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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. 01-00217, 01-00218,
	)	01-04024, and 01-04025
Case No. 39576	)	(Minidoka Power Rights)
	)	
	)	Subcase Nos. 01-02068 and 01-04054
	)	(Palisades Power Rights)
	)	
	)	MEMORANDUM IN RESPONSE TO
	)	MOTION TO ALTER OR AMEND
	)	

The State of Idaho, by and through the undersigned deputy attorney general, hereby submits its memorandum in response to the Surface Water Coalition's (SWC) motion to alter or amend.

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I. DISCUSSION

A. THE SWC'S MOTION FAILS TO ESTABLISH GROUNDS FOR RELIEF UNDER RULE 59(E).

The SWC's motion to alter or amend should be denied because the SWC fails to establish grounds for relief under Idaho Rule of Civil Procedure 59(e). While the rule permits a court to alter or amend a previous judgment, a Rule 59(e) motion cannot be used to raise new arguments or present new evidence that could reasonably have been raised earlier in the litigation. *See Order on Motion to Strike and Request for Attorney's Fees and Costs* at 5 (Mar. 18, 2011) ("the Court will not consider affidavits or new evidence submitted in support of the *Motion for Reconsideration*; . . . the Court will not consider new arguments made in the *Motion for Reconsideration* not raised in the parties' briefings on *Challenge*"); *In re Fehrs*, No. 05-21306-TLM, 2008 WL 4443062, at *2 (Bankr. D. Idaho 2008) (interpreting F.R.C.P. 59(e), the court found: "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.") (quoting 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 59.30[4] (3d ed. 2000)). The SWC's motion to alter or amend fails to point to any clear error of law or to identify any intervening change in the controlling law that would support relief under Rule 59(e), and therefore, the SWC's motion should be denied. *See In re Fehrs*, No. 05-21306-TLM, 2008 WL 4443062, at *2 (Bankr. D. Idaho 2008) (finding that a Rule 59(e) motion should not be granted "unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.") (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).

B. NEWLY INTRODUCED EVIDENCE AND ARGUMENTS RELATED THERETO SHOULD NOT BE CONSIDERED IN THESE PROCEEDINGS.

References and arguments related to the evidence presented in the SWC's March 8, 2010

Affidavit of Travis L. Thomspson should not be considered in these proceedings. The Court made it clear that the SWC cannot present new evidence in support of this motion: “the Court will not consider affidavits or new evidence submitted in support of the *Motion for Reconsideration*.” *Order on Motion to Strike and Request for Attorney’s Fees and Costs*, In re SRBA Case No. 39576, Subcase No. 01-00217 et al. at 5 (Idaho 5th Dist. Ct. Mar. 18, 2011). The SWC’s *Memorandum in Support of SWC’s Amended Joint Motion for Reconsideration* includes both references and arguments related to the evidence set forth in the March 8 affidavit. Consistent with the Court’s March 18 *Order*, those references and arguments—including the entirety of paragraphs 2 through 5 of Section II.A—should not be considered in these proceedings.

C. THE COURT CORRECTLY FOUND THAT THE *EAGLE DECREES* ARE NOT BINDING ON THE STATE BECAUSE THE STATE WAS NOT A PARTY THERETO AND BECAUSE THE ADJUDICATIONS WERE NOT GENERAL STREAM ADJUDICATIONS.

i. INVOLVEMENT OF THE WATERMASTER IN THE *EAGLE DECREES* PROCEEDINGS DOES NOT BIND THE STATE OF IDAHO AS A PARTY THERETO.

Adding nothing to its argument presented on *Challenge*—except for impermissible evidence submitted via its March 8 affidavit—the SWC continues to incorrectly equate the watermaster’s authority to administer water rights to the watermaster’s authority to bind the State of Idaho, in its sovereign capacity, to privately adjudicated water right decrees. The Court correctly recognized the distinction between those authorities, thus finding that the State is not bound by the *Eagle Decrees*.¹

First, the watermaster’s involvement in private water rights adjudications, such as the *Eagle Decrees* proceedings, was limited. As the Idaho Supreme Court found in *Nampa & Meridian Irrigation District v. Barclay*, watermasters were joined to private water rights

¹ Throughout this litigation, the SWC has incorrectly referred to the *Eagle Decrees* proceedings in the singular—e.g., “*Eagle Decree*” and “adjudication”—when in fact, the *Eagle Decrees* proceedings involved two separate and distinct judicial proceedings, which resulted in two separate and distinct decrees.

adjudication proceedings in their administrative capacity only, and not on the subject of the litigation itself: “The defendant water master is only an administrative officer and has no interest in the subject of the litigation; his only duty is to distribute the waters of his district in accordance with the respective rights of appropriators, adjudicated rights having preference over unadjudicated rights and appropriations.” 56 Idaho 13, 20, 47 P.2d 916, 919 (1935).

