, from appropriating additional or supplemental water rights for their lands.

On January 13, 2010, Special Master Booth entered a *Special Master’s Report and Recommendation on Motion to File Late Notices of Claim* (“*Recommendation*”) recommending that most of the Claimants’ *Motions to File a Late Notices of Claim* be denied for the above-referenced subcases.¹ The *Recommendation* also recommended that “any order issued by the Court denying the motions to file late notices of claim not be certified as final pursuant to I.R.C.P. 54(b) pending a determination as to whether the Claimants will seek further relief such as attempting to have the

¹The *Recommendation* also recommended granting Claimants’ *Motions to File Late Notice of Claim* for subcases 72-16778 and 72-16781 and this Court issued an *Order Granting Motions to File Late Notice of Claim* for said subcases on January 13, 2010. Accordingly, subcases 72-16778 and 72-16781 are not a part of Claimants’ current Motion.

partial decrees for the previously decreed water rights set aside.” *Recommendation* at 9. That same day, this Court issued an *Order Denying Motions to File Late Notices of Claim* (“*Order*”) which adopted the findings of fact and conclusions of law contained in the *Recommendation*. In the *Order*, the Court stated: “Although the time for filing a *Motion to Alter or Amend* to the *Special Master’s Report and Recommendation* has not expired, the Court can find no reason to delay the issuance of this *Order*.” Claimants therefore understand that the Court has dispensed with the opportunity/requirement to file a motion to alter or amend with the Special Master, that the Court’s *Order* is interlocutory in accordance with the Special Master’s *Recommendation*, and that this *Motion* is timely.²

Claimants seek reconsideration of the Court’s *Order* because it is based upon an incorrect interpretation that the injunctive provision of the *Gossi Decree* forever enjoined the parties “from diverting or using more water than set forth therein for use upon the lands described in the *Decree*.” *Recommendation* at 6. This interpretation is erroneous because it: (1) fails to recognize that the purpose of the injunction, to protect *Gossi Decree* rights from interference, did not require prohibiting *Gossi Decree* right holders from diverting additional unappropriated water for beneficial use on their lands (*see infra* at 6-14); (2) is inconsistent with the appropriation, use, licensing and SRBA decrees of East Fork water rights for use on lands identified in the *Gossi Decree* (*see infra* at 14-15); (3) abrogates the Claimants’ constitutional rights to appropriate the unappropriated waters of this State (*see infra* at 16-18), and (4) adversely affects existing rights and interests (*see infra* at

²The Special Master’s *Recommendation* was accompanied by a *Notice of Issuance* signed by Deputy Clerk which notified the parties of the opportunity to file a motion to alter or amend by February 28th, and that failure to do so would constitute waiver of the right to challenge the *Recommendation* before the Presiding Judge.

19-21). For these reasons, Claimants respectfully request that the Court reconsider its *Order*, and allow Claimants' to file their late notices of claims.

II. ARGUMENT

A. Standard of Review for Claimants' Motion for Late Claims.

The standard of review for the Claimants' motions for late claims has been previously briefed and is set forth in Claimants' *Response Brief* at pages 2-3. The fact that effect of the *Gossi Decree* injunction was not raised or briefed by any party to the consolidated subcases warrants the Court's reconsideration of Special Master's interpretation.

The Special Master was charged with determining the degree of prejudice, if any, to other parties, and whether a meritorious position has been presented, but not to ultimately decide the merits of the late claims. In evaluating whether a meritorious position has been presented, the court must determine if the moving party has alleged facts that, "if established," would constitute a meritorious position. *See Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct.App. 1988). Along these same lines, the court must apply the standard liberally, rather than strictly, and give the moving party the benefit of genuine doubt. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct.App. 1983). In other words, if ambiguities, questions of law or questions of fact remain, the Claimants should be given the benefit of genuine doubt as to those issues and the merits of the position should be decided after the late claims had been allowed.

