

DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
STATE OF IDAHO



ERIC J. WILDMAN
PRESIDING JUDGE
(208) 736-3011
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SRBA CHAMBERS
P.O. BOX 2707
TWIN FALL, IDAHO 83303-2707

MEMORANDUM

RECEIVED

MAY 07 2010

DEPARTMENT OF
WATER RESOURCES

Date: 05/06/10
From: Julie Murphy, SRBA Deputy Clerk
To: Daniel V. Steenson & IDWR
Subject: 72-16779, *et al.* (Total of 10 rights)

On 1/13/10, an *Order Denying Motions to File Late Notices of Claim* was filed in the above-captioned water rights. When the Court mailed this *Order* to you, I also returned ten (10) voided checks for the filing fees for said *Motions*. With the filing of today's *Order Granting Motion for Reconsideration*, and this Court's subsequent forwarding of the *Notices of Claim to a Water Right* to IDWR, it is necessary that you now send the appropriate filing fees for each of these claims directly to IDWR. If you have any questions, please call me at (208) 736-3011.

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MAY 07 2010
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAY - 6 2010	
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 72-16779, 72-16780, 72-16781, 72-
	) 16782, 72-16783, 72-16784, 72-16785, 72-
Case No. 39576	) 16786, 72-16787, 72-16788, and 72-16789
	)
	) ORDER GRANTING MOTION FOR
	) RECONSIDERATION AS TO
	) ALTERNATIVE RELIEF (POST-
	) DECREE PRIORITY)
_____	)

I.

APPEARANCES

Daniel V. Steenson, S. Bryce Farris, Ringert Law Chartered, Boise, Idaho, attorneys for Wayne and Melodie Baker, Richard and Cheryl Baker, Eddie Baker, Eddie Baker Jr., Gary and Jackie Ingram, Archie Sherwood, Kenneth Ryan, Lilac Three LLC, and Lilac Six LLC.

Laird J. Lucas, Boise, Idaho, attorney for Valley Sun LLC.

II.

FACTS AND PROCEDURAL BACKGROUND

1. This matter originated in 2008 when Wayne and Melodie Baker, Richard and Cheryl Baker, Eddie Baker, Eddie Baker Jr., Gary and Jackie Ingram, Archie Sherwood, Lilac Three LLC, Lilac Six LLC, and Kenneth Ryan (collectively, "Claimants") filed 12 *Motions to File a Late Notice of Claim* ("Late Notices") for the

above-captioned water right claims. The *Late Notices* claimed water from the East Fork of the Salmon River.

2. Two of the *Late Notices*, 72-16778 and 72-16781, are based on licensed water rights and are not at issue here.

3. The remaining 10 *Late Notices* are based on beneficial use and are at issue here.¹ The source, points of diversion, and places of use of the water rights claimed in these *Late Notices* overlap with and supplement water rights previously decreed to Claimants, or their predecessors-in-interest, in what is referred to herein as the *Gossi Decree*, and subsequently in the Snake River Basin Adjudication ("SRBA").

4. The *Gossi Decree*, dated February 14, 1938, was entered into upon stipulation of the parties' predecessors-in-interest and adjudicated the parties' pre-1938 water rights on the East Fork of the Salmon River. *Gossi v. Giampedraglia*, Sixth Judicial District (D. Idaho February 14, 1938) (unpublished opinion). The water rights partially decreed in favor of Claimants in the SRBA were based upon the water rights decreed to Claimants' predecessors-in-interest in the *Gossi Decree*.

5. Claimants now, via their *Late Notices*, seek overlapping water rights in addition to those previously decreed to them, asserting that the quantities of water decreed to them in the *Gossi Decree* and SRBA are significantly less than their actual historic use. The discrepancy, Claimants assert, results from a failure of the *Gossi Decree* and SRBA partial decrees to take into account the significant conveyance loss associated with their diversions.

6. The errors in the quantities decreed, Claimants contend, stem from the fact that the waters diverted by them under the *Gossi Decree* and SRBA partial decrees have never been measured until recently, when the Idaho Department of Fish and Game installed fish screens on the diversions. These measurements revealed that Claimants in many instances divert in the neighborhood of four to five fold the amount of water they have been decreed.