Second, the watermaster had no authority to bind the State, in its sovereign capacity, to the subject matter of the *Eagle Decrees* proceedings. The Director of the Idaho Department of Water Resources (IDWR)² could only, and did only, delegate to the watermaster the authority to administer water rights in accordance with the provisions of title 42, chapter 6, Idaho Code. See Certificate of Appointment (Mar. 28, 1969), Ex. M., *Stanish Aff.* (Nov. 10, 2009). Nothing in chapter 6 as it existed at the time of the *Eagle Decrees* authorized the watermaster to appear on behalf of the State in its sovereign capacity or to otherwise bind the State in its sovereign capacity. See I.C. § 42-1405 (1948), Ex. A., *Memorandum Decision and Order on Challenge* (Feb. 9, 2011).

Third, there is no evidence that the State or IDWR were ever made parties to the *Eagle Decrees* proceedings. Neither the “State of Idaho” nor the “Idaho Department of Reclamation” appear in the captions to the *Eagle Decrees*. The SWC’s conclusory refusal to recognize a distinction among the watermaster, IDWR, and the State does not mean that such a distinction does not exist. For example, Idaho Code § 42-1401C expressly distinguishes the State of Idaho from IDWR as well as other state agencies for purposes of appearance and representation in the SRBA:

(1) Each state agency, and the Idaho water resource board may file a claim and appear separately in any adjudication through the attorney general. This section shall not apply to the Idaho department of water resources.

² Formerly referred to as the Idaho Department of Reclamation.

(2) The attorney general may appear in any adjudication and shall represent the position of the state of Idaho.

I.C. § 42-1401C. In addition, Idaho Rule of Civil Procedure 4(d)(4), as it existed at the time of the *Eagle Decrees*, also recognized a distinction between the State of Idaho and other state agencies for purposes of participating in civil litigation:

Service upon state, agencies, or government subdivisions.—Upon the state of Idaho, or any agency thereof, by delivering two copies of the summons and complaint to the attorney general or any assistant attorney general.

I.R.C.P. 4(d)(4) (1958) (attached hereto as Attachment I).

Fourth, nothing in Idaho Code § 42-604, as it existed at the time of the *Eagle Decrees*, authorized the watermaster to act as an “instrumentality” of IDWR or the State. In support of its motion to alter or amend, the SWC directs the Court to the current version of Idaho Code § 42-604, which provides that water districts are to be considered instrumentalities of the State in certain respects:

Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.

I.C. § 42-604. The SWC’s reliance on this language is misplaced. Nothing in the statute authorizes the watermaster to appear on behalf of the State in its sovereign capacity or to otherwise bind the State in its sovereign capacity; instead, the authority to act as an instrumentality under the existing version of Idaho Code § 42-604 is limited only to the administrative function of water distribution. More importantly, as it existed at the time of the *Eagle Decrees*, Idaho Code § 42-604 did not include the “instrumentality” language that currently exists in the statute and did not otherwise authorize the watermaster to act as an instrumentality of IDWR or the State in any respect. *See* I.C. § 42-604 (1948) (attached hereto as

Attachment II).³

In sum, the State never appeared in, and never was made a party to, the *Eagle Decrees* proceedings via the watermaster's involvement, and thus, the Court correctly found that the State is not be bound by the *Eagle Decrees*.

ii. THE DOCTRINE OF *RES JUDICATA* DOES NOT BIND THE STATE TO THE *EAGLE DECREES*.

As discussed above, the State was not in privity with the watermaster for purposes of binding the State to the *Eagle Decrees*: the watermaster did not have an interest in the subject matter of the litigation; nothing in title 42, chapter 6, Idaho Code, authorized the watermaster to bind the State to the subject matter of the litigation; the State of Idaho, in its sovereign capacity, was never made a party to the litigation; and former Idaho Code § 42-604 did not authorize the watermaster to act as an instrumentality of the State.