Additionally, Chapter 14, Title 42 contains several expressions of legislative intent that water rights be recommended and decreed to reflect a Claimant's beneficial use of water. Idaho Code § 42-1425, pertaining to accomplished transfers, provides that it is in the public interest to allow the "continuation of the historic water patterns" so long as there is no injury at the time of the change,

and that denial of a claim solely because of failure to comply with sections 42-108 and 42-222 would cause undue financial hardship to the claimant and the local economy. Similarly, I.C. § 42-1426, pertaining to enlargements, provides that it is in the public interest to waive certain statutory requirements for the “appropriation of water that has been diverted and applied to beneficial use . . . and to maintain historic water use patterns existing on that date.” Finally, I.C. § 42-1427 recognizes that decreed or licensed water rights have not been uniformly described, that with the passage of time that it is not possible to establish the undefined elements of decreed or licensed water rights, and that “water delivery has occurred based upon the historic water use patterns and custom.” In order to avoid significant impacts to the claimants, the local economy and tax base, “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).

The common theme in these statutes is that the legislature has found that it is in the public interest to define and decree water rights based upon the extent of beneficial use as allowed in accordance with Idaho law. The reason is, in part, based upon legislature’s finding that failure to consider the historic water use patterns and customs would result in significant undue impacts on the claimants and the local economy. The Special Master’s interpretation that the *Gossi Decree* injunction prohibits *Gossi Decree* right holders from appropriating additional water for their lands is contrary to this express legislative intent, disregards over seventy years of water use and customs, resulting in significant adverse impacts to the Claimants.

B. The Correct Interpretation of the *Gossi Decree*.

The Special Master erroneously construed the following provision of the *Gossi Decree* to permanently enjoin future appropriation of water from the East Fork for beneficial use on lands identified in the *Gossi Decree*:

That each and every of the parties to this suit, plaintiffs and defendants, their agents, servants, attorneys and employees and each, every and all persons acting in aid of and for any of the parties to this suit, **are hereby forever restrained and enjoined from in any way or manner interfering with or diverting or using the waters of said East Fork of the Salmon River and its tributaries, except in accordance with the terms and provisions of this decree.**

Lucas Aff., Ex. 2 at 7 (emphasis added).

The Special Master's interpretation is not literal, inescapable or necessary. The Special Master infers a limitation on the injunction to allow new diversion and use of East Fork water on lands that are not identified in the decree. There is, however, no language in the provision either limiting the restraining effect of the injunction to additional use of East Fork water on identified lands, or allowing new use of East Fork water on unidentified lands. The Special Master does not interpret the last, dependent clause "except in accordance with the terms and provisions of this decree" to mean "except pursuant to the water rights identified in this decree." Such an interpretation would prohibit the parties from any future diversion and use of East Fork water on identified and unidentified lands.

The Special Master's interpretation is not the only possible reading of the injunctive provision. The last, dependent clause modifies the restraining effect of the injunctive language to prohibit diversion and use of the East Fork and its tributaries that is not "in accordance with the terms and provisions of the decree." Post-decree water rights for lands identified in the *Gossi*

Decree could be, and have been, established and used without interfering with *Gossi Decree* water rights, and would thus be “in accordance with” the decree. *Gossi Decree* rights are, of course, protected by their seniority from interference by subsequent appropriations, as is the case for any other decreed water rights.

For the injunction to issue, it had to be necessary to prevent irreparable harm to the decreed rights. The *Gossi Decree* contains no finding that the East Fork had been fully appropriated, such that post-decree appropriations of East Fork water would interfere with established rights, and therefore had to be restrained. There was no basis for the *Gossi* court to conclude that prohibiting post-decree appropriations of East Fork water for lands identified in the *Gossi Decree* was necessary to prevent irreparable harm to *Gossi Decree* rights, whereas new diversion and use of water on unidentified, unirrigated lands would not cause irreparable harm to decreed rights. Diversion and use of additional water to irrigate lands identified in the decree was no more or less likely to interfere with the decreed rights than diversion and use of water to irrigate unidentified lands.

