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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
FEB - 9 2011
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	) Subcase Nos. 01-217, 01-218, 01-4024 and 01-4025
	) (Minidoka Power Rights)
Case No. 39576	)
	) Subcase Nos. 01-2068 and 01-4054
	) (Palisades Power Rights)
	)
	) MEMORANDUM DECISION AND ORDER ON
	) CHALLENGE
	)
	)

Holding: The ruling of the Special Master is affirmed.

Appearances:

Paul L. Arrington of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for A&B Irrigation District, Falls Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

W. Kent Fletcher of Fletcher Law Office, Burley, Idaho, attorney for Minidoka Irrigation District.

C. Tom Arkoosh, Capital Law Group, PLLC, Boise, Idaho, attorneys for American Falls Reservoir District #2.

David W. Gehlert, U.S. Department of Justice, Natural Resources Division, Denver, Colorado, attorney for the United States, Bureau of Reclamation.

David I. Stanish, Deputy Attorney General of the State of Idaho, Natural Resources Division, Boise, Idaho, attorney for the State of Idaho.

Chris M. Bromley, Deputy Attorney General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorney for the Idaho Department of Water Resources.

I.

FACTUAL AND PROCEDURAL BACKGROUND

1. This matter concerns certain water rights claimed in the Snake River Basin Adjudication (“SRBA”) by the United States Bureau of Reclamation (“USBOR”) for hydropower purposes. The claims are for water use associated with powerplant facilities owned and operated by the USBOR at Minidoka and Palisades Reservoirs. Both reservoirs are located along the Snake River in southeastern Idaho in what is commonly referred to as the Upper Snake River Basin.

2. On December 19, 2006, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) filed his *Director’s Report, Reporting Area Basin 01, IDWR Part 2*, recommending the above-captioned water rights in the name of the USBOR.¹

3. The Director recommended that the following remark be included under the priority date element of all the above-captioned rights:

The appropriator shall exercise this right in a manner that recognizes the historic practice that the use of water for power generation is incidental to the rights of others to the use of water for other purposes. The appropriator shall not make a delivery call for hydropower generation except as against junior hydropower rights.

(“Subordination Remark”).

4. Under the “other provisions necessary” portion of the four Minidoka power claims (i.e., 01-217, 01-218, 01-4024 and 01-4025), the Director recommended the following remark be included:

The delivery of water to this right may be subject to the provisions for winter power operation at the Minidoka power plant as recognized in the

¹ The six water rights were recommended by the Director with the following elements:

Right	Source	Quantity	Priority	Purpose	Period of Use
01-217	Snake River	2,500 cfs	06/15/1909	Power	01/01 – 12/31
01-218	Snake River	200 cfs	07/01/1912	Power	01/01 – 12/31
01-4024	Snake River	825 cfs	06/16/1927	Power	01/01 – 12/31
01-4025	Snake River	1,510 cfs	05/07/1942	Power	01/01 – 12/31
01-2068	Snake River	1,200,000 afy	07/28/1939	Power from Storage Power Storage Irrigation Storage Irrigation from Storage	01/01 – 12/31 01/01 – 12/31 01/01 – 12/31 03/15 – 11/15
01-4054	Snake River	8,560 cfs	05/06/1958	Power	01/01 – 12/31

Burley Irrigation Dist. v. Eagle, Supplemental Decree (Idaho 5th Jud. Dist., July 10, 1968) and Aberdeen-Springfield Canal Co. v. Eagle, Supplemental Decree (Idaho 7th Jud. Dist., March 12, 1969).

(“Winter Power Operation Remark”).

5. *Objections* to the recommendations were subsequently filed by various parties including the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Falls Irrigation District, Minidoka Irrigation District, North Side Canal Company, and the Twin Falls Canal Company (collectively “Surface Water Coalition” or “SWC”). In addition to objecting to various other elements, the *Objections* filed by the SWC members asserted that the Subordination Remark recommended by the Director should be stricken.

6. The USBOR also objected to the recommendations on the grounds that the Subordination Remark and the Winter Power Operation Remark recommended by the Director should be stricken.²

7. *Responses* to the *Objections* were filed by various parties including the State of Idaho, the Idaho Power Company, and the Idaho Ground Water Appropriators, Inc. (“IGWA”).

8. On April 11, 2008, the Director filed a *Supplemental Director's Report* with respect to the above-captioned water right claims, wherein he set forth the basis for his recommendation that the decrees for those rights include the Subordination Remark. In that *Report* the Director states that the Subordination Remark was recommended because of “the past historical practice of treating BOR’s power water rights as subordinate to junior upstream non-hydropower rights” and because the “system is operated with a preference for irrigation and other non-hydropower water rights.” *Supplemental Director's Report*, p.5.

9. On August 18, 2009, the State of Idaho filed a *Motion for Partial Summary Judgment* in the above-captioned subcases, requesting that the proposed Subordination Remark and Winter Power Operation Remark recommended by the Director be replaced by its own alternative proposed remarks.

² The City of Pocatello also filed *Objections*, but they were subsequently withdrawn.

10. With respect to water right claims 01-217 and 01-218, the State proposed that the following remarks be substituted in place of the remarks recommended by the Director:

Priority Date

While the United States has the privilege to use 2,700 cfs for the development of power under water right nos. 01-00217 and 01-00218, it will be the objective of the United States in the operation of the Minidoka powerplant to limit the exercise of water right nos. 01-00217 and 01-00218 for power production at the Minidoka powerplant whenever operation of the Minidoka powerplant to the full extent of these water rights for power production would result in loss of water otherwise storable in the reservoir system. Accordingly, except as it is determined by the Secretary that additional water may be passed through Minidoka Dam without the loss of water that could be stored in the reservoir system, the United States will limit the release of water through the Minidoka Dam. To the extent that it is practicable to do so, the Watermaster and the Water District 1 Advisory Committee will be informed in advance of any plans for the release of water in excess of the foregoing limitation. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

11. With respect to water right claims 01-4024 and 01-4025 the State requested that the following remarks be substituted in place of the remarks recommended by the Director:

Priority Date

This right may be exercised if it is determined by the Secretary that additional water may be passed through Minidoka Dam, in excess of that authorized under right nos. 01-00217 and 01-00218, without the loss of water that could be stored in the reservoir system. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

This right carries no entitlement to make a delivery call for hydropower generation except as against junior hydropower rights.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

12. With respect to water right claim 01-2068 the State requested that the following remarks be substituted in place of the remarks recommended by the Director:

Priority Date

The United States, after consultation with the Watermaster and the Water District 1 Advisory Committee, may release stored water from Jackson Lake and Palisades reservoirs for the maintenance of power production at Palisades Dam powerplant and may store such water in American Falls Reservoir. The release of such water will be confined, however, when it appears to the Secretary that American Falls, Palisades, and Jackson Lake reservoirs will fail to fill, to not more than 1,000 cfs for minimum firm power production and that amount which can be stored in American Falls Reservoir; and no such release shall be made that will preclude the later delivery of water, by exchange or otherwise, to the upper valley entities entitled thereto. "Upper valley entities" shall mean those reservoir spaceholders diverting from the Snake River and its tributaries above American Falls Dam.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

13. With respect to water right claim 01-4054 the State requested that the following remarks be substituted in place of the remarks recommended by the Director:

Priority Date

This right may be exercised if it is determined by the Secretary that additional water may be passed through Palisades Dam, in excess of that authorized under water right no. 01-02068, without the loss of water that

could be stored in the reservoir system. "Reservoir system" shall mean all Federal reservoirs on the Snake River and its tributaries down to and including Lake Walcott.

Other Provisions Necessary

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

14. On August 19, 2010, the USBOR filed its *Motion for Summary Judgment*, wherein it agreed that the remarks proposed by the State of Idaho in its *Motion* should be substituted for the remarks proposed by the Director in his recommendations.³

15. On November 3, 2009, the SWC and the Idaho Power Company filed their *Joint Memorandum in Opposition to State of Idaho's and United States' Motions for Summary Judgment*.