Privity is not all that is required to satisfy the doctrine of *res judicata*, however, and the SWC's argument that the State cannot collaterally attack the *Eagle Decrees* incorrectly assumes the SWC was successful in establishing the additional elements of the doctrine:

[A] five-factor test which must be considered in determining whether collateral estoppel will act as a bar: 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation.

Western Indus. v. Kaldveer Assocs., Inc., 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994). For example, the Court's findings demonstrate that the nature and extent of the water rights set forth

³ Regardless of which version of Idaho Code § 42-604 is relied upon, nothing in either version authorizes the watermaster to appear on behalf of the State in its sovereign capacity or to otherwise bind the State in its sovereign capacity. The authority to act as an instrumentality under the current version of Idaho Code § 42-604 is limited only to the function of water distribution.

in the *Eagle Decrees* were not fully and actually decided; instead, as the Court found in its order on challenge, the *Eagle Decrees* provided only *prima facie* evidence of a right to use water:

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.

Memorandum Decision and Order on Challenge at 13 (Feb. 9, 2011); *see also id.* (quoting I.C. § 42-1405 (1948) (“provided, that the right thus established shall not be deemed adjudicated, but *prima facie* merely”)).

Accordingly, neither IDWR nor the State is obligated to accept a prior decree as conclusive proof of the nature and extent of a water right: “Although a decree evidences a legal right to the use of water, *see* I.C. § 42-230(e), it does not obligate the Director to make a recommendation contrary to his findings.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 741, 947 P.2d 409, 414 (1997). In *Hagerman*, the Court further stated:

Nowhere in Title 42 is the Director “obligated to accept a prior decree” issued in a private adjudication “as being conclusive proof of the nature of a water right.” This is especially true in light of longstanding decisions in Idaho that decreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, *Graham v. Leek*, 65 Idaho 279, 287-88, 144 P.2d 475, 479 (1943), abandoned, *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 59-60, 231 P. 418, 421-22 (1924), *Washington County Irr. Dist. v. Talboy*, 55 Idaho 382, 393, 43 P.2d 943, 947 (1935), or lost through adverse possession.

Id. (emphasis added); *see also Mays v. Dist. Court*, 34 Idaho 200, 206, 200 P. 115, 116 (1921) (“The decree does not adjudicate any right. It simply gives a *prima facie* right to the delivery of so much water.”).

The SWC’s own actions demonstrate the fallacy of their argument that the findings set forth in the *Eagle Decrees* cannot be disputed. For example, in subcase no. 01-10509, the Twin Falls Canal Company and North Side Canal Company claimed, and had partially decreed, a

beneficial use water right for Milner Lake with a pre-*Eagle Decrees* priority date that is recognized nowhere in the *Eagle Decrees*. See *Partial Decree*, In re SRBA Case No. 39576, Subcase No. 01-10509 (Idaho 5th Dist. Ct. Sept. 28, 2009) (attached hereto as Attachment III). Under the SWC's theory that the *Eagle Decrees* constituted an incontrovertible *de facto* general stream adjudication, there would be no basis to allow water right no. 01-10509 to be decreed with a pre-*Eagle Decree* priority date.⁴ In addition, as the State discussed in previous briefing, the *Eagle Decrees* clearly name the United States as the sole owner of these water rights, yet the SWC now argues that the SRBA decree should include the SWC as an owner as well. Where the SWC fails to hold itself—an admitted party to the *Eagle Decrees*—to the standards of *res judicata*, it would be unreasonable and inequitable to allow the SWC to impose such a standard on the State and the USBOR—neither of which were named parties to the *Eagle Decrees*.

iii. THE COURT FOUND THAT THE STATE IS NOT BOUND BY THE *EAGLE DECREEES* AS A MATTER OF LAW, AND THEREFORE, SUMMARY JUDGMENT WAS PROPER.

The Court correctly found that the State is not bound by the *Eagle Decrees* as a matter of law. The SWC's argument that the mere naming of the watermaster in the *Eagle Decrees* proceedings creates a genuine issue of fact to the contrary ignores the Court's findings regarding both the legal constraints on the watermaster's authority as well as the legal effect of the proceedings under the summary supplemental adjudication statute. Such conclusory arguments are insufficient to create a genuine issue of fact. See *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005) (“[N]onmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of

⁴ Despite the SWC's insistence throughout this litigation that the *Eagle Decrees* must be referenced on the face of all water rights throughout Basin 01, the SWC sought no reference whatsoever to the *Eagle Decrees* in subcase no. 01-10509.

material fact for the purposes of summary judgment.”).