The correct interpretation of the injunctive provision of the *Gossi Decree* lies in recognizing that the nature and purpose of the *Gossi* adjudication was to quiet title to the parties’ water rights to the East Fork. The *Gossi Decree* settled and declared the parties’ existing rights to the waters of the East Fork and its tributaries, required the parties to utilize those water rights in accordance with the provisions of the decree, and restrained the parties from interfering with one another’s decreed rights. It thereby resolved any uncertainty that may have existed regarding the priorities of the parties’ water rights. The *Gossi Decree* pertained only to water rights that had been appropriated at the time of that adjudication. No party sought nor had the right to enjoin future use of the unappropriated waters of the East Fork. No findings were made to support such relief, and the *Gossi* court had no authority

to enter such an order.

The injunctive provision of the *Gossi Decree* should be interpreted consistent with the *Gossi* court's authority as well as the parties' rights, pleadings and stipulated intentions. Reading the provision in isolation and out of context could lead to the conclusion that the *Gossi* parties were forever enjoined from additional diversion and use of East Fork water on any lands. The language used in the provision is, perhaps, imprecise and overbroad, in that the subject of the restraint is use of East Fork water, rather than interference with decreed rights. But just as the Special Master determined that the injunction of the *Gossi Decree* could not restrain future beneficial use of East Fork water on lands that were not identified in the decree, this Court should recognize that the injunction can only restrain interference with decreed rights, and cannot enjoin or restrain future beneficial use of unappropriated East Fork water on any lands, whether the place of use of the future appropriation is or is not identified in the *Gossi Decree*.

Accordingly, the *Gossi Decree* does not prohibit *Gossi Decree* right holders from establishing post-decree East Fork water rights with junior priorities for beneficial use upon their lands.

C. In a Water Right Adjudication, the Purpose an Injunction is to Restrain Interference with Decreed Rights - not to Restrain Future Beneficial Use of Unappropriated Water.

It has long been recognized in Idaho that an "action to ascertain, determine and decree the extent and priority of a right to the use of water partakes of the nature of an action to quiet title to real estate, as provided by sec. 6961." *Mays v. District Court*, 34 Idaho 200, 205, 200 P. 115 (1921). Sec. 6961, providing for actions to quiet title, was originally enacted in 1881 and is currently codified as I.C. §6-401. Until 1981, I.C. §6-401 provided that: "An action may be brought by any

person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim.” Water right adjudications proceeded as quiet title actions as provided in I.C. §6-401. *See, e.g. Mays, supra; Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944) (an adjudication of the waters of Mahogany Creek which originated by a complaint for quiet title). In 1981, I.C. §6-401 was amended to require “that all actions to adjudicate water rights and obtain a decree as to water source, quantity, point of diversion, place of use, nature of use, period of use, and priority as against other water users shall be brought under the provisions of chapter 14, title 42, Idaho Code.” *Nahas v Hulet*, 106 Idaho 37, 40, 674 P.2d 1036, 1039 (1983).

The purpose of injunctive relief in an action to quiet title to water rights is explained in *Kinney on Irrigation and Water Rights* 2d, (1912):

One of the most common reliefs granted by the Court, after the rights have been determined and adjudicated, and the title to the water rights quieted in the one declared to the owner thereof, is, in the same action, **to grant an injunction against the interference of the water rights the title to which was so quieted, by the other parties to the action.** [O]ne owning a certain water right for which he was entitled to a decree to quiet his title thereto, was also entitled to a **perpetual injunction restraining a diversion of the water to which he was declared entitled, by the other parties to the action.**

Kinney, §1536 at 2766-2767.

[W]here the main object of the suit is to determine and adjudicate the rights between the respective parties, after such determination and adjudication, the common practice of the Court is to grant equitable relief by way of an injunction in favor of the prevailing party and against the losing party. Or the injunction may be granted in favor of both parties, or all the parties, **restraining them, or any of them, from interfering with the respective rights of any other parties as determined and adjudicated in the action.**

Id., §1598 at 2908-2909.

