

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAR 28 2011

By _____ Clerk
_____ Deputy Clerk

The legal descriptions for the Island Wells were not included in the amended claims. Consequently, the *Director's Reports* did not include the Island Wells as points of diversion for water rights 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925. No objections were filed, and *Partial Decrees* were issued in 1997. The *Partial Decrees* only included points of diversion at the Airport Wells. Isom's *Motion to Set Aside Partial Decrees* and subsequent *Amended Claims* asserted that the Island Wells are valid points of diversion based on an accomplished transfer. Isom asserted that the Island Wells were historically used as alternative points of diversion when the Airport Wells did not produce sufficient water.

The Court allowed reopening of the *Partial Decrees*. IDWR examined the *Amended Claims* and the facts related to the Island Wells. IDWR issued *Amended Director's Reports* in December 2009. The *Amended Director's Reports* recommended adding points of diversion at the Island Wells. The *Amended Director's Reports* included a condition to protect existing water rights from injury:

Pursuant to a call, in times of scarcity, the diversion of water under this right from the two wells in T05N R26E S34 SENWSW and T04N R25E S3 NESENW has a priority date of May 18, 1982.

After the *Amended Director's Reports* were issued, *Objections* were filed by Schureman on quantity, volume, point of diversion, and place of use elements. Isom filed a *Motion for Summary Judgment* arguing that no genuine issues of material fact remain on the volume and acreage elements. It is undisputed that genuine issues of material fact remain as to the points of diversion.

III. STANDARD OF REVIEW

Summary judgment is appropriate under I.R.C.P. 56(c) only when the pleadings, depositions, admissions, and affidavits 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.

IV. ANALYSIS

Isom argued that there are no genuine issues of material fact as to volume and acreage since these elements were previously determined in the *Partial Decrees*. Isom asserted that *Objections* to volume and acreage are barred by claim preclusion or issue preclusion.

A. Claim Preclusion and Issue Preclusion do not Bar *Objections*

The combined volume limitation and total acreage for place of use were not objected to prior to entry of the *Partial Decrees*. The volume limitation and total acreage remained unchanged in the *Amended Director's Reports*. After the *Amended Director's Reports* were issued, however,

Schureman filed *Objections* to those elements.

Isom argued that Schureman's *Objections* fail as a matter of law because volume and acreage were determined in the ***Partial Decrees***. Isom reasoned that either claim preclusion (*res judicata*) or issue preclusion (collateral estoppel) bar Schureman's *Objections*.

Claim preclusion (*res judicata*) only bars a subsequent action if three requirements are met: 1) the same parties; 2) the same claim; and 3) a final judgment. *Andrus v. Nicholson*, 145 Idaho 774, 777-78 (2008). Issue preclusion (collateral estoppel) bars a subsequent action if five requirements are met: 1) the party against whom the decision is asserted had a full and fair opportunity to litigate the issue; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue asked to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits; and 5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Waller v. State, Dept. of Health and Welfare*, 146 Idaho 234, 192 P.3d 1058 (2008).

1. Claim Preclusion (*Res Judicata*) Does Not Bar Objections

The facts here do not bar these *Objections* under claim preclusion (*res judicata*). The first requirement is that the ***Partial Decrees*** involved the same parties. All parties to these subcases are parties to the SRBA. Thus the prior decision involved the same parties. Although the ***Partial Decrees*** contained a Rule 54(b) certification, the judgments were final only if the *Motions to Set Aside* are denied. However, the *Amended Claims* do not constitute the same claims as the original claims. The *Amended Claims* seek to add the Island Wells which is a significant change to the use of these water rights. Adding the Island Wells could impact the other elements.

In order for this Court to bar Schureman's *Objections* based on claim preclusion, the *Amended Claims* would have to have virtually no impact on the elements to which an *Objection* was filed. That is not the case here. Isom asked to include the Island Wells, but seeks to bar Schureman's *Objection* on volume and total acreage. However, the additional points of diversion significantly change the claims. The addition of the Island Wells may raise concerns on other elements where none existed before. For example, a water user might not object to volume or acreage on wells that are not in close proximity to his water use. However, a water user might object to the same volume and acreage on wells in proximity to his use. It follows that the *Amended Claims* are not the same as the original claims. Thus, the court finds that Schureman is not barred by claim preclusion from filing *Objections*. The *Amended Claims* raise new concerns which were not at issue

before. It follows that Schureman is **not barred by claim preclusion.**

2. Issue Preclusion (Collateral Estoppel)

The facts do not bar these *Objections* under issue preclusion. The issues involved in the original *Partial Decree* are not identical to the current issues. The original claims did not assert the Island Wells as points of diversion. Thus, the change in points of diversion raises new issues which are not identical to the issues brought in the original claims. The change in issues denied the parties a full and fair opportunity to litigate the issue. The parties against whom the *Partial Decrees* are asserted did **not** have a full and fair opportunity to litigate the issues. Consequently, the Objectors did not have a fair opportunity to litigate the elements of volume or acreage as they relate to the Island Wells. In addition, the issues of volume and acreage determined in the *Partial Decrees* are not identical to a determination of volume and acreage with the addition of the Island Wells. While parties may not oppose the volume pumped from the decreed Airport Wells, there may be opposition to volume and acreage for water pumped from the Island Wells. Finally, it follows that the issues sought to be precluded (volume and acreage) were not decided in the *Partial Decrees*.