D. AS THE SOLE CLAIMANT AND OWNER OF THESE WATER RIGHTS, THE UNITED STATES IS FREE TO VOLUNTARILY LIMIT ITS RIGHTS THERETO.

i. THE SWC FAILED TO RAISE THE ESTOPPEL ARGUMENT ON CHALLENGE, AND THEREFORE, IT SHOULD NOT BE CONSIDERED.

For the first time in this litigation, the SWC raises the issue of estoppel in its *Memorandum in Support of SWC's Amended Joint Motion for Reconsideration*. Because neither the Court's March 18 *Order* nor Rule 59(e) allows movants to raise new arguments when they could reasonably have been raised earlier in the litigation, the issue of estoppel should not be considered by the Court. *See Order on Motion to Strike and Request for Attorney's Fees and Costs* at 5 (Mar. 18, 2011) (“the Court will not consider new arguments made in the *Motion for Reconsideration* not raised in the parties' briefings on *Challenge*”); *In re Fehrs*, No. 05-21306-TLM, 2008 WL 4443062, at *2 (Bankr. D. Idaho 2008) (interpreting F.R.C.P. 59(e), the court found: “A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.”) (quoting 12 James Wm. Moore et al., *Moore's Federal Practice* ¶ 59.30[4] (3d ed. 2000)).

ii. THE SCW FAILS TO ESTABLISH A CLAIM FOR ESTOPPEL.

The SWC presented no evidence that the USBOR ever agreed to include the exact language of the Palisades Contracts into its water right decrees. Without such evidence, the SWC cannot prove that the USBOR has taken an inconsistent position as required to claim estoppel. “The doctrine of quasi-estoppel has its basis in acceptance of benefits; it precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a

benefit.” *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994) (citation omitted). The burden of establishing estoppel is on the SWC. See *Tom Nakamura, Inc. v. G & G Produce Co., Inc.*, 95 Idaho 645, 646, 516 P.2d 702, 703 (1973).

The SWC’s position in this matter is simple—any remark in the USBOR’s water right decrees must be identical to the provisions of the Palisades Contracts. That argument dismisses, however, the terms of the Palisades Contracts. While the USBOR may have agreed to operate its projects as set forth in the Palisades Contracts, nowhere in the contracts did the USBOR agree that the language of its water rights would mimic the provisions of the Palisades Contracts. These are two separate and distinct obligations, the latter of which does not exist in the contracts or elsewhere.⁵ The Court correctly recognized this distinction in its *Order*:

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.

Order on Motion to Strike and Request for Attorney’s Fees and Costs at 23–24 (Mar. 18, 2011).

The SWC fails to provide any evidence of an inconsistent representation that directly pertains to this water rights adjudication, and therefore, the SWC’s claim of estoppel should be denied.

iii. ANY FACTUAL DISTINCTIONS BETWEEN THE AGREED-UPON REMARK AND THE PALISADES CONTRACT LANGUAGE ARE IRRELEVANT.

Idaho Code § 42-1411(a)(2)(j) requires only that the agreed-upon remark be necessary for

⁵ The SWC explains its argument as follows: “[I]f BOR entered a contract explicitly stating ‘BOR will not do X,’ the BOR would be estopped from taking a position in any litigation that is inconsistent with its contractual obligation to not do ‘X,’ if such a position would be detrimental to a party to the contract who is also a party to the litigation.” *Memorandum in Support of SWC’s Amended Joint Motion for Reconsideration* at 12 (Mar. 8, 2011). The SWC fails, however, to identify the “X” obligation that the USBOR is violating by way of its motion for summary judgment. Nowhere in the Palisades Contracts does it state: “BOR will not [accept language in a water right that does not mimic exactly the language of the Palisades Contracts].”

the definition, clarification, or administration of the water right.⁶ The SWC's argument that there is an additional prerequisite—requiring the State and the USBOR to prove that the remark also complies with the Palisades Contracts—is a legal fiction: “[D]espite the voluminous record before the Court, there are no facts that would allow the conclusion that the ‘remarks’ proposed by the State and BOR do not violate the Palisades Contracts” *Memorandum in Support of SWC’s Amended Joint Motion for Reconsideration* at 13 (Mar. 8, 2011). To the extent the SWC raised any affirmative defenses in response to the summary judgment motions—e.g., breach of contract—the burden was on the SWC, not the State or the USBOR, to prove those defenses. *See Harman v. Northwestern Mut. Life Ins. Co.*, 91 Idaho 719, 721, 429 P.2d 849, 851 (1967) (“The burden of proving the affirmative defense was on the pleader.”); *Tom Nakamura, Inc. v. G & G Produce Co., Inc.*, 95 Idaho 645, 646, 516 P.2d 702, 703 (1973) (finding that the burden of establishing estoppel was on the parties who asserted it).