16. Following a hearing, the Special Master entered his *Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation*. The Special Master granted the *Motions for Summary Judgment* filed by the State and the USBOR, and recommended that when the above-captioned water rights are decreed they include "the 'priority date' and 'other provisions necessary' remarks proposed by the State and United States." *Order Granting*, p. 14.

17. On July 29, 2010, the Special Master entered an *Order* denying a *Motion to Alter or Amend* filed by the SWC.

18. The SWC timely filed a *Notice of Challenge* with this Court, challenging the Special Master's *Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation* and his *Order Denying Joint Motion to Alter or Amend*.

³ The proposed remarks were derived from a settlement between the State and the USBOR.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on December 21, 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 December 22, 2010.

III.

STANDARD OF REVIEW

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

IV.

DISCUSSION

A. Historical Background.

Consideration of the legal issues and arguments presented in this Challenge requires a brief synopsis of certain historical agreements and prior decrees involving water users located on the Upper Snake River Basin. Of particular importance to the arguments presented are what are referred to herein as the "Palisades Contracts" and the

“Eagle Decree.” Both of these sets of documents pertain to, and result from, the development of the Minidoka and Palisades Dam and Reservoir projects.

The Minidoka and Palisades Dam and Reservoir projects were authorized and developed pursuant the authority of the Reclamation Act of 1902 and its subsequent amendments. The USBOR commenced the development of the Minidoka Dam and Reservoir project in the early 1900’s. The development of the Palisades Dam and Reservoir project was originally authorized in 1941 and reauthorized in 1949. Pub. L. No. 864 (1950). However, the authorization and funding of Palisades Dam and Reservoir was contingent upon the securing of an adequate water supply for the reservoir:

The continuation of construction of Palisades Dam beyond December 31, 1951, or such later controlling date fixed by the Secretary as herein provided, is hereby made contingent on there being a finding by the Secretary by the controlling date that contracts have been entered into with various water users’ organizations of the Upper Snake River Valley in Idaho that in his opinion will provide for an average annual savings of one hundred and thirty-five thousand acre-feet of winter water.

Id.

In an attempt to secure the additional water required, negotiations commenced between the USBOR and Upper Snake River Basin water users. Issues discussed included the historical practice in the area of diverting water into canals during the winter season for stock and domestic purposes as well as the practice of passing water through Minidoka Dam in the winter for power generation. Both practices resulted in the loss of water from the system which could otherwise be stored. An agreement was reached on these and other issues, and over a period of several years more than 50 formal contracts were entered into by the USBOR and various water users in the Upper Snake River Basin memorializing the agreement. These contracts are collectively referred to as the “Palisades Contracts.”⁴

⁴ Excerpts of the Palisades Contract entered into between the USBOR and SWC member, the A&B Irrigation District, are attached as Exhibit A to the *Temple Affidavit*. Excerpts of the Palisades Contract entered into between the USBOR and SWC Member, the Burley Irrigation District, are attached as Exhibit C to the *Bingham Affidavit*. A copy of the Palisades Contract entered into between the USBOR and the Aberdeen-Springfield Canal Company, who is not a party to this action, is attached as Exhibit B to the *Jarvis Affidavit*.

In a document entitled *Status Report Workings of Palisades Water Savings Agreements* dated August 5, 1968, the USBOR characterized the primary mechanisms agreed to in the Palisades Contracts to secure additional water for Palisades Reservoir:

- (1) the elimination by the water users at their own expense of winter diversions in order to conserve water for storage in Palisades and American Falls Reservoirs;
- (2) the curtailment of the use of water for power generation at Minidoka Dam for the financial account of the Minidoka Project to conserve additional water for storage in American Falls, Island Park, and Palisades Reservoirs;
- (3) the coordinated operation of the reservoir system for maximum storage water yields

Status Report Workings of Palisades Water Savings Agreements, p. 2.⁵

Implementation of the above-mentioned conservation measures, specifically the curtailment of power generation at Minidoka Dam, did however mean that certain water users in the Minidoka Project who were otherwise entitled to certain benefits from such power generation would have to be compensated for the loss of those benefits. The parties addressed this issue by including what will be referred to herein as a “power loss provision” in the Palisades Contracts. The USBOR characterized this aspect of the agreement as follows:

[The Palisades Contracts] provide for limiting the use of water for power generation at American Falls and Minidoka Dams below the amounts that would accrue to rights for power production at these two dams. Such curtailment will result in a loss of generation of units 1 to 6 of that powerplant but will result in saving of water for storage for irrigation use. The water so saved is credited to American Falls, Island Park, and Palisades Reservoirs. In compensation for such losses in power generation, replacement power is provided to the Minidoka power system, and, based on a moving average of the net annual amount of replacement power and energy required, the costs thereof are charged to the beneficiaries of the resultant water saving and the financial benefit is credited to the water users of the Minidoka Project.

⁵ A copy of the August 5, 1968 *Status Report Workings of Palisades Water Savings Agreements* is attached to the *Affidavit of David A. Jarvis* as Exhibit A.

Status Report Workings of Palisades Water Savings Agreements, p. 5. Ultimately, via the Palisades Contracts, the additional water necessary for the authorization and funding of Palisades Dam and Reservoir was secured.

After the Palisades Contracts were entered into certain water users located on the Snake River above Milner Dam initiated a water adjudication in the Twin Falls District Court in *Burley Irrigation District, et al v. Eagle* (“*Eagle Decree Adjudication*”). The named defendant was Henry Eagle, the Watermaster for Water District No. 36 (now District No. 01). On July 10, 1968, following the filing of a disclaimer of interest by the defendant, District Judge Theron W. Ward entered his *Findings of Fact and Conclusions of Law* and *Supplemental Decree* upon stipulation of the parties (“*Eagle Decree*”).

The *Eagle Decree* professed to adjudicate rights to the use of water from the Snake River and its tributaries above Milner Dam. However, the rights decreed were expressly made supplemental to prior decrees previously entered in the following cases: (1) the decree entered in the case entitled *Twin Falls Canal Company v. Foster, et al*, by the Twin Falls County District Court on June 20, 1913 (“*Foster Decree*”); the decree entered in the case entitled *Rexburg Irrigation Company, et al, v. Teton Irrigation Canal Company, et al*, by the Fremont County District Court on December 16, 1910 (“*Rexburg Decree*”); and the decree entered in the case entitled *Woodville Canal Company v. Clark and Edwards Canal and Irrigation Company, et al*, by the District Court of the United States for the District of Idaho, Eastern Division on June 25, 1929 (“*Woodville Decree*”).

In addition, the *Eagle Decree* contained the following provision addressing the Palisades Contracts:

That the contracts entered into between various of the parties Plaintiff and the United States of America, Bureau of Reclamation, as the same have been amended and modified, in connection with the Palisades project and other projects, were intended to be, and are, binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries, above Milner Dam, and constitute a *common plan* for the administration of the Snake River.

Eagle Decree, p. 19 (emphasis added).⁶ The *Decree* incorporated by reference and “ratified, confirmed and approved” certain provisions of the Palisades Contracts. The

⁶ A copy of the *Eagle Decree* is attached to the *Affidavit of David I. Stanish in Support of the State of Idaho's Motion for Partial Summary Judgment* as Exhibit E.

provisions incorporated into the *Eagle Decree* pertained to, among other things, the three water savings mechanisms identified in the Palisades Contracts: (1) the elimination of winter diversions; (2) the curtailment of use of water for power generation at Minidoka Dam; and (3) the coordinated operation of the reservoir system for maximum storage.

Although many surface water users and water entities in the Upper Snake River Basin were a party to the *Eagle Decree* Adjudication, neither the USBOR nor the State of Idaho were named parties to the action.

B. The Special Master did not err in holding that neither the USBOR nor the State of Idaho are bound by the *Eagle Decree*.