7. Claimants have not, however, moved to set aside the partial decrees for the various SRBA water rights they assert have been under-quantified. Instead, Claimants

¹ These 10 *Late Notices* are for water right claims 72-16779, 72-16780, 72-16782, 72-16783, 72-16784, 72-16785, 72-16786, 72-16787, 72-16788, and 72-16789.

have chosen to file new beneficial use claims via the *Late Notices* to make up the difference, and have identified the purpose of use for each water right claimed as conveyance loss.²

8. Claimants' *Late Notices* claim priority dates based on the earliest recollections of witnesses who observed the diversions and the associated ditch systems and irrigations practices.

9. Valley Sun LLC, which owns the Greenfire Preserve on the East Fork of the Salmon River, objected to Claimants' *Late Notices*. The Greenfire Preserve is the lower-most property on the East Fork Salmon River and is downstream of Claimants' properties. Valley Sun LLC holds the following surface water rights on the East Fork of the Salmon River for irrigation purposes associated with the Greenfire Preserve: (1) 72-10220A for 5.88 cfs with a priority date of May 10, 1880; (2) 72-10221A for 0.79 cfs with a priority date of May 1, 1936; (3) 72-10222A for 0.29 cfs with a priority date of May 10, 1885; (4) 72-10237A for 2.10 cfs with a priority date of June 28, 1983; and (5) 72-07505A for 0.08 cfs with a priority date of August 18, 1992.

10. Following hearing on Claimants' *Late Notices*, this Court issued an *Order of Reference Appointing Theodore Booth Special Master for Further Proceedings on Motion to File Late Claim* on January 21, 2009.

11. On January 13, 2010, the Special Master entered his *Special Master's Report and Recommendation on Motions to File Late Notices of Claim*, wherein he recommended the denial of the 10 *Late Notices* at issue here and the granting of the remaining 2 *Late Notices* (not at issue here). The basis of the Special Master's recommended denial was that a certain provision in the *Gossi Decree* precluded the parties thereto, and their successors, from making new appropriations of water for use on land covered by the terms of the *Decree*.

12. On January 13, 2010, this Court entered an *Order Denying Motions to File Late Notices of Claim*, wholly adopting the *Special Master's Report and Recommendation*.

² Specifically, Claimants identified the purpose of use for each water right claimed in the *Late Notices* at issue here as "Irrigation (conveyance loss)."

13. On March 15, 2010, Claimants filed their *Motion for Reconsideration of Order Denying Motions to File Late Notices of Claim* with this Court, arguing that the interpretation of the *Gossi Decree* by the Special Master is erroneous because it (1) fails to recognize the purpose of the provision; (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*; (3) abrogates the Claimants' constitutional rights to appropriate the unappropriated waters of this state; and (4) adversely affects existing rights and interests.³

14. Following the submittal of briefing by the parties, hearing on the Claimants' *Motion for Reconsideration* was held before this Court on April 20, 2010.

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on April 20, 2010. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or April 21, 2010.

IV.

DISCUSSION

A. Standard of review.

The decision to grant or deny a motion for reconsideration is left to the sound discretion of the district court. *Indian Springs LLC v. Indian Springs Land Inv., LLC*, 147 Idaho 737, 749, 215 P.3d 457, 469 (2009). A district court acts within its discretion when it: (1) correctly perceives the issue as one of discretion; (2) acts within the outer boundaries of its discretion consistent with applicable legal standards; and (3) reaches its decision by an exercise of reason. *Id.*

B. Claimants have established good cause to file late notices of claim for beneficial use water right claims with priority dates subsequent to February 14, 1938.

³ One of the issues raised and briefed by the parties on reconsideration was whether Claimants' *Motion for Reconsideration* was timely filed. At the April 20, 2010 hearing, this Court ruled that Claimants' *Motion for Reconsideration* was timely.

Pursuant to *SRBA Administrative Order 1* § 4d(2)(e), *Motions to File a Late Notice of Claim* are reviewed under the criteria set forth in Idaho Rule of Civil Procedure 55(c). Rule 55(c) provides that entry of a default can be set aside for good cause shown. The primary considerations in determining good cause are: (1) whether the default was willful; (2) whether a meritorious defense has been presented; and (3) whether setting aside the default would prejudice the opponent. *McFarland v. Curtis*, 123 Idaho 931, 936, 854 P.2d 274, 279 (Ct. App. 1993).