E. THE STATE IS ENTITLED TO ATTORNEY FEES AND COSTS.

Where the SWC's motion was brought and pursued unreasonably and without foundation, the State is entitled to the reasonable attorney fees pursuant to Idaho Rule of Civil Procedure 54(e)(1) and Idaho Code § 12-121. As set forth above, the SWC fails to point to any clear error of law or to identify any intervening change in the controlling law that would support relief under Rule 59(e). *See In re Fehrs*, No. 05-21306-TLM, 2008 WL 4443062, at *2 (Bankr. D. Idaho 2008) (finding that a Rule 59(e) motion should not be granted “unless the district court

⁶ *See Aff. of Anthony Olenichak* (Aug. 18, 2009) (testifying that the proposed remarks “are consistent with Water District No. 1’s historical administration of” the Minidoka and Palisades power rights); *Depo. of Anthony Olenichak* at 135 (Sept. 16, 2009) (“Q. Is the change in the language from what the decreed language is in order to make the language comport with how you’ve administered the right? A. Yes.”); *Depo. of Lyle Robert Swank* at 75 (“Q. And the proposed language includes all of what is necessary for administration within the winter power operations provisions? A. That’s correct.”); *Depo. of Gary Lynn Spackman* at 103–04 (Oct. 22, 2009) (“Q. And the provision provided in the State’s motion for summary judgment, that language, in your opinion, is administrable? A. I would interpret the language to be It is my opinion, language that we could use for the administration of water rights.”).

is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.”) (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). The SWC’s motion, therefore, is not warranted under Rule 59(e), and the State is entitled to attorney fees in responding thereto.

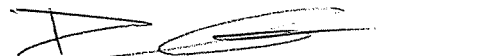
II. CONCLUSION

The SWC impermissibly offers new legal arguments and new evidence that it failed to offer below. The remainder of the SWC’s motion is simply a rehash of the arguments it made on *Challenge*. Because the SWC’s motion fails to point to any clear error of law or to identify any intervening change in the controlling law that would support relief under Rule 59(e), the SWC’s motion should be denied.

RESPECTFULLY SUBMITTED this 11th day of April 2011.

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CERTIFICATE OF SERVICE

I certify that on this 11th day of April 2011, I caused to be served the original and copies of the **MEMORANDUM IN RESPONSE TO MOTION TO ALTER OR AMEND** on the following persons by the methods indicated:

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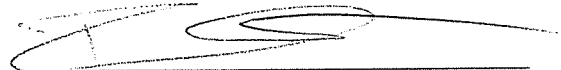
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Attachment I

Idaho Rule of Civil Procedure 4(d)(4) (1958)

IDAHO CODE

CONTAINING THE

IDAHO RULES OF CIVIL PROCEDURE

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Unincorporated association, constitutionality, construction and applicability of statute as to service of process on. 79 A. L. R. 305.

Validity, construction, and application of statute inaking a foreign corporation subject to action arising out of contract made within the state although such

corporation was not doing business therein. 49 A. L. R. (2d) 668.

What constitutes doing business within state by a foreign magazine, newspaper, or other publishing corporation, for purposes other than taxation. 38 A. L. R. (2d) 747.

Rule 4(d) (4). Service upon state, agencies or governmental subdivisions.—Upon the state of Idaho, or any agency thereof, by delivering two copies of the summons and complaint to the attorney general or any assistant attorney general. Upon any other governmental subdivision, municipal corporation or quasi-municipal corporation or public board by delivering a copy of the summons and complaint to the chief executive officer or the secretary or clerk thereof.