Volume and acreage elements were not a concern when the points of diversion were only at the Airport Wells. But volume and acreage raise different concerns when the Island Wells are possible points of diversion. Consequently, this Special Master concludes that the *Objections* are **not barred by issue preclusion.**

B. Licenses Do Not Bar Objections

Water rights 34-7037 and 34-7138 were previously licensed with a place of use of 1980 acres. Isom argued, therefore, that the licenses determined volume and, thus, bar Schureman's *Objections*. However, the licenses did not decide the volume limit now sought by Isom. The licenses allowed 3.5 acre feet per acre for a total of 6,930 acre feet. The *Amended Director's Report* increased the total acre-feet limit to 8,441.5 acre feet. Isom said the increased volume merely accounts for conveyance losses over the eight miles the water must travel. Isom's position does not show that no genuine issues of material fact remain. Isom seeks not merely to rest on the licenses. Isom seeks additional volume to account for the conveyance loss from the new points of diversion. The licenses did not determine an additional volume for conveyance loss. The *Objections* question whether the additional points of diversion are justified and, if so, what additional volume should be added for conveyance loss. Since the licenses did not address the additional volume, and since the additional volume directly relates to the additional points of diversion, genuine issues of material fact

remain. Summary judgment is **denied**.

C. Use of Island Wells Prior to 1987

In order to establish a valid accomplished transfer, a claimant must show the change occurred prior to 1987. Thus, Isom must show use of the Island Wells prior to 1987. I.C. § 42-1425. Genuine issues of material fact remain as to the use of the Island Wells prior to 1987.

A license exam for water right 34-7037 shows that both Island Wells were drilled prior to 1987. The first well was drilled in August 1976. The second well was drilled in May 1982. *Affidavit of Rob Harris*, Exhibits D & E. IDWR concluded a field exam and licensing report in August 1985. *Affidavit of Paul Arrington*, Exhibit F.

Power records show only a small amount of power was used in conjunction with the Island Wells between 1984 and 1987. Records of Big Lost River Electric show no groundwater was pumped in 1984. Only a small amount was pumped in 1986. More power was used in 1987. (Feb. 12, 2009, letter from Dave Shaw to IDWR)

Crater Farms Inc. and BLRID entered agreements in 1974, 1978, 1979, and 1980 to convey water through the Munsey Canal. *Affidavit of Paul Arrington*, Exhibit A-D. However, the agreements in the 1970s and 1980s refer to the legal description for the Airport Wells.

Although affidavit evidence shows that both Island Wells were drilled prior to 1987, evidence of power use prior to 1987 shows little use of these wells. Additionally, it is unclear whether the Island Wells were used to the extent of becoming alternative points of diversion prior to 1987. Genuine issues of material fact remain as to the Island Wells use prior to 1987 and whether the use was extensive enough to assert they were alternate points of diversion.

D. Injury Analysis Required

Schureman alleged that if an accomplished transfer to the Island Wells occurred, the use injured existing users, in violation of I.C. § 42-1425.

Schureman requested a remand during the summary judgment briefing. Both Schureman and Isom quoted this Special Master's previous decision in subcase 29-271 (City of Pocatello). In the *Order on Summary Judgment* the court discussed remand relating to accomplished transfers:

However duplicative a formal remand may be, it is provided for when an objection is filed relating to I.C. § 42-1425. Here, an objection was filed that relates to the accomplished transfer portion of the claim. To the extent Pocatello seeks a formal remand to IDWR, the motion is **granted**. These subcases are "remanded" to IDWR, with the Special Master retaining concurrent jurisdiction. The remand will consist of additional information or evidence being presented to IDWR. After IDWR considers

the additional information, its conclusions may be reported in an *Amended Director's Report* or a *Supplemental 706 Report*. The *Amended Director's Report* or *Supplemental 706 Report* should contain explanatory material stating the basis for its recommendation and should address injury to existing water rights. To be clear, the remand is not intended to be a separate administrative transfer proceeding, but is to be part of the record for this case.

Order on Summary Judgment (Subcases 29-271 *et. al.*) (Aug. 18, 2006)

In those subcases, the request for remand was honored by allowing the parties to provide IDWR with information about possible injury. However, the remand request was never allowed as a shield to summary judgment. The same analysis applies here. This court would allow a “remand” to IDWR on the issue of injury relating to the claimed accomplished transfer. If such a request is made, the “remand” would not necessarily require IDWR to hold a formal administrative hearing. The “remand” would allow the parties to present evidence or information to IDWR relating to the accomplished transfer and the injury to existing water rights. IDWR could then consider the information and report its conclusions as to injury in an amended director’s report or a supplemental 706 Report. The conclusions reached by IDWR would be part of the record for these subcases. If the matter goes to trial, IDWR would be asked to explain the basis for its conclusions as to injury when it is called as a witness.

However, motions for summary judgment must succeed or fail on their own merits. A party would not defeat a motion for summary judgment by merely requesting a “remand” to IDWR. Here, the remand request is insufficient to defeat summary judgment. The *Amended Director's Report* clearly shows that IDWR considered the injury issue. That is so because the *Amended Director's Report* contained language indicating that an injury analysis was made. IDWR added language in the *Amended Director's Report* which attempted to protect existing water rights:

Pursuant to a call in times of scarcity, the diversion of water under this right from the two wells in T05N R26E S34 SENWSW and T04N R25E S3 NESENEW has a priority date of May 18, 1982.

On the other hand, this language does not provide a shield for Isom. Although the proposed language could offer protection to existing water rights, there are genuine issues of material fact as to whether the language is sufficient to protect against the injury alleged by Schureman.

Isom argued that the language protects against injury as a matter of law. Isom cited a prior decision in Basin 34 which dealt with an accomplished transfer. ***Master's Report and Recommendation*** (Subcases 34-256 *et. al.*) (February 19, 1999) In that group of subcases, senior

water users filed *Objections* to the *Director's Reports* for groundwater rights in the Lost River Valley which involved accomplished transfers. The senior water users asked the court to reject changes in the place of use for rights which were transferred to an area known as Era Flat. The senior water users asserted that the water rights injured existing water rights. The ***Master's Report and Recommendation*** agreed with the *Director's Report* allowing the change in place of use. However, the decision was made after a trial on the merits. The decision was not made on summary judgment.

These subcases present a very different scenario. This litigation is not in the trial phase; it is in the summary judgment phase. Thus, the court must determine whether genuine issues of material fact exist as to injury. Norman K Sowards owns groundwater rights which are pumped from a well just north of the Island Wells. *Affidavit of Norman Sowards*. During the 1994 irrigation season, Mr. Sowards states his wells became inadequate for irrigation once nearby wells were brought on line. As a result Mr. Sowards says he had to drill deeper wells and install a larger pump.

Darrell McDonald owns water rights which are pumped from a well located between the two Island Wells. *Affidavit of Darrell E McDonald*. Mr. McDonald states that the bowls for his pump had to be lowered and the horsepower increased for his pump during 2004. The improvements were required to compensate for the dropping water table. The *Affidavit* also asserted that water pumped from the Island Wells is removed from the portion of the aquifer which impacts Mr. McDonald. Mr. McDonald asserts that he faces injuries not protected by IDWR's proposed language. He asserts that the accomplished transfer would allow additional pumping which would require him to drill deeper to utilize his water rights. In addition, the *Objections* assert that "the accomplished transfer of these water rights to add two new wells will injure water rights in the area of the new wells." Genuine issues of material fact remain as to injury.

V. CONCLUSION

Isom seeks to add two points of diversion to water rights which were partially decree in 1997. A *Motion for Summary Judgment* was filed which argued that the volume and acreage for these water rights should be determined as a matter of law. Isom reasoned that the 1997 ***Partial Decrees*** determined both volume and acreage. Thus, Isom urged the Court to cut off Schureman's *Objections* on volume and acreage. Isom conceded that genuine issues of fact remain as to the addition on the Island Wells, but asserted that claim preclusion or issue preclusion should bar the relitigation of volume and acreage.

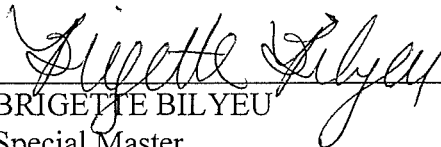
The Court finds that neither claim preclusion nor issue preclusion bars *Objections* as to

volume or acreage. Although Isom views these elements as isolated from the point of diversion elements, the Court finds the elements to be intertwined. Consequently, claim preclusion fails because the proposed change to point of diversion changes the entire water right claim. Accordingly, the *Amended Claims* for these rights do not constitute the same claims as those originally filed. Claim preclusion fails.

Issue preclusion fails because the issues raised in the *Partial Decrees* are different than those asserted in the *Amended Claims*. The addition of the Island Wells raises new issues of fact and law. The parties against whom Isom seeks to assert the *Partial Decrees'* determination of volume and acreage did not have a full and fair opportunity to litigate the issues. Thus, issue preclusion fails.

The licenses did not determine the volume limit now sought by Isom which seeks additional volume to transport the water over eight miles. Genuine issues of material fact remain. Finally, the question of whether the language proposed by IDWR is sufficient to protect existing users from injury raises genuine issues of material fact. Consequently, summary judgment is **denied**.

DATED: March 28, 2011.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION FOR SUMMARY JUDGMENT was mailed on March 28, 2011, with sufficient first-class postage to the following:

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