One of the issues addressed on summary judgment was whether the terms of the *Eagle Decree* are binding on the USBOR and the State of Idaho. In particular, the SWC argue that summary judgment should have been precluded in this matter because the remarks proposed by the State and USBOR fail to reflect the “common plan” established in the *Eagle Decree* and unlawfully expand the subordination of the rights beyond that subordination recognized and confirmed by the *Decree*. The Special Master held that the *Eagle Decree* was not binding on the State or the USBOR because neither entity was a party to the *Eagle Decree* Adjudication and because the Adjudication was not a general adjudication. On Challenge, the SWC argues the *Eagle Decree* is, in essence, a *de jure* and *de facto* general adjudication that is binding upon the USBOR and the State. For the reasons set forth below this Court disagrees.

1. The adjudication resulting in the *Eagle Decree* was not a general adjudication.

One of the differences between a general adjudication and other adjudications is the extent of their resulting binding effect. For example, the Idaho Supreme Court has previously instructed that “a private water adjudication binds only those parties to the decree.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997); I.C. § 42-1401A(8). On the other hand a decree entered in a general adjudication is, subject to certain exceptions, “conclusive as to the nature and extent of all

water rights in the adjudicated water system.” I.C. § 42-1420(1). Thus, as a general matter once a final decree is entered in a general adjudication, all water users within the adjudicated water system are bound by its terms and cannot subsequently attack it. *See* I.C. § 42-1420(1). This includes water users who did not file claims but should have.

In this case it is undisputed that the *Eagle Decree* Adjudication was commenced pursuant to former Idaho Code § 42-1405 (1948).⁷ At the time the complaint was filed in the *Eagle Decree* Adjudication, Idaho Code § 42-1405 (1948) provided for the summary supplemental adjudication of water rights.⁸ A summary supplemental adjudication proceeding was permitted under the former statute only where the priority of rights upon the stream, canal or reservoir at issue had previously been determined by the entry of a decree and *thereafter* one of the following two situations presented itself:

It shall appear that any person or corporation having the right to the use of any part of said water was not included in said decree as a party thereto, and said right was not determined thereby, or that any person who subsequent thereto has acquired any right to the use of such waters, any such person or corporation may have such right adjudicated in the following manner

I.C. § 42-1405 (1948).

Under such circumstances, a water user could “bring an action in the district court of the county wherein such decree was entered against the watermaster having charge of said stream, canal or reservoir in which said party claims an interest.” *Id.* The former statute required only that the applicable watermaster be named as a defendant, that the applicable watermaster be served with a copy of the summons and complaint, and that the plaintiff publish a notice of the pendency and purpose of the action in such newspapers as the judge may order once a week for not less than three weeks. *Id.*

The SWC argues that even though the *Eagle Decree* resulted from a summary supplemental adjudication proceeding, it is a *de jure* and/or *de facto* general adjudication

⁷ In the *Findings of Fact and Conclusions of Law* accompanying the *Eagle Decree* District Judge Theron W. Ward made the finding that the adjudication was commenced pursuant to Idaho Code § 42-1405. pp. 1 & 2. A copy of the District Court’s *Findings of Fact and Conclusions of Law* is attached to the *Affidavit of Travis L. Thompson* as Exhibit E.

⁸ A copy of Idaho Code § 42-1405 as it existed at the time the complaint was filed in Twin Falls County Case *Burley Irrigation District, et al v. Eagle* is attached hereto as Exhibit A. Summary supplemental adjudications are currently governed by Idaho Code § 42-1424.

decree that is binding on parties and non-parties alike. A review of Idaho Code § 42-1405 (1948) reveals that the SWC's argument is untenable. A decree issued as a result of a summary supplemental adjudication proceeding under the former statute by its express terms did not adjudicate any right to the use of water. Rather, it simply gave a *prima facie* right to the delivery of so much water:

The court by its decree in said action shall determine the rights of said plaintiff in accordance with the proof submitted but subject to the terms of the original decree hereinbefore referred to: provided, that the right thus established shall not be deemed adjudicated, but prima facie merely, and may be attacked by suit brought in a court of competent jurisdiction at any time by any person deeming himself aggrieved thereby.

I.C. § 42-1405 (1948) (emphasis added). The Idaho Supreme Court aptly described the process as set forth in Compiled Statute § 7036 – Idaho Code § 42-1405's nearly identical predecessor – as follows:

[O]ne who was a stranger to the decree or any subsequent appropriator might, if satisfied with the earlier decree, accept its terms, and avail himself of a summary and inexpensive remedy *to establish his prima facie right.*

Mays v. District Court of Sixth Judicial Dist., 24 Idaho 200, 206–207, 200 P. 115, 116 (1921) (emphasis added).

The differences between a general adjudication decree and a summary supplemental adjudication decree issued pursuant to the former statute are stark. Most significantly, it is clear that I.C. § 42-1405 (1948) did not contemplate that such a decree would have the same *res judicata* or binding effect as a general adjudication decree. Unlike a general adjudication decree, the express terms of the former statute provide that a decree issued in a summary supplemental adjudication is *not* conclusive as to the nature and extent of any water right, but is merely *prima facie* evidence of a right to use of water. Moreover, unlike a general adjudication decree the express terms of the former statute direct that a summary supplemental adjudication may be subsequently attacked by third parties. Since the *Eagle Decree* does not carry the binding or *res judicata* effect of a general adjudication decree it cannot bind non-parties to its terms. The Special Master did not err in holding that the *Eagle Decree* is not binding on the USBOR, which undisputedly was not a named party to the adjudication, or the State of Idaho.

2. The adjudication resulting in the *Eagle Decree* did not fall within the terms of the McCarran Amendment.

The McCarran Amendment, 43 U.S.C. § 666, was enacted by Congress in 1952. 66 Stat 560 §§ 208(a)-(c) (1952). It provides for the waiver of federal sovereign immunity in certain state water adjudications, thereby allowing the United States and Indian Tribes' water rights to be determined in a state-court proceeding:

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances

43 U.S.C. § 666.

In *In Re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (1988), the Idaho Supreme Court addressed the issue of what portions of the Snake River Basin would have to be included in the Snake River Basin Adjudication in order to establish jurisdiction over the United States. At issue was whether the adjudication needed to include the Boise River basin and the Weiser River basin, both of which are tributaries to the Snake River. The Court's decision rested on the interpretation and application of the McCarran Amendment. The Court found that "the necessity for the inclusion of *all* tributaries of the Snake River in order to obtain jurisdiction over the United States is made clear by the legislative and judicial history of the McCarran Amendment." *Id.* at 6, 764 P.2d at 83 (emphasis added). The Court went on to instruct that the McCarran Amendment "requires the adjudication of the rights of *all* those who use the water of a river system within a state, including those who use the water of tributaries," to establish jurisdiction over the United States. *Id.* at 9, 764 P.2d at 86 (emphasis added). The Court resolved that in order for the United States to be subject to the jurisdiction of the trial

court in the Snake River Basin Adjudication, the adjudication would have to include the rights of all claimants on the Snake River and all of its tributaries, including those in the Boise River basin and the Weiser River basin. *Id.* at 8, 764 P.2d at 85.⁹

In this case it is undisputed that *Eagle Decree* did not include all tributaries of the Snake River, or even the entirety of the main stem of the Snake River itself. In the *Findings of Fact and Conclusions of Law* accompanying the *Eagle Decree*, the district court found that “the Plaintiffs herein comprise 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. . . .*” It is also undisputed that the USBOR was not a named party to the proceedings culminating in the *Eagle Decree*. Since the adjudication proceeding resulting in the *Eagle Decree* did not include the rights of all claimants on the Snake River and all of its tributaries, it did not fall within the term of the McCarran Amendment.

The SWC argues the United States waived its sovereign immunity to the state proceeding resulting in the *Eagle Decree* as a result of certain correspondence drafted to and from William Burpee, a Field Solicitor for the United States Department of Interior, and John Rosholt, one of the attorneys who represented certain parties to the *Eagle Decree*. The letters reveal that Field Solicitor Burpee was aware of the *Eagle Decree* Adjudication, reviewed the complaint filed in that proceeding, and expressed certain thoughts and recommendations regarding the proceeding.¹⁰ However, the U.S. Supreme Court has made clear that “[w]here jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States.” *State of Minnesota v. U.S.*, 305 U.S. 382, 388–389 (1939). Therefore, the actions of the Field Solicitor in this case cannot be construed as a waiver of the United States’ immunity to being sued in state court.

Since the *Eagle Decree* Adjudication did not fall with the terms of the McCarran Amendment, and because the United States did not otherwise waive its sovereign

⁹ As a result of that holding the water rights filed in the completed Lemhi Adjudication and substantially completed Payette Adjudication were required to be re-filed in the SRBA.

¹⁰ The subject letters are included in the record as Exhibits F, G, H, and I to the *Affidavit of Travis L. Thompson*.

immunity, the Special Master did not err in holding that the United States is not bound by the *Eagle Decree*.

3. The supplemental adjudication statute did not provide a process for the commencement of a general or McCarran adjudication.

A plain reading of the language of the former summary supplemental adjudication statute indicates that the purpose of the summary supplemental adjudication process was for the acknowledgment by the watermaster of the existence of water rights not claimed in a prior adjudication until such time as the claim was confirmed in a subsequent proceeding. The process is supplemental to a prior adjudication as opposed to a mechanism for commencing an entirely new adjudication. As a practical matter, a determination that the *Eagle Decree* Adjudication was a general or McCarran adjudication would have significant consequences to non-parties to the adjudication wholly unrelated to the “common plan” issue. Specifically, parties with water rights not recognized in the prior decrees (i.e. *Foster*, *Rexburg* and *Woodville*) and who did not file claims in the *Eagle Decree* Adjudication would lose those rights under principles of *res judicata* and would be precluded from filing claims to those rights in the SRBA seeking a priority date pre-dating the entry of the *Eagle Decree*. For a McCarran adjudication this would include both federal and tribal claims.

The SRBA Court has dealt with this issue extensively with respect to the Lemhi Adjudication¹¹ that was commenced as a general adjudication and for which a final judgment was entered. The SRBA Court has consistently held that under principles of *res judicata* parties seeking to claim water rights that should have been claimed in the Lemhi Adjudication but were not are bound by the decree and are precluded from pursuing the claim in the SRBA with a priority predating the of entry of the final judgment entered in the adjudication. In a line of cases addressing late claims the SRBA held:

[The] Notice of Entry of Judgment was a final judgment as to those parties whose claim was subject to the Partial [Final] Decree. Accordingly, under principles of *res judicata*, law-of-the-case, and the holding in *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 Pd 409 (1997), any water user or successor-in-interest whose claim was decreed or who failed to file a claim is bound by the Partial Decree.

¹¹ As well as other adjudications.

Order of Partial Decrees and Order Disallowing Water Rights, Subcases 74-250 *et al.*, at 5 (Jan. 12, 2009); *see also*, *Order of Recommitment to Special Master for Specific Finding*, Subcases 74-1080 *et al.*, at 3–6 (Jan. 12, 2009); *Order of Recommitment to Special Master for Specific Finding*, Subcases 74-50A *et al.*, at 2–6 (Jan. 12, 2009). Accordingly, the consequences for failing to file a claim in a general adjudication are significant.

In light of these consequences, the Idaho Supreme Court has rejected the notion that a water rights adjudication is a strictly *in rem* proceeding, the notice of which can be satisfied through publication only or some other form of legislatively prescribed constructive notice. In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997), the Court held:

Except for the limited class of actions which are strictly, *in rem*, a decree is not, and cannot be made, conclusive as to parties who are strangers to it. **The same principle applies to decrees rendered in proceedings to adjudicate rights to the use of water, they not being strictly *in rem*.** The contention is that one's rights can be affected by a decree to which he is a stranger is repugnant to a fundamental principle of our jurisprudence that no one will be judged until he has a hearing. The operation of this principle cannot be defeated by the mere fact that it will put other parties to some added trouble or expense.

Id. (quoting *Mays v. District Court of Sixth Judicial Dist.*, 24 Idaho 200, 207–08, 200 P. 115, 116 (1921) (emphasis added). A proceeding that is strictly *in rem* determines the interests of in specific property against the whole world. In that limited class of proceedings all persons in the world cannot be served with process, hence some type of constructive notice is authorized. However, in a *quasi in rem* proceeding, such as a water rights adjudication, where persons claiming an interest in the property are known, they must be served with more than constructive notice via publication. In 1903, the Idaho legislature approved an act entitled “An act to regulate the appropriation and diversion of the public waters and to establish rights to the use of such waters and the priority of such rights.” 1903 Idaho Session Laws 223. The statute provided for constructive notice via publication of suits to adjudicate water rights. *Id.* § 34 at 247. This specific provision of the act was held to be unconstitutional on the grounds that the Idaho Constitution requires

personal service of such defendants. *Bear Lake County v. Budge*, 9 Idaho 703, 75 P. 614 (1904).

The “publication only” method of notice to non-named parties makes it quite apparent that the summary supplemental adjudication procedure was intended to apply to subject omitted right(s) sought to be recognized and not as a re-adjudication of the previously adjudicated basin including the water right interests of non-named parties. Furthermore, that the procedure was not intended to be binding on non-parties. In this regard the summary supplemental adjudication process could not have been a mechanism for commencing a general or McCarran adjudication.

C. The Special Master’s decision does not unlawfully expand subordination.

The SWC argues on Challenge that the Special Master’s decision unlawfully permits the USBOR to expand the extent of subordination under its rights. The SWC points out that the remark recommended by the Special Master provides for subordination to all “water otherwise storable in the reservoir system,” as opposed to merely “irrigation storage” as they assert was contemplated by the Palisades Contracts and *Eagle Decree*. The SWC alleges that the expanded subordination is unlawful because it disregards their landowners’ beneficial ownership interest in the above-captioned water rights and it is contrary to the express terms of the *Eagle Decree* and Palisades Contracts. Each will be addressed in turn.

1. The SWC does not have a beneficial or equitable ownership interest in the above-captioned water rights.

The SWC argues that its landowners have a beneficial ownership interest in the above-captioned water rights and that the Special Master erred in granting summary judgment in this matter because they, as beneficial owners of the rights, did not consent to the subordination language proposed by the State and USBOR. The SWC’s argument in this respect relies upon the Idaho Supreme Court’s holding in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

In *Pioneer Irr. Dist.*, the USBOR claimed ownership in the SRBA of certain irrigation storage and irrigation from storage water rights from Arrowrock, Lucky Peak

and Anderson Ranch Reservoirs – all projects authorized and developed under Reclamation Law. *Id.* at 108, 157 P.3d at 602. Various irrigation entities that held repayment contracts with the USBOR for the storage and delivery of project water from the three above-mentioned reservoirs filed competing claims of ownership in the SRBA to the same water rights. *Id.* In resolving the issue of ownership, the SRBA Court ruled that the USBOR held nominal legal title to the water rights and the irrigation entities held equitable title in trust for their landowners. *Id.* With respect to the issue of ownership, the Supreme Court affirmed.

Integral to the Court's holding was the fact that the landowners in the irrigation entities, not the USBOR, were the ones that put the water to beneficial use by irrigating their lands:

There is no dispute that the BOR does not beneficially use the water for irrigation. It manages and operates the storage facilities. Irrigation of the lands serviced by the irrigation districts was the basis upon which original water right licenses were issued. Without the diversion by the irrigation districts and beneficial use of water for irrigation purposes by the irrigators, valid water rights for the reservoirs would not exist under Idaho law.

Id. at 110, 157 P.3d at 604. In its review of the applicable case law, the Court noted that “a common theme throughout these cases is the recognition of the connection between beneficial use of water and ownership rights” and that in Idaho “the appropriator must apply the water to a beneficial use in order to have a valid water right.” *Id.* at 113, 157 P.3d at 607. Accordingly, the Court agreed that because the landowners in the irrigation entities were the ones to beneficially use the water, the irrigation entities were entitled to more than a mere contractual right in the water. *Id.* at 115, 157 P.3d at 609.

This case however is distinguishable. As an initial matter the water rights at issue here are not irrigation rights but rather hydropower rights. More importantly, the water at issue here is not merely stored and distributed by the USBOR; it is used by the USBOR for hydropower purposes. It is undisputed that it is the USBOR that runs the subject water through turbines owned, operated and maintained by the USBOR. For all practical purposes the USBOR is the consumer of the water in this case. As the entity that diverts and puts the water to a beneficial use, and absent an agreement to the contrary, the USBOR is entitled to a water right under Idaho law. *See e.g. Pioneer Irr. Dist.*, 144

Idaho 106, 113, 157 P.3d 600, 607 (stating, “in Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right”); I.C. §§ 42-217 & 42-219. While an argument can be made that the SWC is the consumer of the resultant byproduct of the water – hydropower electricity – it cannot be said that the SWC members are the consumers or beneficial users of the water itself. Therefore, while the Palisades Contracts may provide the SWC with a contractual right to have a certain amount of power delivered to it at certain specified times and rates, the Contracts do not create in the SWC, or its members, an equitable or beneficial interest in the above-captioned water rights.

Moreover, unlike the irrigation entities in *Pioneer*, the SWC did not file separate claims to the above-captioned water rights in this case. Nor did the SWC file any objections to the ownership element of the Director’s recommendation for the rights (i.e., the SWC did not object to the Director’s recommendations that the above-captioned water rights be decreed solely in the name of the USBOR). If the SWC claimed an ownership interest in the above-captioned water rights, they were required to file a claim to the same in the SRBA asserting the same and/or to file an objection to the *Director’s Reports* for the above-captioned claims on the issue of ownership. The SWC did neither.

Last, a ruling that the SWC landowners own a beneficial ownership interest in the above-captioned water rights would be inconsistent with prior judicial determinations. In *Burley Irr. Dist. v. Ickes*, 116 F.2d 529 (D.C. Cir 1940), the United States Court of Appeals addressed the issue of ownership of the hydropower rights associated with the Minidoka Dam and Reservoir reclamation project. In that case, the court held that the United States owned the rights without qualification:

The Minidoka Project, the various divisions thereof, and all structures and facilities in connection therewith, including both irrigation and power works, were constructed by the United States, and the costs of construction were met with moneys from the Reclamation Fund. For many years the entire project was administered solely by the Bureau of Reclamation. The works therefore were originally the property of the United States, as to both legal and equitable titles, and they remain so today except to the extent that they have been transferred to others under legal authority. Furthermore, by adjudication of the state court of Idaho in 1913, and later of the United States District Court for the District of Idaho, priorities in the appropriations and rights to receive the waters of the Snake River were determined, and those applicable to lands within the

project, including that for power of Minidoka Dam, were decreed to the United States. *Thus the Government originally owned without qualification not only the works of the project, but the water right from the use of which plaintiff asserts its claim here. That ownership continues unabated, except as it has been modified or transferred pursuant to authority given by Congress.*

Id. at 531 (emphasis added).

Likewise, the *Foster Decree* entered in 1913 by the Twin Falls County District Court determined that the United States was the sole owner of the Minidoka power rights:

Right No. 9

That the defendant, the SECRETARY OF THE INTERIOR OF THE UNITED STATES, and his successors in office, is hereby awarded the use of the waters of the natural flow of the Snake River at Minidoka Dam for power, light, manufacturing, and pumping purposes in the following amount and from the following date: 2,500 second feet from June 15, 1909, and 200 second feet from July 1, 1912, said water to be returned to the Snake River below the Minidoka Dam after being used for said power purposes, and hereby designated as Right No. 9.

Twin Falls Canal Company v. Foster (Idaho 4th Dist. Ct. June 13, 1913). In *Pioneer*, no such judicial determinations existed. This Court agrees that the USBOR, as the diverter and beneficial user of the subject water, is the owner of the above-captioned water rights.

2. Neither the Palisades Contracts nor the *Eagle Decree* preclude the USBOR from subordinating its water rights.

The SWC argues that the terms of the Palisades Contracts and the *Eagle Decree* preclude the USBOR from choosing to subordinate its water rights to other uses besides those identified in those documents (i.e., choosing to subordinate to all storage uses as opposed to merely “irrigation storage”). This Court has already disposed of the argument that the USBOR is bound by the terms of the *Eagle Decree*, or that the *Eagle Decree* can affect the USBOR’s water rights. Therefore the only remaining question is whether the Palisades Contracts work to preclude the USBOR from electing to subordinate its rights to certain uses in addition to storage irrigation.

In the Palisades Contracts, the SWC alleges that the USBOR agreed to subordinate its Minidoka power rights to irrigation storage when operating the Minidoka

Powerplant to the full extent of its water rights “would result in loss of irrigation water otherwise storable in the reservoir system.” See *Temple Aff.*, ¶¶12–13 & Ex. A; *Bingham Aff.*, ¶¶5–7 & Ex. C; *Sorenson Aff.*, ¶¶4–5. Although the Palisades Contracts do not appear to be identical for each water user, the following excerpts from the Palisades Contract between the USBOR and the Burley Irrigation District are representative:

Winter Power Operation; Minidoka Powerplant

20. (a) The United States, in its operation of American Falls and Minidoka Dams during the storage season of each year is required to pass through enough water to satisfy existing diversion rights in the stretch of river down to and including Milner Dam and certain power rights below Milner Dam, and has the privilege under an existing decree to use at Minidoka Dam 2,700 cubic feet per second of water for the development of power. While the United States must operate the American Falls and Minidoka dams so as not to interfere with these third-party rights, *it will be the objective of the United States in the operation of both its American Falls and Minidoka powerplants to curtail the release of additional water from American Falls Reservoir for power production at those powerplants during the storage season of any year whenever the operation of those powerplants to the full extent of their respective water rights for power production would result in loss of irrigation water otherwise storable in the reservoir system.* Accordingly . . . the United States will . . . limit the release of water through those dams as follows

(c) For the purposes of this contract and without relinquishment of any part of the power rights herein described, it is assumed that but for curtailment of operations as provided in (a) of this article, units 1 through 6 of the Minidoka power plant would be operated to the maximum extent practicable within the limits of the power rights therefor . . . *and that in consequence of operations under this article there may be losses in the production of power and energy attributable to those units.* Payments for such power and energy losses shall be made, on the basis of an average annual replacement requirement, by all contractors having reservoir rights benefitting from the water savings resulting from operations under the provisions of (a) of this article in annual amounts determined as follows

(g) In order to permit the operation of the Minidoka power system with a power supply undiminished by water savings operations under this article, the United States, as the operator of the Minidoka powerplant and of other interconnected powerplants operated under the Federal Reclamation Laws, will, to the extent authorized by law, *make available to the Minidoka powerplant at rates established under law an amount of power and energy equivalent to that lost by reason of such water saving operations.* In

determining the net profits attributable to the first six units of the Minidoka powerplant which are . . . to be credited to the lands of the South Side Pumping and Gravity divisions of the Minidoka Project, all payments made by the owners of storage rights in the reservoir system in pursuance of the apportionment of power replacement charges . . . shall be accounted for as revenues attributable to those six units, and such payments will . . . *be accepted by the District . . . as full settlement for losses resulting from such curtailed operations.*

Bingham Aff., Ex. C (emphasis added).

The SWC argues that the above-mentioned provisions from the Palisades Contracts prove that the USBOR agreed to subordinate its power rights only to irrigation storage, and that it cannot now elect to subordinate its power rights to additional uses. This Court disagrees. The Idaho Supreme Court has addressed whether a water right owner can voluntarily agree to subordinate his right to other uses. In *Idaho Power Company v. State*, 104 Idaho 575, 661 P.2d 741 (1983), the Court addressed whether the Idaho Power Company could voluntarily agree to have subordination clauses inserted in certain water right licenses. The Court responded as follow:

We find nothing in the law of this state which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, *e.g.* restrictive covenants and equitable servitudes. Whatever merits such an argument may have with regard to subordination clauses forced upon an unwilling appropriator by the FPC or the state, we need not decide. We hold only that a voluntary subordination agreement is not in violation of Idaho's water law

Id. at 587, 661 P.2d at 753.

It has already been determined above that the SWC members do not have a beneficial or equitable ownership interest in the above-captioned water rights and that the USBOR is the sole owner of the rights. As sole owner, nothing precludes the USBOR from voluntarily obtaining less than the full gambit of rights associated with its water rights. While the SWC may argue that they have a contractual right to receive power from the USBOR at certain specified times and rates, they have presented no case law or authority establishing that the terms of the Palisades Contracts act to preclude the

USBOR from exercising its right to voluntarily subordinate its power rights to certain uses in addition to storage irrigation.

The Special Master correctly identified in his *Order* that a difference exists between pure contractual rights and interests in a water right under state water law. *Order Granting*, p. 12. Any issue pertaining to whether the USBOR's decision to voluntarily subordinate its rights results in a breach of the Palisades Contracts, or in a monetary claim in favor of the SWC, is not ripe for jurisdiction before this Court and does not create a state law interest in the USBOR's water rights in favor of the SWC. Any such issue or claim lies in the jurisdiction of the United States Court of Federal Claims. 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort").

Last, the remarks proposed by the USBOR and State recognize the existence of the Palisades Contracts and by their express terms do not alter, amend, or modify any provisions of the Palisades Contracts:

This decree does not alter, amend, or modify the contracts entered into between various federal contractors and the United States Bureau of Reclamation, as amended, in connection with the Palisades project and the Minidoka project, which contracts remain binding among the parties thereto.

Via the above-quoted remark, whatever obligations and contractual rights exist between the parties under the Palisades Contracts are in no way affected by the remarks proposed by the State and the USBOR, and recommended by the Special Master.

For the reasons stated above the SWC's argument that the terms of the Palisades Contracts preclude the USBOR from voluntarily subordinating its water rights is unavailing under the circumstances.

D. The Special Master did not err in granting summary judgment due to unlawful procedure.

The SWC argues that the Special Master erred in granting summary judgment in this case because both former Director David Tuthill and current Interim Director Gary

Spackman, as witnesses for the State, supported the State's proposed alternative remarks. The SWC argues that former Director David Tuthill and current Interim Director Gary Spackman's involvement as witnesses on behalf of the State violated Idaho Code § 42-1401B, which governs the role of the Director in an adjudication. The SWC further argues that under the circumstances the Director was required to file an *Amended Director's Report*.

Idaho Code § 42-1401B provides that "the director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication." The SWC argues that former Director Tuthill and current Interim Director Spackman violated this directive in this proceeding, and acted as both parties and claimants. Such is not the case. There is no prohibition against a party to a SRBA subcase from calling a representative of IDWR as a witness. *See e.g., SRBA Administrative Order I*, § 10.g. Such a practice is common in the SRBA.¹² The State of Idaho, who is authorized to be a party in SRBA subcases under Idaho Code § 42-1401C, is no exception to the rule. *State v. United States*, 128 Idaho 246, 262, 912 P.2d 614, 630 (1995)(addressing ability of state agencies to appear in SRBA after Department was removed as party). Former Director Tuthill and current Interim Director Spackman, as witnesses called on behalf of the State, were not acting as "claimant[s] on behalf of the state" or as parties to the adjudication, but rather were acting in their capacity as witnesses called on behalf of the State of Idaho.

The Special Master further did not err in granting summary judgment due to the lack of an *Amended Director's Report*. Under the Idaho Adjudication Statutes, I.C. §§ 42-1401, *et seq.*, the Director is required to prepare and file with this Court a *Director's Report* in response to a water right claim. I.C. § 42-1411. Among other things, the *Director's Report* is required to include "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(j). Once filed the *Director's Report* becomes part of the record and constitutes "prima facie evidence of the nature and extent of the water rights acquired under state law." I.C. § 42-1411(4). The Idaho Supreme Court has instructed that:

¹² It is not unheard of for a representative of IDWR who is called as a witness to conclude that he or she would have recommended the subject water right claim differently based on new information proffered at trial.

[t]he Director's Report is *prima facie* evidence and the facts contained therein are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption.

...

Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant.

Hagerman Water Right Owners, Inc., 130 Idaho at 746, 947 P.2d at 419.

The record in this case establishes that the Special Master did not rely on the *prima facie* status of the *Director's Report* in rendering his recommendation. The Special Master granted summary judgment in this matter based on issues of law. Namely that the USBOR was the owner of the subject rights as a matter of law, and that neither the *Eagle Decree* nor the Palisades Contracts prohibited the USBOR from voluntarily subordinating its water rights to certain uses as a matter of law. This is significant because the *Director's Report* is *prima facie* evidence of the *facts* contained therein, but has no bearing on issues of law. Simply stated, the issuance of an *Amended Director's Report* in this case would make no difference with respect to the determinant issues of law.

Furthermore, the decision to request an *Amended Director's Report* generally rests in the discretion of the Court. *See e.g., SRBA Administrative Order 1* § 4(2)(j) ("The Presiding Judge or Special Master shall determine how to proceed when an amendment is granted and whether a supplemental Director's Report is required"); § 10.f.(3) ("The court may request that IDWR prepare an Amended Director's Report for any amended claim, including claims amended at trial to conform to the evidence"). The Court cannot find that the Special Master abused his discretion in this case by not requiring the filing of an amended *Director's Report*.

The original recommendation was a remark for the total subordination of the hydropower right to upstream rights. The remark proposed by the USBOR and the State was less restrictive than the remark originally recommended. Although discretionary with the Judge or presiding Special Master whether to require an *Amended Director's Report*, the practice is typically done to provide notice to third parties via docket sheet publication when it is anticipated that the elements to be set forth in the *Amended*

Director's Report will fall outside the parameters set by the claim on one side and the original *Director's Report* on the other side.

This issue was previously settled in the SRBA. In *Memorandum Decision and Order on Challenge (Gisler)*, Subcase No. 36-00077D (June 2000) *aff'd North Snake Ground Water District v. Gisler*, 136 Idaho 747, 40 P.3d 105 (2002) ("*Gisler*"), the *Director's Report* recommended a quantity less than claimed. The claimant, Gisler, objected to the Director's recommendation. NSGWD agreed with the Director's recommendation but did not file a Response to Gisler's objection and therefore was not a party to the subcase. Eventually, in resolution of the objection, the Department and Gisler entered in to an *SF-5*, agreeing to a quantity less than claimed by Gisler but more than recommended by the Director. The Special Master issued a *Special Master's Report and Recommendation* based on the quantity specified in the *SF-5*. NSGWD, who had been monitoring the proceedings but who was not a party to the subcase, filed a *Motion to Alter or Amend the Special Master's Recommendation*. NSGWD asserted the quantity recommended by the Special Master was not supported by the evidence. NSGWD argued further that because it was not a party to the subcase, until notice of the Special Master's recommendation was published via the docket sheet, NSGWD as well as other parties to the adjudication had no way of knowing that the subcase resolved for a quantity greater than originally recommended by the Director. The District Court rejected the argument holding that a *Motion to Alter or Amend* was an improper means for a non-party to contest a settlement in a subcase. The Court held:

Although other SRBA claimants [non-parties to the subcase] do not receive notice of the actual filing of an *SF-5*, they should reasonably expect a settlement may be reached in any contested subcase. Furthermore, other SRBA claimants are on notice regarding the parameters of a potential settlement, i.e. that it will fall somewhere between the initial claim and the Director's Report.

Gisler at 15. The Court explained further that as a consequence of this notice, the proper course of action would have been for NSGWD to file a Response.

In contested subcases where NSGWD [has a stake in the outcome and] agrees with the Director's Report (as in the subcases *sub judice*), they can file a Response (Standard Form 2) which, in essence, would state: 'We agree with the Director's Report.' I.C. § 42-1412(2). By doing this,

NSGWD, with minimal effort, would become a party to the subcase, and an SF5 could not be entered into without their involvement. . . . At oral argument, counsel for NSGWD further stated that the reason NSGWD did not get involved at the beginning of these subcase was because they agreed with the Director's Report.

Gisler at 16. The Court then explained the circumstance where third parties would not be on notice:

Obviously, other SRBA claimants would not have notice in the event that an SF5 (concurrent with by IDWR) was filed that fell outside of these parameters. For example, if a claimant's initial claim was for 5 cfs, and the Director's Report recommended 4 cfs, other claimants would not expect IDWR to concur with an SF5 which recommended 6 cfs.

Gisler at 16, fn. 10. In this latter type of situation an *Amended Director's Report* would be necessary in order to provide notice to third parties as well as allow the opportunity to file objections and responses. The situation in the instant case is distinguishable. The remark as agreed upon falls somewhere in between the claim, which was claimed as unsubordinated, and the Director's original recommendation for total subordination. Therefore, there was no need for the Special Master to request an Amended Director's Report for the purpose of providing docket sheet notice to non-parties.

Next, the SWC was already a party to the subcase. The *Amended Director's Report* typically does not benefit the parties to the subcase because they are already apprised of the change in the Department's position. The only benefit an *Amended Director's Report* can bestow on parties to the subcase is a shift in the *prima facie* weight and presumption. The Director's change in position without the filing of an *Amended Director's Report* essentially nullifies the presumption. This is typically not an issue where both sides are prepared to present evidence. It is not uncommon for the Department to change its position during the discovery period of a subcase as additional information is provided to the Department by the parties.

In this case it is a non-issue because the Special Master did not rely on the presumption and further because the Director changed his position, the presumption evaporated. The Special Master did not abuse his discretion in refraining from ordering an *Amended Director's Report* as the case turned on issues of law.

E. The Special Master did not err in granting Summary Judgment pursuant to Idaho Rule of Civil Procedure 56.

Summary judgment is properly granted when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” I.R.C.P. 56(c). The court will “liberally construe the record in favor of the party opposing the motion for summary judgment and will draw all reasonable inferences and conclusions in favor of that party.” *Arreguin v. Farmers Ins. Co.*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005).

The SWC argue that summary judgment was improper in this case because there are unresolved genuine issues of material fact. This Court however finds that summary judgment was proper on the basis that the issues presented could be determined as a matter of law. The issues of (1) whether the terms of the *Eagle Decree* bind USBOR and the State, (2) whether the SWC has an ownership interest in the subject water rights, and (3) whether the USBOR as sole owner of the water rights may voluntarily subordinate the same are all issues of law and were correctly decided by the Special Master on summary judgment. Therefore, the Special Master did not err in his granting of summary judgment.

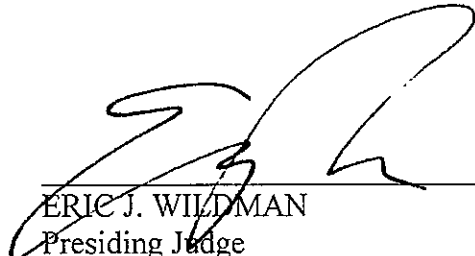
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CONCLUSION

For the reasons set forth above, the SWC’s Challenge is **HEREBY DENIED**. Pursuant to I.R.C.P. 53(e)(2) and *AOI* section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the Special Master’s *Order Granting Motions for Summary Judgment and Special Master Report and Partial Recommendation* and *Order Denying Joint Motion to Alter or Amend* and wholly adopts them as its own. When the above-captioned water rights are partially decreed, the “priority date” and

"other provisions necessary" remarks proposed by the State and USBOR shall be included as recommended by Special Master Dolan.

DATED: 2/9/11.

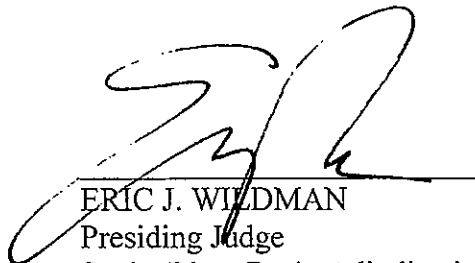


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

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: 2/9/11.



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO ANNOTATED .

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COMMISSIONERS

IN TWELVE VOLUMES
VOLUME EIGHT

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EXHIBIT A

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er Carey act. Gooding v. Ida-
265 U. S. 518, 68 L. ed. 1157,
618; Sallee v. Commonwealth,
1) 227.

e With Statute Required.

absence of the issuance of a
l a compliance therewith un-
nd other sections of the stat-
igation district is not entitled
eneficial use of any additional
water from a natural stream.
Reynolds Irr. Dist., 56 Idaho
c. (2d) 1314.

i of Land.

which decreed right is appur-
on which it is used need not
described in decree, particu-
se of rental rights. Farmers'
re Ditch Co. v. Riverside Irr.
Idaho 450, 94 Pac. 761.

Reference.

teral reference notes under
1401.

shall be the duty of the
as of this state to prepare
hout delay to the depart-
ment, a certified copy of
by the district court and
n the various counties of
place of such transcript,
as are recorded in books
ipt of said transcripts or
he department to record
lassify and arrange said
ne stream and its tribu-
l to each water commis-
by the district court of
n allotment of the waters
t, the clerk of such dis-
pense of the county, and
rtified copy of the decree
n. R. C. & C. L., § 4622;

42-1404. Printed copies of decrees to be prepared.—Upon receipt by
such water commissioner of such certified copies of such decrees of allot-
ment, such commissioner shall arrange all the decrees relating to each
separate stream, and number them in the order of their priorities, and
shall cause them to be printed in a neat pamphlet form and shall supply
each user of water on such stream with a printed copy of such decree.
And such water commissioner shall, on or before the first day of January
of each year thereafter, cause to be printed a list of all decrees or
licenses which may be issued from time to time to the users of water
from any stream within his district, such list to state the name of the
person to which such decree or license has been granted, the date of the
priority of the right, the amount of water granted, the description of
the land to which it is supplied, and the number of such decrees or
licenses, which numbers shall be in the order of the priorities of the
rights under decrees or licenses, and each user of water on such stream
shall be provided with a copy of such list of rights, and the expense of
printing such decrees and such lists of rights shall be borne by the
users of water on such streams, and shall be charged to such users as
a part of the expenses of distributing water to such users, and shall be
paid in the manner provided for the payment of the expenses and
compensation of the watermasters. [1903, p. 223, § 40; reen. R. C. &
C. L., § 4623; C. S., § 7035; I. C. A., § 41-1304.]

42-1405. Summary supplemental adjudication of water rights.—
Where the priority rights upon any stream, canal or reservoir in this
state shall have been determined by decree of any court of competent
jurisdiction, and thereafter it shall appear that any person or corpora-
tion having the right to the use of any part of said water was not in-
cluded in said decree as a party thereto, and said right was not deter-
mined thereby, or that any person who subsequent thereto has acquired
any right to the use of such waters, any such person or corporation may
have such right adjudicated in the following manner:

He may bring an action in the district court of the county wherein
such decree was entered against the watermaster having charge of the
distribution of the water of said stream, canal or reservoir in which
said party claims an interest, or if there be no watermaster thereof,
then against the department of reclamation; that the said party shall
in his complaint, set out his own right as he is now required to do in
cases involving the right of priority of use of water, and he shall further
set forth his acceptance as binding upon him of the said decree and the
findings of fact and conclusions of law upon which it is based. There-
upon summons shall issue out of said court in said cause and be served
upon said defendant. The plaintiff in said action shall cause to be pub-
lished once a week for not less than three weeks a notice of the pendency
and purpose of said action in such newspaper or newspapers as the judge
of said district court may order, which notice shall contain the title of
the court and the cause, the name of the stream, canal or reservoir in
the waters of which said plaintiff claims an interest, the date of priority
claimed by him and the date and short title (being usually the name of
the first plaintiff and the first defendant) of the decree theretofore
entered, fixing the permanent rights in said stream, canal or reservoir.
After the expiration of the time fixed by said order, said cause may be
brought on for hearing in open court, and any party interested may
appear and defend against said right. The court by its decree in said

action shall determine the rights of said plaintiff in accordance with the proof submitted but subject to the terms of the original decree hereinbefore referred to: provided, that the right thus established shall not be deemed adjudicated, but prima facie merely, and may be attacked by suit brought in a court of competent jurisdiction at any time by any person deeming himself aggrieved thereby. The court shall charge all costs arising under said action to the party bringing the same, unless the defendant personally shall be guilty of mismanagement or bad faith in the action or defense. Whereupon water shall be distributed to him in accordance therewith and in the same manner as though he had had his said right included in said decree. The plaintiff, any party to said original decree, or any person interested, may appeal from the decree entered in the action hereby authorized to be brought, and the statutes governing new trial and appeal and the procedure in connection therewith shall govern so far as applicable: provided, however, if the plaintiff appeals or moves for a new trial, notice thereof and of the date fixed for the settlement of any reporter's transcript, bill of exceptions, or any other matter required to be settled, shall be served by the publication of such notice or notices for three weeks in such newspaper as the judge of said district may by order direct. The proposed draft of such reporter's transcript, or other matter required to be settled, or bill of exceptions, shall be filed with the clerk of said court and such filing shall be sufficient service thereof. The transcript and briefs upon appeal shall be served as in other civil cases. [1911, ch. 224, § 1, p. 708; am. 1915, ch. 34, § 18, p. 112; reen. C. L., § 4623a; C. S., § 7036; I. C. A., § 41-1305.]

Compiler's note. The words enclosed in parentheses so appeared in the act.

Cross ref. Appeal, tit. 18.
New trial, § 10-601 et seq.

Cited in: *Wyllie v. Kent*, 28 Idaho 16, 152 Pac. 194; *Independent Irr. Co. v. Baldwin*, 43 Idaho 371, 252 Pac. 489.

ANALYSIS

Application of section.
Definitions.
Effect of decree.
Jurisdiction of courts.
Nature of action.
Parties.

Application of Section.

This section does not confer jurisdiction to enter summary decree adjudicating right to use water claimed to have been developed and not part of the natural and public waters of the state. *Union Cent. Life Ins. Co. v. Albrethsen*, 50 Idaho 196, 294 Pac. 842.

Definitions.

The word "acquired" necessarily means more than acquisition from a previous water owner whose rights had been adjudicated because the purchaser would be bound by the decree as to his predecessor in interest. *Owsley Canal Co. v. Henninger*, 66 Idaho 485, 162 Pac. (2d) 389.

The term "waters" is used in the generic sense and therefor includes all water distributed by the watermaster. *Owsley Canal Co. v. Henninger*, 66 Idaho 485, 162 Pac. (2d) 389.

Effect of Decree.

Decree does not adjudicate any right. It simply gives prima facie right to delivery of so much water. *Mays v. District Court*, 34 Idaho 200, 200 Pac. 115.

Decree may be attacked by action brought in court of competent jurisdiction, at any time, by any aggrieved party. *Mays v. District Court*, 34 Idaho 200, 200 Pac. 115.

Anyone bringing action under this section must accept former decree as binding upon him. *Mays v. District Court*, 34 Idaho 200, 200 Pac. 115.

While this section refers to former decree as fixing permanent rights in stream, language means permanent between parties to decree or permanent in effect, as distinguished from prima facie effect of remedy herein provided. *Mays v. District Court*, 34 Idaho 200, 200 Pac. 115.

Decree void under this section affected rights of no one, raised an estoppel against no one, and did not have effect of making drain ditch appurtenant to land. *Union Cent. Life Ins. Co. v. Albrethsen*, 50 Idaho 196, 294 Pac. 842.

stiff in accordance with the the original decree herein thus established shall not rely, and may be attacked diction at any time by any The court shall charge all bringing the same, unless ismanagement or bad faith shall be distributed to him mer as though he had had plaintiff, any party to said ay appeal from the decree brought, and the statutes ure in connection therewith however, if the plaintiff of and of the date fixed for bill of exceptions, or any served by the publication ch newspaper as the judge posed draft of such report-e settled, or bill of excep-rt and such filing shall be d briefs upon appeal shall 224, § 1, p. 708; am. 1915, § 7036; I. C. A., § 41-1305.]

m "waters" is used in the gen- and therefor includes all wa-ibuted by the watermaster. inal Co. v. Henninger, 66 Idaho 'ac. (2d) 389.

Decree.

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void under this section affected no one, raised an estoppel one, and did not have effect drain ditch appurtenant to on Cent. Life Ins. Co. v. Al-60 Idaho 196, 294 Pac. 842.

Jurisdiction of Courts.

One has right to invoke jurisdiction of courts to protect his right to use of water for irrigation purposes and secure adjudication of priority as against others. Such right of action exists independent of statute. Mays v. District Court, 34 Idaho 200, 200 Pac. 115.

Everything necessary to give jurisdiction must appear by the record in proceedings under this section. Union Cent. Life Ins. Co. v. Albrethsen, 50 Idaho 196, 294 Pac. 842.

The district court of county, in which was located all water wherein priority rights were determined by federal court decree, had jurisdiction to fix priorities of canal company's appropriations of additional waters tributary under permits subsequently granted it by state to bore wells, as well as those of other users of such waters whose priorities had not been fixed. Owsley Canal Co. v. Henninger, 66 Idaho 485, 162 Pac. (2d) 389.

Nature of Action.

Remedy provided by this section is not exclusive. Mays v. District Court, 34 Idaho 200, 200 Pac. 115; Harvey v. Deseret Sheep Co., 40 Idaho 450, 234 Pac. 146.

Action to ascertain and decree extent and priority of right to use of water partakes of nature of action to quiet title to real estate (see § 6-401). Mays v. District Court, 34 Idaho 200, 200 Pac. 115.

Actions under this section are not brought against other water users but against administrative officers who distribute it. Mays v. District Court, 34 Idaho 200, 200 Pac. 115.

Parties.

Where the United States is interested in a contract with an irrigation district and such district brings an action for

an adjudication of its water rights, which are affected by said contract, the United States is an indispensable party to such suit, and this is true notwithstanding the fact that the secretary of the interior is made a party, and that the contract in question was made and executed through and by him; and neither is the situation changed by the fact that there had been prior decree of the state court adjudicating such rights wherein the secretary was a party defendant. American Falls Reservoir Dist. No. 2 v. Grandall, 82 Fed. (2d) 978.

Construction company becoming equitable owner of irrigation works upon completion of system has sufficient interest to maintain action for supplemental adjudication of water rights though no formal conveyance was made until after commencement of action. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

Watermaster holds over until his successor is elected or appointed and has qualified, and when office has not thus been vacated, he is proper party defendant. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 Pac. 45.

In action for adjudication of priorities in well waters tributary to lake, complaint was not demurrable because of failure to join all users of water from lake as defendants since users not party to action were not bound by provisions of statute authorizing action and could not be injured by judgment therein, while intervening users had an ample opportunity to protect their rights as if suit had been brought under statute requiring that all water users be made parties. Owsley Canal Co. v. Henninger, 66 Idaho 485, 162 Pac. (2d) 389.

Collateral Reference.

See collateral reference notes under § 42-1401.

CHAPTER 15

CONSERVATION OF WATER FOR IRRIGATION PURPOSES

SECTION.

- 42-1501. Declaration of policy.
- 42-1502. Powers and duties of department.
- 42-1503. Reports of department.
- 42-1504. Authority to cooperate with other agencies.

SECTION.

- 42-1505. Separability.
- 42-1506. Department of reclamation successor to state water conservation board.

42-1501. Declaration of policy.—By the passage of this act the legislature declares its intention to meet, so far as possible, a state-wide

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE was mailed on February 09, 2011, with sufficient first-class postage to the following:

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Page 2 2/09/11

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