Compiler's note. There does not seem to be any statutory provision for service of summons when the state of Idaho, or one of its boards or commissions or state departments is sued although pursuant to § 67-1401, it is the duty of the attorney general to defend on behalf of the state. Moreover by § 41-3305, the 1955 legislature has waived immunity to extent of liability insurance carried on behalf of the state of Idaho and any agent, agency or department thereof, although no provision is made for service of summons on anybody. By § 5-507 (6) provision is made for service upon a county, city or village, and likewise a provision under § 50-2001 for service upon a city or village. Section 14-421 provides that title may be quieted against a state tax lien and summons for the state shall be served upon the commissioner of finance. Sections 7-313 and 7-404 provide for service of writs of prohibition and mandamus upon inferior tribunals, corporations or boards. This rule may partially affect the above cited sections of the Idaho Code.

Federal rules comparison. Federal Rules 4(d) (4), 4(d) (5) and 4(d) (6) refer to federal practice.

Textbook ref. Barron & Holtzoff, Federal Practice and Procedure, vol. 1, § 182.

Moore's Federal Practice, 2nd Edition, vol. 2, ch. 4, ¶¶ 4.01-4.03, 4.30.

Comp. rules. Ariz. Rev. Stat., Vol. 16, Rules of Civ. Proc., Rules 4(d) (7), 4(d) (8).

Colo. Rev. Stat. 1953, Vol. 1, Rules of Civ. Proc., Rules 4(e) (6)-4(e) (9).

Del. Code Ann., Vol. 13, Rules of Superior Courts, Rule 4(f) (1) (IV).

Ky. Rev. Stat., Rules of Civ. Proc., Rules 4.04(6), 4.04(7).

Minn. Rules of Civ. Proc., Rules 4.03 (d), 4.03(e).

Nev. Rev. Stat., Vol. 1, Rules of Civ. Proc., Rule 4(d) (5).

N. J. Rules Governing New Jersey Courts, Rules 4:4-4(g)—4:4-4(h).

Utah. Code Ann. 1953, Vol. 9, Rules of Civ. Proc., Rules 4(e) (5)-4(e) (9), 4(e) 11.

Rule to rule ref. This rule is referred to in rules 4(e), 5(a), 25(a) (1), 27(a) (2).

DECISIONS UNDER SIMILAR STATUTES

Drainage Districts.

Service of summons on proposed change of plans in drainage district is entirely distinct proceeding from service of summons in civil actions. *Field v. Drainage Dist. No. 1*, 46 Idaho 248, 267 Pac. 443.

Collateral References.

Court did not have jurisdiction of declaratory judgment action over home

loan board where only service of process was by mailing a copy to office of board, and by delivery of a copy to district attorney. *Queens County Group v. Home Loan Bank Board*, 104 Fed. Supp. 396.

Effect of death as a result of injury on requirement of notice of claim against a city or other subordinate governmental unit. 51 A. L. R. (2d) 1128.

Rule 4(e). Summons—Other service.—Whenever a statute of this state provides for service of a summons, or of a notice, or of an order in lieu of summons, upon a party not an inhabitant of, or found within the state, or upon unknown persons, service shall be made under the circumstances and in the manner prescribed by the statute. Personal

Attachment II

Idaho Code § 42-604 (1948)

IDAHO CODE

CONTAINING THE

GENERAL LAWS OF IDAHO ANNOTATED

PUBLISHED BY AUTHORITY OF
LAWS 1947, CHAPTER 224

Compiled Under the Supervision of the
1947 Idaho Code Commission

OSCAR W. WORTHWINE
RALPH R. BRESHEARS CAREY H. NIXON
COMMISSIONERS

IN TWELVE VOLUMES
VOLUME EIGHT

INDIANAPOLIS
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42-603. Supervision of water distribution—Rules and regulations.—The department of reclamation shall provide such rules and regulations in relation to making of proof of completion of works constructed under the provisions of this title, and of the proof of application of the water as provided for in this title, and shall also devise all needful rules for the distribution of water from the streams, as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. [1915, ch. 34, § 8, p. 103; reen. C. L., § 3273; C. S., § 5607; I. C. A., § 41-503.]

Compiler's note. Department of reclamation substituted for state engineer on authority of § 67-3301.

42-604. Creation of water districts.—The department of reclamation shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: provided, that any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty miles, may be divided into two or more water districts: provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream: provided, that any stream may be divided into two or more water districts, irrespective of the distance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district: provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof. [1903, p. 223, § 23; am. 1907, p. 532, § 2; reen. R. C., § 3274; am. 1909, p. 326, § 1; am. 1915, ch. 34, § 9, p. 103; reen. C. L., § 3274; C. S., § 5608; am. 1927, ch. 63, § 1, p. 78; I. C. A., § 41-504.]