The essentials [for an action for injunction] are that: There must be first the existence of the right in the party seeking the injunctive relief; the injury must be irreparable; there must be an actual continuing injury to the right; or there must be a threat of continuance in the future; the party praying for the injunction must show that he has no adequate remedy at law; and, further, there must have been no unreasonable delay or laches before bringing the action for injunctive relief.

Id., §1600 at 2912.

[A]n action will lie by an appropriator whose rights are interfered with by another appropriator . . . whereby the quantity of the water to which the appropriator is entitled is unlawfully diminished. But, upon the other hand, an action for an injunction can not be successfully maintained against those who did not cause the injury, **nor can a prior appropriator maintain such an action against a subsequent appropriator, where the latter takes only the surplus water of a stream, which is not covered by the claim of the former**, nor during those periods of time when the prior appropriator has no use for the water. **If the contrary were the rule, the first appropriator upon a stream might claim all of its waters, regardless of use. If the prior appropriator receives the water to which he is entitled, at a point where he can apply the same to the entire beneficial use for which the appropriation was made, he can not complain.**

Id., §1610, at 2935-2936 (1912) (emphasis added).

Injunctions as described by *Kinney* were commonly issued in early water right adjudications. In *Frost v. Alturas Water Co.*, 11 Idaho 294; 81 P. 996 (1905), for example, some twenty appropriators of the Malad or Big Wood River commenced an action against some seven hundred other appropriators for a decree to quiet title to their respective water rights and for an “injunction restraining each from interfering with the respective rights of the others.” 11 Idaho at 297, 81 P. at 996. On appeal concerning joinder of parties, the Idaho Supreme Court explained:

[A]ll the appropriators and users of water from a common source have in a manner a common interest in having the rights of the respective appropriators determined and quieted by the courts and in a decree enjoining any and all appropriators who are inclined to interfere with or obstruct the rights of others or divert water to which they are not entitled from so doing by the restraining and injunctive power of a court of equity.

11 Idaho at 300, 81 P. at 997.

The 1914 Decree in *Potter v. Patterson* concerning appropriations “from Fish Creek and its tributaries, in the County of Blaine,” contains an injunction which perpetually enjoins the parties from interfering with the flow of waters in Fish Creek, except as provided in the decree. *Farris Aff*, Ex. A. Similarly, the Stewart Decree entered in *Farmers’ Co-operative Ditch Co., v. Riverside Irrigation Dist., Ltd.* concerning the Boise River in Ada and Canyon Counties, contains the following order:

It is hereby ordered, adjudged and decreed that none of the parties hereto, or their successors in interest, shall have a right to the use of the waters of Boise river herein awarded, except for a beneficial purpose; and that whenever the beneficial use is ceased, such parties or parties shall cease to divert and have no right to divert the said waters; that each and every of the parties hereto, their servants, attorneys, employees, privies and successors in interest, **are hereby enjoined and restrained from any and all interference with or diversion or use of the waters of said Boise river, except as provided in this decree**, whenever such interference, diversion or use would in any manner interfere with the quantity of water awarded by this decree to any of the other parties to this action.

Farris Aff, Ex. B (emphasis added).

With regard to the Stewart Decree, there are numerous appropriations from the Boise River subsequent to the Stewart Decree for the same entities and lands which were part of the Stewart Decree, including both natural flow rights and storage rights. Subsequent rights for supplemental water have been recommended, and in most cases, partially decreed in the SRBA. Again, the correct interpretation of the *Gossi Decree* and other early Idaho water right decrees is that the injunctions included in those decrees prevented interference with the decreed rights, but did not prohibit the parties from exercising their constitutional rights to make future beneficial use of unappropriated water for use on their lands.

D. The Purpose and Effect of the Gossi Adjudication Was to Quiet Title to Established Water Rights and Restrain Interference Therewith, Not to Prohibit Beneficial Use of Unappropriated East Fork Water.

In 1933 Raymond Gossi filed the first action to adjudicate East Fork water rights. *Affidavit of S. Bryce Farris*, Ex. C. The action was resolved by stipulation, and the district court entered a decree which defined the water rights of the parties and “enjoined and restrained [them] forever from in any manner interfering with the rights as herein adjudicated.” *Id.*, Decree at 3.

A second action to adjudicate East Fork water rights was filed in 1937 by water right claimants who were not parties to the 1933 adjudication. Parties holding rights decreed in the 1933 adjudication were named defendants. The action was resolved by a stipulation to modify the 1933 Decree to correct errors in water quantities, priorities and irrigated lands, and to “determine all the rights of the parties to this action . . . in accordance with the Complaint, Answer and Cross-complaint on file in this action.” *Farris Aff.*, Ex. D at 2. The parties submitted a proposed decree, which was entered by the district court on February 14, 1938.

The *Complaint* and the *Answer and Cross-Complaint* in the *Gossi* adjudication each sought to quiet title to and enjoin interference with parties’ East Fork water rights as described therein. *Farris Aff.*, Ex. E, *Complaint* at 13-14 ; Ex. G, *Answer and Cross-Complaint* at 9-10. The *Complaint* and *Cross-Complaint* are in the same form, containing the requisite allegations and claims for relief to quiet title to the parties’ water rights. The pleadings describe the lands owned by each party (*id.*, Ex. E at 2-5; Ex. F at 3-5), the dates, sources, quantities, and means of appropriation and the beneficial use on the described lands (*id.*, Ex. E at 5-12; Ex. F at 5-9). Each of the pleadings contains the following, requisite allegation of adverse claims and exclusive use of appropriated waters:

That the [defendants/plaintiffs] **claim an interest in the said waters so appropriated** and used by these [plaintiffs/defendants] and their predecessors in interest, but that such claim on the part of the [defendants/plaintiffs], is without right and these [cross-complainants] are entitled to the **exclusive use and possession of said waters as hereinabove set out**, for the irrigation of their said lands.

Id., Ex. E at 13, ¶ XXXV; Ex. F. at 9, ¶XXXIV (emphasis added).

To support claims for injunctive relief, the pleadings allege interference with the claimed water rights and lack an adequate remedy at law. *Id.*, Ex. E at 13-14, ¶¶ XXXVI, XXXVII; Ex. F. at 9-10, ¶¶ XXV, XXVI (emphasis added). Each of the pleadings requests entry of a decree:

Quieting the title to the waters of the East Fork of the Salmon River and its tributaries mentioned in the complaint and this cross-complaint, and determining the rights of all the parties hereto and to said waters and the use of the waters of said East Fork of Salmon river and its tributaries, as described in the pleadings herein.

That these [plaintiffs/defendants] have a judgment and decree of this court awarding to them ***the amounts and quantities of waters so appropriated, diverted and used by them, as hereinbefore in [this compliant/cross-complaint] set forth***, and that the rights of these [plaintiffs/defendants] are superior to the rights of the [defendants/plaintiffs], and each of them, in and to the waters of the said East Fork of the Salmon River and its tributaries.

That the [defendants/plaintiffs] **be restrained** by an order of this Court **from obstructing** in any manner, or to any extent, or from in any manner, or to any extent, **interfering with the flow of the waters of the said East Fork** of the Salmon River and its tributaries, to or through the ditches of the plaintiffs herein, **to the full extent of the waters claimed by them** in their [complaint/cross-complaint] herein . . .

Id., Ex. E at 14-15; Ex. F at 10-11 (emphasis added).

The pleadings sought to quiet title only to the appropriated waters of the East Fork, as described therein. The requests for an order restraining the parties from interfering with one another's existing water rights is consistent with the allegations of threatened interference. No allegation or claim for relief mentions the unappropriated waters of the East Fork. There is no allegation that the East Fork had been fully appropriated or over-appropriated, or that an injunction

restraining the parties from making future appropriations was necessary or sought to protect the parties' appropriations described in the pleadings. Similarly, there is no allegation of injury or claim for injunction related to potential future diversion of additional unappropriated water to use on lands identified in the pleadings. The *Gossi* adjudication parties had the right to seek to quiet title to their established water rights only. Since the parties had no right to quiet title to the unappropriated waters of the East Fork, to which they had established no property interest, they could not seek an injunction to restrain other parties from diverting unappropriated water.

The *Gossi* parties' confirmed their intent to quiet title to their water rights and enjoin interference therewith in their *Stipulation* in which they stipulated to entry of an order to modify and correct the 1933 Decree "in accordance with the Complaint, Answer and Cross-complaint." *Farris Aff.*, Ex. G at 2. The proposed Decree which they filed and was entered by the district court should be interpreted consistent with the *Gossi* parties' rights, pleadings and stipulated intentions. Considered in isolation and out of context, the Special Master's misinterpretation of the injunctive provision of the *Gossi Decree* is understandable.

Accordingly, the *Gossi* court had no basis and no authority to restrain the *Gossi* parties from making new appropriations of East Fork water for use on any lands to which the water might be put to beneficial use, including lands identified in the *Gossi Decree*.

E. The Special Master's Interpretation is Inconsistent With the Appropriation, Use, Licensing and SRBA Decrees of Post *Gossi Decree* Water Rights.

Prior to the Special Master's *Recommendation*, the *Gossi Decree* had never been interpreted to prohibit *Gossi Decree* right holders from establishing additional rights for their *Gossi Decree* lands. Post *Gossi Decree* water rights to the East Fork have been appropriated by *Gossi Decree* right

holders, licensed by IDWR, and decreed by this Court for irrigation of lands identified in the *Gossi Decree*. Objector Valley Sun, for example, owns five East Fork water rights to irrigate the same 294.1 acres (combined place of use). *See Affidavit of Jon C. Gould*, Ex. A. Three of these rights (72-10220, 72-10221 and 72-10222) were originally decreed to parties in the *Gossi Decree*. Two of these rights were appropriated long after the *Gossi Decree* (72-10237A, June 28, 1983 priority and 72-7505A, August 18, 1992, licensed in 1998). Similarly, licensed water right no. 72-2095, discussed at pages 7-8 of the *Recommendation*, was also appropriated long after the *Gossi Decree* for use on lands that are within the place of use for a *Gossi Decree* right (72-193B). The other licensed right discussed by the Special Master (72-2048, priority October 13, 1916, licensed in 1971) also shares a place of use with *Gossi Decree* rights (72-10302A, 72-10303, 72-10304) as a result of an accomplished transfer recommended by IDWR and incorporated into an SRBA partial decree.

Each of these post *Gossi Decree* rights has been recognized by IDWR and partially decreed by this Court. The Special Master's interpretation of the *Gossi Decree* would result in these rights having been licensed and/or decreed in violation of the terms of the *Gossi Decree*.

In addition, the Idaho Department of Fish and Game has constructed, operates and maintains fish screens in the Claimants' diversions and ditches. The sizes of the fish screens were based on measured diversions into the Claimants' ditch systems that reflect their historic, beneficial use of East Fork water. The Idaho Department of Fish and Game has obtained water right permits for "bypass flows" associated with operation of several of the fish screens (*see e.g.* 72-7488, 72-7489, and 72-16751).

F. The Special Master's Interpretation of the *Gossi Decree* Abrogates Claimants' Constitutional Rights.

Article XV, § 3 of the Idaho Constitution provides: "The right to divert and appropriate the unappropriated waters of the any natural stream to beneficial uses, shall never be denied." This constitutional right to appropriate unappropriated waters not only applies to a claimant's initial appropriation, but also to subsequent appropriations from the same stream or source, for the same beneficial uses and on the same lands. It is not uncommon for a claimant to appropriate supplemental water from either natural flow or storage water for the same lands as the claimant's initial appropriations. This constitutional right to appropriate waters, and to make supplemental appropriations of unappropriated waters for beneficial uses, shall never be denied according to the Idaho Constitution.

The Special Master's interpretation of the *Gossi Decree* abrogates this constitutional right for each of the Claimants. The Special Master recognized that the *Gossi Decree* could not have prevented new appropriations of water on land not specified in the *Gossi Decree*, which is consistent with the parties' constitutional right to divert water under Art. XV, § 3 of the Idaho Constitution. There is no basis for the Special Master's conclusion that the *Gossi Decree* abrogated the constitutional right to make new appropriations for lands that were described in the *Gossi Decree*.

The distinction created by the Special Master between lands described in the *Gossi Decree* and lands not described in the *Decree*, and the interpretation that the parties' constitutional rights are abrogated, is not supported by any findings or conclusions in the *Gossi Decree*. For example, there is no finding that the East Fork was an over appropriated stream in 1938, or that there was any other fact or conflict between the parties which would require abrogation of the right to appropriate the

waters of the East Fork. To the contrary, the *Gossi Decree* court and this Court are charged with upholding the Idaho Constitution, and are precluded from issuing an order or decree which abrogates constitutional rights. See I.C. § 59-401 (“loyalty oath” for judges and other elected or appointed officers to support the Constitution of the State of Idaho).

Similarly, this Court cannot interpret a prior decree to have the effect of abrogating constitutional rights. When interpreting the meaning of a statute courts also construe any ambiguity in favor of its constitutionality. In *Meisner v. Potlatch Corporation*, 131 Idaho 258, 954 P.2d 676 (1998), the Court explained the standard concerning the interpretation of a statute as follows: “it is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional.” *Id.* at 261, 954 P.2d at 679 (quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990)). Similarly, when interpreting provisions of the *Gossi Decree*, any doubt concerning the interpretation should likewise be presumed that it is constitutional and should be resolved in favor of that which will render the terms of the decree as constitutional.

G. There Has Been No Waiver of the Constitutional Right to Appropriate the Unappropriated Waters of the East Fork River and its Tributaries

While a court does not have a right to issue a decree or order which violates a constitutional right, a party may knowingly and intentionally waive a constitutional right. “Waiver is a voluntary intentional relinquishment of a known right or advantage . . . and will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel.” *Seaport Citizens Bank v. Dippel*, 112 Idaho 736, 739 (App. 1987). A presumption exists against

the waiver of constitutional rights, and all circumstances surrounding the waiver must be examined to determine if the waiver was made knowingly and intentionally. *Jackson v. Daimler Chrysler Fin. Servs. Ams., LLC*, 2007 U.S. Dist. LEXIS 50787, *7 (D. Idaho 2007). Courts have held that the waiver of a constitutional right to a jury trial is to be narrowly construed and any ambiguity is to be decided against the waiver. *Phoenix Leasing Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994). Waiver of a constitutional right to divert unappropriated water of this State under Art. XV, § 3 should be narrowly construed and any ambiguity should be decided against the waiver.

Here, the Special Master did not make a finding of waiver by any of the Claimants of their constitutional rights, and there is no finding or evidence in the *Gossi Decree* of such a knowing and intentional waiver of their constitutional rights to divert the unappropriated water of the East Fork, whether that be to new lands or lands referenced in the *Gossi Decree*. The Special Master cannot simply infer from the language of the *Gossi Decree* injunction that the parties waived their constitutional rights when there is no evidence of waiver. Again, considering all circumstances, the duty of the court to issue a decree which upholds the parties constitutional rights, and the lack of any evidence of a knowing and intentional waiver of a constitutional right, the correct interpretation of the terms of the *Gossi Decree* injunction is that it enjoins *Gossi Decree* right holders from interfering with *Gossi Decree* rights. It does not abrogate or waive *Gossi Decree* right holders constitutional rights to appropriate the unappropriated waters of the East Fork for beneficial use on their lands.

H. The Special Master's Interpretation of the *Gossi Decree* Injunction Adversely Affects Existing Rights and Interests.

The Special Master's interpretation that the *Gossi Decree* establishes forever the maximum quantity of water that may be diverted and used on *Gossi Decree* lands creates the dilemma that *Gossi Decree* right holders must attempt to modify the decree if they discover that additional water is required to irrigate their lands. It has been a common practice for water users to appropriate additional natural flow and storage to supplement their early decreed water rights. *Affidavit of David B. Shaw*, ¶ 10 at 4-5. Supplemental rights have been appropriated in numerous instances throughout Idaho when decreed quantities have been discovered to be insufficient to fully irrigate the place of use throughout the irrigation season.

Preserving the right and opportunity to make supplemental appropriations of water is particularly important for *Gossi Decree* right holders, whose rights are based on an "estimate" of the originally appropriated quantities of water, rather than actual measurements. *Lucas Aff.*, Ex.2 at 3. The record establishes that greater quantities of water are necessary and have been beneficially used to adequately irrigate the Claimants' *Gossi Decree* lands. The diversion of sufficient water to account for conveyance losses and deliver sufficient water to irrigate agricultural fields is a recognized beneficial use of water. The *Gossi Decree* parties each claimed estimated quantities of water that they had applied to their lands, without accounting for diverted quantities necessary to cover conveyance losses. *Farris Aff.*, Ex. B, ¶¶ XVIII - XXXI at 5-12; Ex. C, ¶¶ XV - XXIII-A at 5-9. Under the Special Master's interpretation of the *Gossi Decree* injunction, the only way for *Gossi Decree* right owners to utilize additional water for irrigation or any other beneficial use on their lands is to file an action in district court to modify the *Gossi Decree*. This result is contrary to

the situation in many Snake River basins, where early decreed rights have been supplemented by subsequent natural flow and storage rights, and would put the district court in the position of administering the appropriation of East Fork water, a function delegated by the legislature to IDWR.

The Special Master's interpretation that the *Gossi Decree* injunction restrains *Gossi Decree* right holders from using East Fork water on their lands except as provided in the decree would also prohibit *Gossi Decree* right holders from exercising their statutory right to change the points of diversion, places, periods or purposes of use of their *Gossi Decree* rights. See I.C. §42-108. *Gossi Decree* right holders would be deprived of their right to make different, additional and/or more productive use of their water rights and their lands. Ironically, while the Special Master's interpretation of the injunction prohibits diversions from the East Fork to supplement *Gossi Decree* rights, it does not prevent supplemental groundwater diversions that are in close proximity to and directly affect East Fork flows.

The record in these subcases demonstrates that the Claimants have historically beneficially used the quantities of water described in their late claims, that the additional quantities of water are necessary to irrigate their lands, and that Claimants use of such water will not interfere with any *Gossi Decree* or other water rights. The record also establishes that several *Gossi Decree* right holders also hold and utilize post-decree East Fork water rights. In addition, the Idaho Department of Fish and Game has obtained bypass flow water rights, and expended significant staff and financial resources in the construction of diversion works and fish screens based upon the Claimants' historic diversions of East Fork water.

The Special Master's interpretation that the *Gossi Decree* injunction restricts the Claimants to use only the quantities of water described in the decree adversely impacts all of these interests,

efforts, and investments. This result is exactly what the legislature intended to prevent by directing IDWR and this Court to consider historic use, practice and customs when recommending and decreeing water rights. *See supra* at 4-5. The legislature has declared that it is in the public interest to accurately define and decree water rights based upon the extent of beneficial use. This Court should not disregard the Claimants' historic beneficial use of East Fork water based upon an incorrect interpretation of the *Gossi Decree* injunction.

III. CONCLUSION

For the reasons stated herein, Claimants respectfully request that the Court grant their *Motion for Reconsideration* and allow Claimants' to file late notices of claim for the above-referenced subcases.

Dated this 12th day of March, 2010.

RINGERT LAW CHARTERED

By: 
Daniel V. Steenson
Attorney for Claimants

CERTIFICATE OF SERVICE

I certify that on March 12, 2010, I served copies of this document, including all attachments by mailing a copy thereof, postage prepaid, to each of the parties listed below.

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Laird Lucas
Attorney at Law
P.O. Box 1342
Boise, ID 83701

Chief, Natural Resources Division
Office of the Attorney General
P.O. Box 44449
Boise, ID 83711-4449



Person serving documents