Prior to referring this matter to the Special Master, this Court determined that Claimants demonstrated an excuse for the untimely filing of the *Late Notices* sufficient to satisfy factor one of the Rule 55(c) good cause analysis. The matter was thereafter referred to the Special Master to determine (1) whether Claimants had presented a meritorious defense, and (2) the issue of prejudice to other parties, if any, that may arise as a result of the *Late Notices*. Each will be addressed in turn.

i. Meritorious defense.

The Special Master decided the case on the grounds that Claimants failed to set forth facts amounting to a meritorious defense. Specifically, the Special Master determined that the following provision in the *Gossi Decree* precluded Claimants from making new appropriations of water from the East Fork of the Salmon River to be used on land covered by the terms of the *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.*

(hereinafter, “Limiting Provision”) (emphasis added). Since Claimants now seek supplemental water rights with the same source, points of diversion, and places of use as those water rights covered by the *Gossi Decree*, the Special Master determined that such claims would be precluded as a matter of law under the plain language of the *Decree*.

The effect of a prior decree on subsequently claimed water rights has been previously addressed by Idaho courts. In *State v. Hagerman Water Right Owners, Inc.*,

130 Idaho 736, 742, 947 P.2d 409, 415 (1997), the Idaho Supreme Court instructed that “a decree issued in a private water adjudication binds . . . those parties to the decree.” In so instructing, the Court cited Idaho Code § 42-1401A(9), which defines a private adjudication as binding “those persons joined in the action and for the administration of such rights.” *Id.*

Likewise, this Court has previously held that allowing a claimant to reopen a prior decree to present evidence of a larger quantity than was previously decreed is contrary to principles of *res judicata*:

Claims in the SRBA can vary from the elements in the prior decree to account for changes in circumstances such as abandonment, forfeiture, and accomplished transfer, or to correct errors. However, evidence of an earlier use or **larger quantity than previously decreed** does not fit within either of the above exceptions and constitutes a collateral attack on the prior decree.

The Court makes two observations in this respect. First, the fact that the present owner of a previously decreed water right may now have evidence of an earlier use or larger quantity than was previously decreed does not mean that an error or oversight occurred when the predecessor-in-interest filed (or failed to file) the claim in the prior adjudication. There are other plausible explanations. For instance, claims can be made in a manner so as to avoid contests. Existing differences between users over water rights can be worked out prior to the claim being filed so as to avoid litigation in the adjudication process. Settlements such as these may dictate what each user eventually claims in the adjudication. Therefore, parties or their successors-in-interest to the prior decree are entitled to rely upon the prior decree, at least to the extent that the scope of the right will not be expanded beyond what was previously adjudicated.

Next, allowing a claimant to reopen a prior decree to present evidence of earlier use or **larger quantity than was previously decreed completely undermines the principals of *res judicata* and the Supreme Court’s ruling in *State v. Hagerman Water Right Owners*, as well as the law-of-the-case in the SRBA.**

Order Conditionally Granting Motion to File Late Notice of Claim, (Riggan), Subcase Nos. 74-15015 and 74-15861 (January 12, 2009), pp. 6–7 (footnotes omitted) (emphasis added).

Given the above, applicable law makes clear that the SRBA cannot serve as an opportunity for parties to re-adjudicate their prior decreed water rights. To the extent

Claimants seek overlapping water rights with the same source, points of diversion, and places of use as those water rights covered by the *Gossi Decree*, and with a priority date prior to the date of the *Decree*, Claimants' late claims are precluded as a matter of law under principles of *res judicata*.

That being said, this Court has consistently held that a previous decree is not conclusive with respect to post-decree appropriations, and has customarily allowed parties to claim additional beneficial use water rights not recognized in a prior decree with priority dates subsequent to the effective date of the prior decree. See e.g., *Order Conditionally Granting Motion to File Late Notice of Claim, (Riggan)*, Subcase Nos. 74-15015 and 74-15861 (January 12, 2009); *Order of Recommitment to Special Master for Specific Finding*, Subcase Nos. 74-1080 and 74-15537 (January 12, 2009) (conflict with Lemhi Decree); *Order of Partial Decrees and Order Disallowing Water Right, (Herbst)*, Subcase Nos. 74-250 *et al.* (January 12, 2009) (conflict with Lemhi Decree); *Order of Recommitment to Special Master for Specific Findings, (Carlson)*, Subcase Nos. 74-50A *et al.* (January 12, 2009) (conflict with Lemhi Decree). This is based on the reasoning that prior to the enactment of the statutory deadlines for appropriating water under the beneficial use method of appropriation, water users were not precluded from appropriating additional water via beneficial use.⁴

In this case, the priority dates identified by Claimants in their *Late Notices* range from 1928 to 1932, all prior to the date of the *Gossi Decree*. As stated above, Claimants are precluded by principles of *res judicata* from claiming beneficial use water rights on lands covered by the *Gossi Decree* with priority dates prior to the date of the *Decree*. However, Claimants have alternatively asserted in their briefing and at oral argument priority dates for the *Late Notices* of February 15, 1938, which is one day subsequent to the *Decree* date. To the extent Claimants seek supplemental beneficial use water rights to be used on lands covered by the *Gossi Decree* with priority dates subsequent to the *Decree* date, Claimants have set forth sufficient facts to establish a meritorious defense to their *Late Notices*.

⁴ Permit and license requirements for appropriating surface water did not become mandatory until July 1, 1971. 1971 Idaho Sess. Laws, ch. 177, p.884 (approved March 24, 1971, effective July 1, 1971).

The fact that Claimants have, for the purposes of a Rule 55(c) good cause analysis, set forth sufficient facts to establish a meritorious defense does not, however, establish the legal effect of the *Gossi Decree*'s Limiting Provision on the *Late Notices*. That determination hinges upon the interpretation of the Limiting Provision, which is a question of law. *See e.g., Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007) (holding, "the determination and legal effect of a contractual provision is a question of law").

Under Idaho law, the interpretation of a decree is "subject to the same rules applicable to construction of contracts." *McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (Ct. App. 2008). The Idaho Supreme Court has directed that "the interpretation of a contract begins with the language of the contract itself." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). Where the language of a contract is unambiguous, its meaning and legal effect must be determined from its words. *Id.* On the other hand, where language in a contract is found ambiguous, determination of its meaning is a question of fact. *McKoon*, 146 Idaho at 109, 190 P.3d at 928. A contractual provision is ambiguous if it is reasonably subject to conflicting interpretations. *Cristo Viene Pentecostal Church*, 144 Idaho at 308, 160 P.3d at 747.

In this case, a question exists as to the legal effect of the Limiting Provision of the *Gossi Decree* on the *Late Notices*. The Special Master interpreted the Limiting Provision to preclude Claimants from now seeking supplemental water rights with the same source, points of diversion, and places of use as those water rights covered by the *Decree*, regardless of the claimed priority date. Such an interpretation is certainly reasonable.

However, the parties in their briefing on reconsideration set forth alternative interpretations of the Limiting Provision, which although conflicting, are also reasonable. For instance, Claimants argue that the Limiting Provision can be interpreted to restrain and prohibit only interference with decreed rights, and not as enjoining or restraining future beneficial use of unappropriated water from the East Fork of the Salmon River on any lands, whether the place of use of the future appropriation is or is not identified in the *Gossi Decree*.

Since there is a colorable position that the Limiting Provision is reasonably subject to more than one interpretation, Claimants have demonstrated a meritorious

position with respect to this issue for purposes of satisfying the good cause standard of Idaho Rule of Civil Procedure 55(c). A motion to file a late claim is not the proper proceeding for litigating the merits of this position. The parties will have a full and fair opportunity to litigate the meaning of the Limiting Provision after the claims have been investigated and reported by the Department and any objections filed.

Another argument raised pertains to the excessive quantity of water used for conveyance loss as compared to the quantity used for irrigating. In some cases the conveyance loss represents 4 to 5 times the quantity ultimately applied for irrigating. For purposes of establishing a meritorious position there is no “bright line” limitation on a quantity that can be used for conveyance. Although the Department may have a policy regarding conveyance loss, it must take into account factors such as historic use and custom for the pertinent area, consumptive use, the quantity and timing of any return flow as well as the hydrology of the area (i.e. gaining or losing reach of the river). Such factors may influence what constitutes an acceptable conveyance loss under the circumstances. For example, the timing of a high return flow may actually enhance the availability of water to downstream users. At a minimum, Claimants have demonstrated a colorable argument in support of the conveyance loss. Again, it is not necessary to litigate the merits in the context of a motion to file a late notice of claim. Claimants need only exhibit a meritorious position. Accordingly, to the extent Claimants seek supplemental beneficial use water rights to be used on lands covered by the *Gossi Decree* with priority dates subsequent to the *Decree* date, Claimants have set forth sufficient facts for the purposes of a Rule 55(c) good cause analysis to establish a meritorious defense to their *Late Notices*.

ii. Prejudice to other parties.

With respect to the issue of prejudice to other parties, the Special Master did not find that such prejudice exists. To the contrary, the Special Master recommended that the two *Late Notices* not at issue here be granted, even though they are diverted from the same source as the *Late Notices* presently at issue. The resulting inference is that the Special Master determined that there is no prejudice to other parties on the source resulting from the *Late Notices*. This Court agrees.

Prejudice to other parties is the factor on which the Court places significant emphasis in a Rule 55(c) good cause analysis. The Court must weigh the prospect of denying a claim to a property right against the prejudicial effect that allowing the late claim to proceed would have to the rest of those who timely had their claims adjudicated. The fact that claimants who timely filed may have to file and prosecute an objection is not the threshold determination. The Court weighs a number of factors such as in the event the late claim is ultimately decreed would the resulting shifting of the tabulation of priorities on the source effectively deny an existing water user sufficient water to satisfy their previously adjudicated right. In other words, would the most junior right on the source for all intents and purposes become a “paper right.”⁵

In determining prejudice to other parties in the context of a Rule 55(c) good cause analysis this Court weighs several factors. These include, but are not limited to the following: (1) whether the late claim is a consumptive or non-consumptive claim; (2) whether the late claim will disturb a settlement agreement previously entered into by other water users on the source; (3) whether the late claim is based on a license or prior decree; (4) whether any unclaimed water is still available under the prior decree, if the late claim is based on prior decree; (5) whether the late claimant has historically and consistently been using the water in accordance with the claimed elements thereby avoiding any surprise to other water users on the source regarding a new unforeseen demand on the source; (6) whether the source is already fully or over appropriated; (7) whether the particular basin in which the late claim is asserted is a completed basin, and if so; (8) the extent to which existing users have relied on the basin being completed; and, (9) if interim administration according to decreed rights is in effect, the extent to which existing users now rely on the current administrative scheme.

In this case, the evidence in the record establishes that the use claimed in the *Late Notices* – conveyance loss – is non-consumptive. Testimony was presented via the *Affidavit of David B. Shaw* that the water diverted by Claimants from the East Fork of the

⁵ The Court recognizes that in times of shortage there may be insufficient water to satisfy the most junior right or rights on the source. However, the Court looks at whether or not unappropriated water is available to fill the rights decreed on the source based on typical historical water supplies and conditions. In making the determination the Court takes into account whether or not the claimant has historically been diverting and using the water but just failed to file a claim. In other words, would allowing the late claim deviate from the historical status quo.

Salmon River is never very far from the river, and water lost through seepage from the irrigation ditches and from the fields themselves will return relatively rapidly to the river (i.e., within 10 to 400 days). (*Shaw Aff.*, ¶6). This evidence was uncontroverted in the record.

With respect to the issue of prior settlement agreements, no evidence of any settlement agreement aside from the stipulated *Gossi Decree* has been raised by the parties pertaining to the reach of the East Fork of the Salmon River at issue here. Since Claimants are precluded from seeking priority dates for their *Late Claims* senior to the water rights decreed in the *Gossi Decree*, there is no evidence that the *Late Notices* would disturb any prior settlement agreement pertaining to the East Fork of the Salmon River. There is no issue with respect to available water under a prior decree as these claims are based on beneficial use and subsequent to the *Gossi Decree*.

Last, no evidence in the record exists, nor has any allegation been made, that the stretch of the East Fork of the Salmon River at issue here has been fully appropriated. Undisputed evidence in the record shows that the stretch of the East Fork of the Salmon River at issue here is actually a gaining reach. (*Hamilton Aff.*, ¶¶ 10 & 12). There is no indication that the source is either fully or over appropriated or that allowing the late claims to proceed would deny Valley Sun LLC or other users of water to satisfy their existing rights based on historically typical conditions. The claims being sought are based on what has been historically and consistently diverted by the Claimants. There is no unforeseen additional burden on the source. The issue arose when it was discovered that the quantity historically diverted exceeded the quantity that was decreed.

The above-mentioned factors, when weighed in conjunction, establish that there is no prejudice to other parties on the source resulting from the *Late Notices*. Although this Court recognizes that Basin 72 is a completed basin, and that water users with previously decreed rights within a completed basin are less likely to monitor the filing of late notices such as those at issue here, this factor alone is insufficient to outweigh the other factors considered by this Court in this instance.

Valley Sun LLC argues that permitting Claimants to move forward with their *Late Notices* will result in *per se* injury to it because it holds several surface water rights on the East Fork of the Salmon River with priority dates subsequent to February 15, 1938.

Valley Sun LLC cites *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996) and *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) for the proposition that injury to a priority date is *per se*. While it is true that injury to a priority date is *per se*, injury to a priority date alone is insufficient to establish prejudice for purposes of a Rule 55(c) good cause analysis.⁶ Were that the standard the filing of a motion for a late claim would be an act in futility unless the claimant agreed to subordinate his late claim to all other rights on the source. This Court has never so strictly construed the prejudice element of the Rule 55(c) good cause analysis. There are numerous legitimate justifications for filing a late notice of claim in the SRBA, and it has not been the practice of this Court to preclude the same for the sole reason that someone else on the source has a partially decreed water right with a priority date senior to the claimed priority date in the late claim.

V.

ORDER

For the reasons set forth above, the Court concludes that Claimants have satisfied the I.R.C.P. 55(c) good cause standard. This conclusion is not to be interpreted as a determination as to the ultimate validity of the claims. Following investigation and recommendation by the Department, Valley Sun LLC as well as any other party to the adjudication will have the opportunity to object to the recommendation in the *Director's Report*. This Court therefore reverses its prior ruling.

THEREFORE IT IS ORDERED that Claimants' *Motion for Reconsideration* is **HEREBY GRANTED** and Claimants' *Motions to File a Late Notice of Claim* for water

⁶ Unlike the situation in *A & B* and *Fremont-Madison* the issue in this case arises in the context of seeking leave to file a late claim for the confirmation of an existing use. *A & B* and *Fremont-Madison* dealt with the application of the amnesty statutes I.C. § 42-1425 and I.C. § 42-1426, which operate to confirm previously unauthorized transfers or enlargements in the absence of injury to existing users. Unlike the situation in this case, allowing the amnesty statutes to apply where injury exists and without mitigating for such injury, raises constitutional problems. As a result, with respect to enlargement claims the Court requires subordination to non-enlargement claims with priority dates that precede the enactment of the enlargement statute. The same constitutional issues are not present in this case. (i.e. the late claims do not seek to have a previously unauthorized use confirmed senior to existing rights).

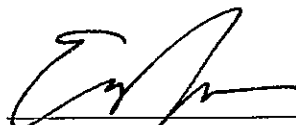
right claims 72-16779, 72-16780, 72-16782, 72-16783, 72-16784, 72-16785, 72-16786, 72-16787, 72-16788, and 72-16789 are **granted**. Provided, however, that the earliest priority that can be claimed for each claim is one day later than the date of entry of the *Gossi* decree or February 15, 1938.

The original *Notices of Claim*, as well as any attached filing fees, and a copy of this **Order** will be forwarded to the Idaho Department of Water Resources for further action. Following investigation by the Idaho Department of Water Resources, recommendation for the claims will be reported in the next *Late Claims Director's Report* which is now issued on an annual basis. This modifies the provisions of **SRBA Administrative Order 1** 4d(2)(h).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated May 6, 2010



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION FOR RECONSIDERATION AS TO ALTERNATIVE RELIEF (POST- DECREE PRIORITY) was mailed on May 06, 2010, with sufficient first-class postage to the following:

ARCHIE SHERWOOD
CHERYL K BAKER
D WAYNE BAKER
EDDIE BAKER JR
EDDIE E BAKER
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JACKIE INGRAM
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