Application of Section.

On streams "whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof" there can be no legal organization of water district, and no persons claiming to be officers of such district have any authority to determine priorities and amounts or to interfere with the irrigation works of any user. *Marsters v. United States*, 236 Fed. 663.

Estoppel to Deny Validity.

In action for contribution for expense of watermaster, defendant who had participated in meetings of water district and received benefits for eleven years could not deny liability, although this section had not been complied with in the formation of such water district. *Owen v. Nampa &c. Irr. Dist.*, 48 Idaho 680, 285 Pac. 464.

Validity of District.

No particular steps are specified or form prescribed to be taken or followed

by department of reclamation in creating or designating water district. *Owen v. Nampa &c. Irr. Dist.*, 48 Idaho 680, 285 Pac. 464.

Waters in Boise River.

Decision in case of *Farmers Cooperative Ditch Co. v. Riverside Irr. Dist.*, 16 Idaho 525, 102 Pac. 481, together with decree and orders of trial court in that case, though not res judicata, constituted an adjudication of the waters in Boise River for the purpose of distribution. *Owen v. Nampa &c. Irr. Dist.*, 48 Idaho 680, 285 Pac. 464.

Collateral Reference.

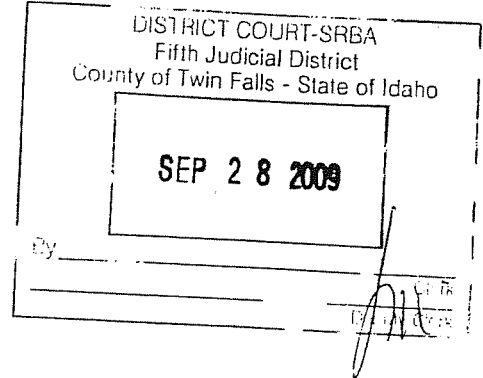
Right of owner of land within reclamation project in respect to which water right was allowed upon application pursuant to reclamation act, to perpetual right beyond control of federal government for sufficient amount of water beneficially to irrigate land. 115 A. L. R. 1320.

Attachment III

**Partial Decree, In re SRBA Case No. 39576,
Subcase No. 01-10509 (Idaho 5th Dist. Ct.
Sept. 28, 2009)**

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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 01-10509



NAME AND ADDRESS: TWIN FALLS CANAL COMPANY
PO BOX 326
TWIN FALLS, ID 83303-0326

NORTH SIDE CANAL CO LTD
921 N LINCOLN AVE
JEROME, ID 83338

SOURCE: SNAKE RIVER TRIBUTARY: COLUMBIA RIVER

QUANTITY: 24400.00 AFY

This right provides for maintaining a water surface elevation of 4133.72 feet measured at the upstream face of the dam consistent with the March 25, 1919 judgment entered by Judge Dietrich in the U.S. District Court case Twin Falls Canal Co. v. Twin Falls Land & Water Co. et al.

The volume delivered for irrigation under this right shall be limited to actual physical drawdown of Milner Reservoir at the end of the irrigation season between water-surface elevations of 4133.72 and 4130.72 feet.

PRIORITY DATE: 03/01/1905

POINT OF DIVERSION: T10S R21E S28 NWSW Within Twin Falls County
SWNW
SWNW Within Jerome County
S29 NESE Within Twin Falls County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation Storage	01-01 TO 12-31	24400.00 AFY
	Irrigation from Storage	03-15 TO 11-15	24400.00 AFY

This right is for checking and impounding the waters of the Snake River at Milner Dam.

PLACE OF USE: Place of use for irrigation from storage is within the boundaries of Twin Falls Canal Company and North Side Canal Company.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Irrigation from Storage is limited to delivery during the final days of the irrigation season, subject to irrigation demand, diversion limitations and reservoir operations. Irrigation from Storage is available to meet the irrigation needs of Twin Falls Canal Company and North Side Canal Company near the end of the irrigation season when their natural flow water rights at Milner Dam are not sufficient to fill their diversions. The right holder may reduce, as necessary, the water surface elevation to facilitate maintenance and repair on Milner Dam and appurtenant structures.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

OTHER PROVISIONS (continued)

ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

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.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication