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DEPARTMENT OF
WATER RESOURCES

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

JUN 21 2011

By

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Clerk
Deputy Clerk

In Re SRBA

) Subcase Nos. 01-04, *et al.*

) (see list of 37 subcases attached)

Case No. 39576

)

)

) MEMORANDUM DECISION AND ORDER ON

) PERMISSIVE REVIEW

)

Holding: The ruling of the Special Master is **affirmed in part and reversed in part.**

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

Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, Idaho Falls, Idaho, attorneys for the Mud Lake Water Users, Inc., Montevieu Canal Co., Independent Water Users of Mud Lake, Producers Irrigation Co. and Jefferson Irrigation District.

Candice McHugh of Racine Olson Nye Budge & Bailey, Chartered, Boise, Idaho, attorneys for Aberdeen American Falls Groundwater District, Bingham Groundwater District, Bonneville Jefferson Groundwater District, Carey Valley Groundwater District, Jefferson Clark Groundwater District, Madison Groundwater District, Magic Valley Groundwater District and North Snake Groundwater District.

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

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.
STATEMENT OF THE CASE

A. Nature of the case.

This matter comes before the Court pursuant to an *Order Granting Permissive Review* issued in the above-captioned matter on February 24, 2011. The *Order* was issued in response to a request by the Aberdeen American Falls Groundwater District, Bingham Groundwater District, Bonneville Jefferson Groundwater District, Carey Valley Groundwater District, Jefferson Clark Groundwater District, Madison Groundwater District, Magic Valley Groundwater District and North Snake Groundwater District (collectively, “Ground Water Districts” or “GWD”) that this Court review the Special Master’s *Order on Motions for Summary Judgment* issued on December 11, 2009 in the above-captioned subcases. Among other things, the Special Master’s *Order* denied the Ground Water Districts’ request that the *Partial Decrees* for the above-captioned water rights contain certain limiting remarks. The Ground Water Districts assert that the Special Master’s *Order on Motions for Summary Judgment* is contrary to law and asks this Court to reverse the same.

B. Statement of facts and course of proceedings.

1. On May 15, 2005, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) filed his *Director’s Report, Irrigation and Other Uses, IDWR Lower Basin 01*, which contained recommendations for the above-captioned water rights. A summary of the pertinent elements recommended by the Director is attached hereto as **Exhibit A**.

2. At issue are the Director’s recommendations with respect to the source and period of use (a.k.a. “season of use”) elements. The Director recommended the “Snake River” as the source of water for all of the above-captioned water rights, save five that were recommended disallowed. The Director recommended the period of use as 3/15 – 11/15 for all of the above-captioned water rights, save the five that were recommended disallowed and 01-13 which was recommended as 04/01 – 10/31.

3. On October 4, 2006, the GWD filed *Objections* to the recommendations for the above-captioned water rights, asserting among other things that:

The Director’s recommendation fails to identify and distinguish the water supply associated with this water right. The claimed right is entitled to be filled only by high surface water runoff from snow melt or rain. Its source of supply is not from

base flow (ground water) to the Snake River. Conditions are required to prevent enlargement of the source of supply.

Objections, p.2.¹

4. On August 22, 2008, the GWD filed a *Motion for Summary Judgment* (“*Flood Water Motion*”) requesting that water right claims 01-10034, 01-10482, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241 and 01-10483 be disallowed on the grounds that no water has ever been delivered under those rights.² The GWD further asserted that 29 of the above-captioned water right claims are what they characterized as “high water rights.”³ They argued that the *Partial Decrees* for those rights should contain certain remarks to define and clarify the source and period of use elements:

[The 29 identified water right claims] are high water rights and only have water delivered during high runoff and snow melt during spring and early summer. They do not receive water for beneficial use during the entire irrigation season. Therefore, a condition limiting the season of use, and clarifying these water rights is necessary.

The primary source of supply for all of these high water rights (or flood rights) . . . consist primarily of snow melt and spring runoff. Therefore, a condition clarifying the source of supply and that these water rights are not entitled to make a delivery call against junior priority ground water rights is necessary.

Flood Water Motion, p.2.

5. Also on August 22, 2008, the GWD filed a *Motion for Summary Judgment on Priority Dates* (“*Priority Date Motion*”) with respect to water right claims 01-7, 01-8, 01-9, and 01-14. The *Priority Date Motion* asserted that although the four identified water right claims were recommended with a priority date of April 1, 1939, “by the terms of the Eagle decree, these priority dates were negotiated, and the date of actual first diversion to beneficial use may or may

¹ The *Objections* were originally filed by the Idaho Ground Water Appropriators, Inc. (“IGWA”). However, on May 29, 2008, the Special Master entered an *Order Granting IGWA’s Motion for Substitution of Parties* permitting the GWD to substitute in as parties in the above-captioned subcases in the place and stead of IGWA.

² The Court does not address this issue here as it was not determined by the Special Master below and has not been raised on permissive review by the GWD.

³ The following 29 water right claims were identified by the GWD as being “high water rights” in their August 22, 2008 *Flood Water Motion*: 01-4, 01-5, 01-6, 01-7, 01-8, 01-9, 01-10, 01-13, 01-14, 01-16, 01-17, 01-211A, 01-211B, 01-212, 01-213, 01-214A, 01-214B, 01-219, 01-2050, 01-2061, 01-10034, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482 and 01-10483.

not have actually been April 1, 1939.” *Priority Date Motion*, p.2. The GWD contended that “a clarifying remark should be added to the partial decrees in these sub-cases identifying the priority date for administration, being the date of actual first diversion for beneficial use, to facilitate lawful administration of these rights.” *Id.*

6. On January 13, 2009, the GWD were granted leave to amend their *Objections* to the above-captioned water rights. Out of the 29 water right claims identified in their *Flood Water Motion*, the GWD amended their *Objections* to the majority of the claims (i.e., 23 water right claims⁴) in pertinent part as follows:

Source. Should be: A condition should be added to reflect that for conjunctive administration this water right is a flood right and available only during high-flow periods.

Quantity. Should be: A condition should be added to reflect that for conjunctive administration the quantity of water available to supply this right has historically been limited to the period of high flows resulting from snow melt. Accordingly, consideration should be given to the history and seasonal availability of water so as not to require replacement water at times when the right has not received a full supply. Additionally, for purposes of conjunctive administration, the irrigation requirement for purposes of a delivery call, the quantity should not exceed 5/8 inch per acre head gate delivery.

Period of Year. Should be: The season of use should be limited to the high-flow period only, ending in late June or early July. Consideration should be given to the history and seasonal availability of water so as not to require replacement water at times when the right has not received a full supply.

Other Conditions. Should be: A condition should be added that this water right is not entitled to make a delivery call against junior priority ground water rights. Alternatively, conditions that limit the season of use, priority date, and identifies the source as flood flows from snow melt should be included in times of shortage, for conjunctive administration purposes.

Amended Objections, p.2.

7. With respect to the remaining 6 water right claims identified in their *Flood Water Motion* (i.e., 01-7, 01-8, 01-9, 01-10, 01-13 and 01-14), the GWD’s *Amended Objections* were identical to the above-identified 23 water right claims with respect to the quantity, period of use

⁴ The 23 referenced water right claims are: 01-4, 01-5, 01-6, 01-16, 01-17, 01-211A, 01-211B, 01-212, 01-213, 01-214A, 01-214B, 01-219, 01-2050, 01-2061, 01-10034, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482 and 01-10483.

and other conditions elements, and differed only as with respect to the source and priority date elements as follows:

Source. Should be: A condition should be added to reflect that for conjunctive administration this water right is a flood right as indicated in the “Eagle Decree” *Burley Irrigation Dist. v. Eagle*, Supplemental Decree and Stipulation (Idaho 5th Jud. Dist., 1968) and available only during high-flow periods.

Priority Date. Should be: Based on when water was first put to beneficial use and not established by stipulation in the Eagle Decree. A condition should be added to reflect that during times of shortage and in the administration of this water right, that the priority date is the date that water was first put to beneficial use not the priority date currently recommended.

Amended Objections, p.2.

8. On June 24, 2009, the Mud Lake Water Users, Inc., Montevue Canal Co., Independent Water Users of Mud Lake, Producers Irrigation Co., and Jefferson Irrigation District (collectively, “Mud Lake Water Users” or “MLWU”) filed a *Motion for Summary Judgment* in the above-captioned action. The MLWU’s *Motion for Summary Judgment* was substantially similar to the GWD’s *Flood Water Motion* and argued that the 29 water right claims identified by the GWD should be characterized and decreed as “flood water rights” as a matter of law.

9. On June 25, 2009, the GWD effectively re-filed their *Flood Water Motion* and *Priority Date Motion*. The June 25, 2009 *Flood Water Motion* differed from the August 22, 2008 *Flood Water Motion* in that their *Objections* to water right claims 01-5, 01-16, 01-212 and 01-213 had been dismissed by agreement, leaving 25 water right claims they now asserted should be characterized as “high water rights” (hereinafter, “25 Water Right Claims”).⁵ Additionally, the GWD no longer sought disallowal of claim 01-10034, but rather its treatment as a flood water right. For the purposes of this hearing the June 25, 2009 *Priority Date Motion* remained unchanged from the August 22, 2008 *Priority Date Motion*.

10. On June 25, 2009, the A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Falls Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company (collectively,

⁵ The following 25 water right claims are identified by the Ground Water Districts as being “high water rights” in their June 25, 2009 *Flood Water Motion*: 01-4, 01-6, 01-7, 01-8, 01-9, 01-10, 01-13, 01-14, 01-17, 01-211A, 01-211B, 01-214A, 01-214B, 01-219, 01-2050, 01-2061, 01-10034, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241, 01-10482 and 01-10483 (hereinafter, “25 Water Right Claims”).

“Surface Water Coalition” or “SWC”) filed their *Second Joint Motion for Summary Judgment*, asserting among other things that the *Objections* filed by the GWD and MLWU should be dismissed as a matter of law.

11. Responses and replies to the various *Motions for Summary Judgment* were subsequently filed by several parties including the GWD, the MLWU, the SWC and the United States.

12. On December 11, 2009, the Special Master entered his *Order on Motions for Summary Judgment*, denying the relief requested by the GWD and the MLWU in their respective *Motions*. The Special Master held the following: (1) The source of water for all rights listed in the *Supplemental Eagle Decree* is the Snake River not limited by classification as flood or high flows; (2) The priority dates decreed in the *Eagle Decree* are valid; (3) Flood water rights are not subordinated to junior hydraulically connected water rights; (4) The season of use for flood water rights should be IDWR’s standard season of use; and (5) Remarks that may be added to the flood water rights are that the waters a) are supplemental, b) to be used for production of agricultural crops and associated domestic uses upon certain described lands, and c) are non-transferrable. *Order on Motions for Summary Judgment*, p.19.

13. On February 16, 2011, in response to the GWD’s request, the Special Master recommended to this Court that it entertain permissive review of the holdings in the *Order on Motions for Summary Judgment*.

14. On February 24, 2011, this Court entered an *Order Granting Permissive Review of Special Master’s Order on Motions for Summary Judgment* pursuant to *SRBA Administrative Order 1* (“AOI”), Section 9.e.

15. On April 5, 2011, the GWD filed their *Opening Brief on Permissive Review*. *Responses* in opposition were subsequently filed by the United States and the SWC. A *Response* in support of the GWD’s *Opening Brief* was filed by the MLWU. On May 13, 2011, the GWD filed their *Reply Brief on Permissive Review*.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument on permissive review was heard before the Court on May 23, 2011. 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 May 24, 2011.

III.

STANDARDS OF REVIEW

A. Permissive review.

The SRBA's permissive review procedure permits review by this Court of an "interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion." *SRBA Administrative Order 1* ("A01") Section 9.e. On permissive review, the Court must only review the question(s) of law which the Court has been requested by either the Special Master or parties to review. *Id.* Any factual findings, if they exist, are not ripe for review and the nature of permissive review does not allow the Court to make factual findings. The Court's inquiry, then, is limited to review of the Special Master's legal conclusions, and the application of those legal conclusions to any facts that exist at the time of the permissive review.

A Special Master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.3d 326, 334 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (1993). This permits a district court to adopt the Special Master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a district court's standard of review of a Special Master's conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d at 104. Further, the label put on a determination by the Special Master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. *Wright and Miller, supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

B. Summary judgment.

In this permissive review proceeding the Court is asked to review certain conclusions of the Special Master entered in his *Order* following his consideration of several *Motions for*

Summary Judgment. The standard of review on appeal from an order granting or denying summary judgment is the same standard that is used by the special master in ruling on the motion. *Gibson v. Ada County*, 142 Idaho 746, 751, 133 P.3d 1211, 1216 (2006). Summary judgment is proper if 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. The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* When a court considers a motion for summary judgment, all facts are to be liberally construed in favor of the nonmoving party, and the court must draw all reasonable inferences and conclusions in that party's favor. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). The filing of cross motions for summary judgment does not change the standard of review; the court must evaluate each party's motion on its own merits. *Farm Bureau Insurance Company of Idaho v. Kinsey*, 149 Idaho 415, 418, 234 P.3d 739, 742 (2010).

IV. DISCUSSION

The GWD and MLWU have placed several issues before this Court on permissive review. The Court will first address the arguments that the 25 Water Right Claims are “flood water rights” and should contain certain limiting remarks in their *Partial Decrees* regarding their source and period of use elements, and/or a limiting remark that those rights are not entitled to make a delivery call against junior groundwater diversions. The Court will then address the arguments that a limiting remark should be added to the priority date element of the *Partial Decrees* for water right claims 01-7, 01-8, 01-9 and 01-14.

A. The Special Master did not err in denying the GWD's and MLWU's requests to include a remark limiting the source and period of use elements of the 25 Water Right Claims and/or a remark that those rights are not entitled to make a delivery call against junior priority groundwater rights.

The GWD and MLWU argue on permissive review that the Special Master erred in denying their request to insert certain remarks in the *Partial Decrees* for the 25 Water Right Claims limiting their source and period of use elements, and/or a remark that those rights are not entitled to make a call against junior priority groundwater rights. They assert such remarks are

necessary given that the 25 Water Right Claims are what they have characterized alternatively as “high water rights” or “flood water rights.” With respect to the source element, the GWD contend that a remark should be added indicating “that these water rights’ source of supply consists primarily of spring runoff and snow melt.” GWD’s *Opening Br.*, p.24. With respect to the period of use element, the GWD contend that a remark should be added reflecting that “the period of use should end in early July.” *Id.* at p.19.

The arguments of the GWD and MLWU rely in part on certain language contained in what will be referred to herein as the *Eagle Decree*.⁶ The *Eagle Decree* was entered in Twin Falls County Case *Burley Irrigation Dist. v. Eagle* on July 10, 1968 in response to a summary supplemental water adjudication initiated by certain surface water users in Water District 01. It professed to adjudicate rights to the use of water from the Snake River and its tributaries above Milner Dam in Water District 01, and was entered upon a stipulation of the parties. The rights in the *Eagle Decree* were identified as being required for the production of agricultural crops and associated domestic uses on the described lands. *Eagle Decree, Findings of Fact and Conclusions of Law*, p.6.

The provision of the *Eagle Decree* relied upon by the GWD and MLWU addresses certain water rights established and/or adjusted in connection with the planning and development of the Palisades Dam and Reservoir Project:

That in connection with the establishment of the water rights for said Palisades Reservoir, it was particularly necessary for the parties Plaintiff to agree among themselves, and avoid extensive, expensive and delaying litigation by so agreeing upon a common priority date for those persons who were using, or were making plans to construct projects and perfect rights to use, the so-called “Flood Water Rights,” being those waters of the river which were only available during periods of high flow; and which the parties Plaintiff had been using to the best of their ability and to the extent of their irrigation works, or were planning to use as projects were constructed; and that the parties Plaintiff did at such time agree on a common priority date of April 1, 1939, for such rights, which said agreement has been acted upon by all of the parties Plaintiff hereto continuously, and deliveries have been made in accordance therewith by defendant Henry Eagle.

Eagle Decree, Findings of Fact and Conclusions of Law, p.3 (emphasis added).

⁶ Copies of the *Findings of Fact and Conclusions of Law* and *Supplemental Decree* constituting the *Eagle Decree* are attached as Exhibits E and F respectively to the *Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment* dated August 26, 2008.

The GWD and MLWU argue that the *Eagle Decree*'s reference to those water rights decreed with a priority date of April 1, 1939 as "Flood Water Rights" in the above-quoted provision establishes that those rights rely on spring runoff and snow melt as their source and are available for use only during a limited period of the irrigation season ending sometime in late June or early July. Out of the 25 Water Right Claims identified by GWD as "flood water rights," this argument covers water right claims 01-7, 01-8, 01-9, 01-10, 01-13 and 01-14, as those six water claims were decreed in the *Eagle Decree* with a priority date of April 1, 1939. The remaining 19 claims, which were not decreed in the *Eagle Decree* with a priority date of April 1, 1939, are broken into two groups by the GWD – 9 claims which have priority dates junior to April 1, 1939,⁷ and 10 claims with priority dates senior to that date.⁸ With respect to the claims with junior priority dates, the GWD assert those must be considered "flood water rights," given that senior water rights decreed in the *Eagle Decree* with a priority date of April 1, 1939 were referred to as "flood water rights." With respect to the claims with senior priority dates, the GWD rely upon certain expert witness testimony that surface water rights in Water District 01 junior to October 11, 1900 are primarily dependent upon spring runoff and snow melt, and do not receive water after June or early July in most years. See *Carlson Aff.*, ¶11; *Olenichak Aff.*, ¶¶8–11.

This Court's analysis of the propriety of the requested limiting remarks begins with Idaho Code § 42-1411(2), which provides in part that to the extent the Director deems appropriate and proper he shall include in his *Director's Report*: "(i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and (j) 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." For the reasons identified below, the Court finds that the Special Master did not err in his determination that the limiting remarks proposed by the GWD and MLWU with respect to the 25 Water Right Claims were unnecessary and/or improper as a matter of law.

As an initial matter, the GWD's and MLWU's assertions that the *Eagle Decree* establishes that these water rights rely only upon spring runoff and snow melt as their source and

⁷ This group includes 01-2050, 01-2061, 01-10225, 01-10237, 01-10238, 01-10239, 01-10240, 01-10241 and 01-10482.

⁸ This group includes 01-4, 01-6, 01-17, 01-211A, 01-211B, 01-214A, 01-214B, 01-219, 01-10034 and 01-10483.

have a period of use ending in late June or early July is unavailing. The *Eagle Decree* defines what it referred to as “flood water rights” as “being those waters of the river which were only available *during periods of high flow*,” and stated that the parties agreed upon a common priority date of April 1, 1939 for such rights. *Eagle Decree, Findings of Fact and Conclusions of Law*, p.3 (emphasis added). Nowhere in the express terms of the *Eagle Decree* are those rights limited to a source of spring runoff and snow melt or to a period of use ending in early July. Likewise, nowhere in the express terms of the *Eagle Decree* is the term “periods of high flow” limited to spring runoff or snow melt, or to only water available prior to early July. Thus, this Court does not find the term “flood water rights” as used in the *Eagle Decree* to be ambiguous. *See e.g., Page v. Pasquali*, 150 Idaho 150, 152, 244 P.3d 1236, 1238 (2010) (“Where the contract’s terms are clear and unambiguous, “the determination of the contract’s meaning and legal effect are questions of law and the meaning of the contract and intent of the parties must be determined from the plain meaning of the contract’s own words”).

The Special Master’s *Order* correctly recognized that Idaho’s waterways are subject to fluctuating water supplies during a given year. Periods of higher than normal flows or “high flow” might occur year round as a result of a banner water year, or might occur sporadically throughout the year due to a multitude of causes, including but not limited to higher than normal snow pack and snow melt, sporadic high levels of precipitation, sporadic high reach gains, return flows, etc. Even in a normal water year, water supplies may fluctuate at any given time due solely to senior users on the source deciding not to exercise part or all of their senior rights. Any of the above-mentioned causes may result in “periods of high flow” where water is available above and beyond what may normally be available in an average water year to be diverted by those who now realize themselves to be in priority.

In such cases, placing a limiting remark in the *Partial Decrees* for the 25 Water Right Claims precluding those rights from diverting available water after early July, or subsequent to spring runoff, would run afoul of the prior appropriation doctrine. The Idaho Supreme Court has stated that the Idaho Constitution has confirmed the doctrine of prior appropriation with respect to surface waters. *Clear Springs Foods, Inc. v. Spackman* 2011 WL 907115, *10 (Idaho 2011). Article XV, Section 3, of the Idaho Constitution provides: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied Priority of appropriation shall give the better right as between those using the water. . . .”

Placing a limiting remark in the 25 Water Right Claims making it unlawful for those water users to divert after early July, or to divert water subsequent to spring runoff, would result in junior water users diverting out of priority in those instances when water is available, for whatever reason, after early July. Such a scheme of remarks is not contemplated by the prior appropriation doctrine, as it would lead to out of priority diversions. Nor was such a scheme contemplated by the *Eagle Decree*, which provided that “[a]ll of the rights decreed to the lands described in the Decree herein are and shall be in addition to and supplemental to *all other existing water rights* appurtenant to said lands” *Eagle Decree, Findings of Fact and Conclusions of Law*, p.6 (emphasis added). Absent from the *Eagle Decree* is any express language subordinating the rights contained therein to any future junior rights. As such there is no support in the *Eagle Decree* for the proposition that the holders of the 25 Water Right Claims agreed to subordinate their claims to, or agreed to refrain from making a call against, future groundwater diversions.

Moreover, such limiting remarks are not supported by the record of historical water use in this case. For instance, the *Affidavit of Norman C. Young* establishes that water right claim 01-211B is in priority “an average of 84 days per year, during the period of watermaster regulation,” and in many years “is in priority and used without curtailment nearly the entire irrigation season;” and that water right claim 01-214B is in priority “an average of 26 days per year, during the period of watermaster regulation,” and “has been in priority and used for as many as 104 days in an irrigation season.” *Young Aff.*, ¶¶12 & 13. Another example, the *Affidavit of David B. Shaw*, establishes that water rights 01-6, 01-14, 01-17, 01-211A, and 01-211B have historically been available late in the irrigation season (i.e., September or October) in most years. *Shaw Aff.*, ¶¶6–10. Even the experts retained by the GWD’s and MLWU’s conceded that certain of the 25 Water Right Claims can be in priority in August, September or October in a given year, and that the water available in the river at that time is *not* spring runoff or snow melt. *Carlson Depo. Tr.*, pp.98–100; *Olenichak Depo. Tr.*, pp.62–66.⁹

The point of reciting the above-mentioned facts is not to establish which given days in an average year the 25 Water Right Claims are in priority. Rather, the facts are illustrated to support the general proposition that including the remarks proposed by the GWD and MLWU in the *Partial Decrees* for the 25 Water Right Claims would result in precluding those water users

⁹ Copies of the *Deposition of Ronald Dean Carlson* dated October 7, 2008 and the *Deposition of Anthony Olenichak* are attached as Exhibits C and D respectively to the *Third Affidavit of Travis L. Thompson* filed on July 29, 2009.

from diverting water when it is available, resulting in out of priority diverting in contravention of the prior appropriation doctrine. One of the basic realities of the prior appropriation doctrine is that not all water rights on a given source are going to receive their full allotment of water every day during the irrigation season. That does not mean however that those water rights are decreed with a season of use remark limited to those days water is normally available to that right. The priority doctrine, and the administration of water rights in priority based on the principle of first in time first in right, makes such remarks unnecessary.

An example is illustrative. Take two hypothetical surface water users diverting water from a common source for irrigation purposes. Water user A is the most senior user on the source, and in a historically average water year receives his full allotment of water under his water right. Water user B's water right is directly junior in priority to water user A's right. In a historically average water year water user B receives water until July 1, after which there is only enough water in the source to satisfy water user A's right. Water from the common source has been administered in this fashion as between water user A and B for 100 years. In year 101, however, water user A ceases using his senior right, either through abandonment, forfeiture, enrollment of his acreage in a long term conservation program, etc. Under the prior appropriation doctrine, water user B now moves up in priority on the source. *See e.g., Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982) (stating, "[i]f a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, and the junior appropriators move up the ladder of priority"). If water user B's water right contained a remark limiting its period of use as ending on July 1 based on the fact that historically, in an average year, water has not available to water user B after that date, water user B would be precluded from diverting, in priority, the now available and unappropriated water from the common source to satisfy his right. It would follow that water users junior to water user B on the common source would divert out of priority. Such results are not contemplated by the prior appropriation doctrine.

Although Idaho law precludes restricting the period of use of an irrigation beneficial use water right to those specific periods of the irrigation season when the water is normally available to satisfy the right, this *Decision* does not stand for the proposition that senior-priority right holders are entitled to curtailment of junior-priority rights for those periods when water has historically not been available. Whether or not such curtailment would be appropriate is

properly to be determined by the Director under the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 (“CMR”) in the context of a delivery call material injury analysis. Historic availability and seasonal variability are factors that the Director may consider in responding to a delivery call.¹⁰ This was confirmed on review by the district court in a delivery call made by spring users against the holders of junior-priority groundwater rights, many of which are parties to the instant proceeding. In *Order on Petition for Judicial Review*, Gooding County Dist. Court, Case no. 2008-444 (June 19, 2009) *affm’d on other grounds*, *Clear Springs Foods, Inc. v. Spackman* 2011 WL 907115 (Idaho 2011), the district court held:

[A] determination of material injury requires the Director to determine what portion of a senior’s water right deficit is caused by naturally occurring seasonal lows as opposed to the portion of the deficit that results from the exercise of junior rights. [T]he material injury analysis under the CMR ... require[s] the Director to exclude any water deficit attributable to such seasonal variations. Juniors cannot be curtailed to provide water that a senior would not have received anyway due to seasonal variations; nor can juniors be required to provide replacement water for such amounts.

Id. at 21-22. The district court concluded further the Director must give full effect to the decreed elements of the senior right so as to avoid a re-adjudication of the right. The district court therefore held that any finding of deficit to the senior right based on seasonal variability or historic availability must be pursuant to established burdens of proof and evidentiary standards applied in delivery calls. *Id.* at 24. The GWD assert it is for this reason they are now seeking a limiting remark in the decrees at the adjudication stage of the rights to avoid a “re-adjudication” issue in the event of a future delivery call. Nonetheless, for the reasons discussed above, there is no legal basis for restricting the use of a beneficial use right to only those periods where water is normally available. Included in the “bundle of sticks” that comprises a water right is the right to

¹⁰ The CMR specifically address that particular situation and include factors the Director may consider in determining whether the water rights of senior-priority holders are suffering material injury. One such factor includes “[w]hether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to ... a senior-priority surface or ground water right.” IDAPA 37.03.11.042.01.c. The CMR further prohibit senior right holders from making a delivery call for curtailment against junior-priority groundwater rights where the use of junior-priority right is covered by an approved mitigation plan. IDAPA 37.03.11.042.02. A factor the Director may take into account in determining whether a mitigation plan will prevent injury includes: “[T]he history and seasonal availability of water for diversion *so as to not require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods and extended drought periods.*” IDAPA 37.03.11.043.03.c (emphasis added).

beneficially use the water in priority when it is available even though sufficient water to satisfy the right may only be available on an intermittent basis. How such a right is to be administered conjunctively with junior-priority groundwater rights is a separate issue. While the applicable legal standards and burdens of proof may differ from those applied when adjudicating a water right the CMR properly cover that issue in the event of a future delivery call.

The Special Master's determination to deny the GWD's and MLWU's request to insert certain limiting remarks into the *Partial Decrees* for the 25 Water Right Claims is therefore affirmed. The Court's holding in this *Memorandum Decision and Order* is limited to affirming the Special Master's determination in this respect. The Court does not decide the issue of under what circumstances the claimants of the 25 Water Right Claims may successfully call junior users during the irrigation season. That issue is not before the Court.

B. The Special Master did not err in denying the GWD's request that a limiting remark be added to the priority date element of water right claims 01-7, 01-8 and 01-9. The Special Master's decision with respect to 01-14 is reversed and remanded for further proceedings.

The GWD argue in their *Priority Date Motion* that the following limiting remark should be added to priority date element of water right claims 01-7, 01-8, 01-9 and 01-14:¹¹

Priority Date. Should be: Based on when water was first put to beneficial use and not established by stipulation in the Eagle Decree. A condition should be added to reflect that during times of shortage and in the administration of this water right, that the priority date is the date that water was first put to beneficial use not the priority date currently recommended.

The GWD assert that although water right claims 01-7, 01-8, 01-9 and 01-14 were recommended with a priority date of April 1, 1939, "by the terms of the Eagle decree, these priority dates were negotiated, and the date of actual first diversion to beneficial use may or may not have actually been April 1, 1939." *Priority Date Motion*, p.2. Furthermore, they contend the terms of the *Eagle Decree* are not binding as to them since they were not parties to the proceedings resulting

¹¹ In their *Reply Brief on Permissive Review*, the GWD argued that a limiting remark should be added to the priority date element of water right claims 01-7, 01-8, 01-9, 01-10, 01-13 and 01-14. The SWC correctly asserted at oral argument that the GWD did not raise the priority date argument with respect to water right claims 01-10 and 01-13 in their opening brief on permissive review. As such, the Court will not consider the arguments of the GWD with respect to water right claims 01-10 and 01-13 as they are not properly before this Court. *See e.g., Suitts v. Nix*, 141 Idaho 706, 708, 117 P.3d 120, 123 (2005) (holding "a reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief").

in the *Eagle Decree*, and argue that a remark should be added to the *Partial Decrees* for the four rights identifying the priority date for administration as the date of actual first diversion for beneficial use. *Id.*

With respect to water right claims 01-7, 01-8, 01-9 and 01-14, the plaintiffs to the *Eagle Decree* stipulated that the priority dates for those rights would be April 1, 1939 to “avoid extensive, expensive and delaying litigation.” *Stipulation* entered in Twin Falls County Case *Burley Irrigation Dist. v. Eagle* on July 10, 1968.¹² The GWD are correct in their assertion that the priority dates agreed to in the *Eagle Decree* are not binding upon them. This Court has previously held that the *Eagle Decree* did not adjudicate any rights to the use of water, but rather simply established *prima facie* rights to the delivery of so much water. *Memorandum Decision and Order on Challenge* (Feb 9, 2011), and *Memorandum Decision and Order on Motion to Alter or Amend Judgment* (May 17, 2011) entered in subcase nos. 01-217, *et al.* Furthermore, since the *Eagle Decree* was not entered as a result of a general adjudication, it is not binding on non-parties, such as the Ground Water Districts.¹³ *Id.*

However, this Court finds that the GWD failed to submit evidence sufficient to rebut the *Director's* recommendation of an April 1, 1939 priority date with respect to water right claims 01-7, 01-8 and 01-9, or to create a genuine issue of material fact with respect to those rights on summary judgment. Under Idaho law, the *Director's* recommendation with respect to a water right claim is *prima facie* evidence of the nature and extent of the water right. I.C. § 42-1411(4). Any party filing an objection to the *Director's* recommendation has the burden of going forward with the evidence to rebut the recommendation. I.C. § 42-1411(5).

In addition to the *Director's Report*, the claimants of water right claims 01-7, 01-8 and 01-9 submitted additional evidence in form of the *Affidavit of Norman C. Young* and the *Affidavit of David B. Shaw* supporting the claimed priority date. With respect to 01-7 and 01-8, the record establishes that the holders of those rights “initiated water rights by diversion and beneficial use

¹² A copy of the *Stipulation* is attached as Exhibit D to the *Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment* dated August 26, 2008.

¹³ The adjudication resulting in the *Eagle Decree* was commenced pursuant to former Idaho Code § 42-1405 (1948), which at the time provided for the summary supplemental adjudication of water rights. For a complete analysis on the binding effect of summary supplemental adjudication decrees under former Idaho Code § 42-1405 (1948), and in particular the binding effect of the *Eagle Decree*, see this Court's *Memorandum Decision and Order on Challenge* (Feb 9, 2011) and *Memorandum Decision and Order on Motion to Alter or Amend Judgment* (May 17, 2011) issued in subcase nos. 01-217, *et al.*

prior to 1939 *in addition* to its previously decreed 1903 [01-221B] and 1908 [01-214B] rights” and “used water in excess of the diversion rate allowed under its . . . 1903 and . . . 1908 priority in 1932, 1936 and 1937.” *Young Aff.*, ¶¶11 & 15 (emphasis added). Likewise, the *Shaw Affidavit* shows that the claimants of water rights 01-7 and 01-8 had the capacity to use water under those rights as early as 1931 and that water was being diverted and put to beneficial use under 01-7 and 01-8 in 1936. *Shaw Aff.*, ¶11. With respect to water right claim 01-9, the record establishes that the claimant of that claim had the capacity to use water under that right as early as 1928, and that water was being diverted and put to beneficial use under 01-9 in 1928. *Id.*

In response to the evidence submitted by the claimants, the GWD rely upon the following. First, they cite to a letter dated June 24, 1968 from the former Director of the Department of Reclamation (predecessor agency to IDWR) R. Keith Higginson to counsel for certain of the holders of the 25 Water Right Claims regarding the proposed *Eagle Decree*.¹⁴ In the letter, the former Director gives notice that he would withdraw from any intervention in the proceeding resulting in the *Eagle Decree* and notes that the proceeding “will firm up the present practices, even though it will determine priorities of 1939 for diversion which in some instances did not take place until the late 50’s.” *Letter*, p.3. While the letter implies that certain water rights in the *Eagle Decree* may have received a priority date of 1939 even though no diversions were made until 1950’s, the GWD have failed to establish with any certainty that the Director was referring to water rights 01-7, 01-8 or 01-9. The *Eagle Decree* decreed numerous water rights. The record indicates that the Director’s comments would not have been made in relation to water right claims 01-7, 01-8 and 01-9, as the record establishes that all three rights had the capacity to divert and did indeed divert water under those rights prior to 1939. *Shaw Aff.*, ¶11; *Young Aff.*, ¶¶11 & 15. The GWD failed to provide any reason to link the Director’s comment to water right claims 01-7, 01-8 and 01-9.

Second, the GWD rely upon excerpts from a report dated September 26, 2007 prepared by an expert for the SWC for use in a delivery call proceeding unrelated to the instant proceeding.¹⁵ The expert report contains certain graphs depicting the average month diversions for the claimants of water right claims 01-7, 01-8 and 01-9. With respect to the claimants of

¹⁴ A copy of the letter is attached as Exhibit 33 to the *Affidavit of Robert L. Harris in Support of Motion for Summary Judgment* dated June 24, 2009.

¹⁵ A copy of excerpts of the report is attached as Exhibit B1 to the *Affidavit of Candice M. McHugh in Support of Motion for Summary Judgment on Priority Dates* dated June 25, 2009.

water right claims 01-7 and 01-8, the graphs are irrelevant to the question of diversion on or before April 1, 1939, as they only contain data of diversions from 1955 to 2006. With respect to the claimant of water right claim 01-9, the graphs contain diversion data going back to 1915 and show that the claimant diverted water in May, June and September prior to April 1, 1939.¹⁶ Neither the above-referenced letter nor the graphs relied upon by the GWD create genuine issues of material fact sufficient to avoid summary judgment, nor do they constitute sufficient evidence to rebut the *prima facie* weight of the *Director's Reports* for these rights. The Special Master did not err in denying the GWD's request that a limiting remark be added to the priority date element of water right claims 01-7, 01-8 and 01-9.

With respect to water right claim 01-14, the Court finds that the GWD carried their burden of rebutting the presumption created by the *Director's Report* with respect to the priority date element. The record in this case, particularly the *Shaw Affidavit*, establishes that the claimant of water right claim 01-14 did not have the capacity to divert the water, nor did the Claimant first divert the water under that right until 1957. *Shaw Aff.*, ¶11. This evidence is uncontradicted in the record. Thus, this Court finds that the Special Master erred in granting summary judgment in favor of the SWC with respect to the priority date element of this claim. Water right claim 01-14 will be remanded to the Special Master for further proceedings to (1) determine the specific priority date for water right 01-14 and/or (2) determine whether the priority date remark proposed by the GWD is necessary for definition of the right or for clarification of the priority date element of the right under Idaho Code § 42-1411(2).

V.

CONCLUSION

For the reasons set forth above, all of the rulings of *Special Master* placed at issue on permissive review **are affirmed**, except for the *Special Master's* determination to deny the GWD's *Priority Date Motion* with respect to water right claim 01-14. Water right claim 01-14 is recommitted to the Special Master for the purpose of conducting further proceedings to determine (1) the specific priority date for water right 01-14 and/or (2) whether the priority date remark proposed by the GWD is appropriate under Idaho Code § 42-1411(2).

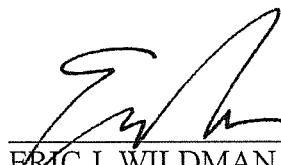
¹⁶ The excerpts of the report provided by the GWD do not contain graphs for the months of July, August or November.

VI.

SEPARATION OF ISSUES AND ORDER OF RECOMMITMENT

The instant proceeding was limited in scope to the issues of source and priority raised in common in the attached list of 37 subcases. In the interest of avoiding unnecessary delay by allowing remaining unrelated issues to proceed before the Special Master during the pendency of any appeal and pursuant to *AOI* Section 11, the common limited issues of priority and source as addressed herein are separated from the 37 subcases and shall proceed independently of the subcases. Other than the issues pertaining to priority and source as addressed herein, the remaining portions of the 37 subcases are recommitted to the Special Master for continued proceedings on remaining issues. Water right claim 01-14 is recommitted to the Special Master for the purpose of conducting further proceedings consistent with this opinion.

DATED: June 21, 2011.

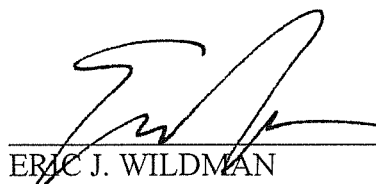


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

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: June 21, 2011.



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

Exhibit A
(summary of pertinent elements recommended by the Director)

Right	Claimant	Source	Priority	Quantity	Purpose and Period of Use
01-00004	Twin Falls Canal Co.	Snake River	12/22/1915	600.00 cfs	Irrigation (03/15 – 11/15)
01-00005	North Side Canal Co.	Snake River	12/13/1915	300.00 cfs	Irrigation (03/15 – 11/15)
01-00006	AFRD#2	Snake River	03/30/1921	1,700.00 cfs	Irrigation (03/15 – 11/15)
01-00007	Burley Irr. Dist.	Snake River	04/01/1939	163.40 cfs	Irrigation (03/15 – 11/15)
01-00008	Minidoka Irr. Dist.	Snake River	04/01/1939	266.60 cfs	Irrigation (03/15 – 11/15)
01-00009	Milner Irr. Dist.	Snake River	04/01/1939	121.00 cfs	Irrigation (03/15 – 11/15)
01-00010	Twin Falls Canal Co.	Snake River	04/01/1939	180.00 cfs	Irrigation (03/15 – 11/15)
01-00013	Falls Irr. Dist.	Snake River	04/01/1939	125.00 cfs	Irrigation (04/01 – 10/31)
01-00014	A&B Irr. Dist.	Snake River	04/01/1939	267.00 cfs	Irrigation (03/15 – 11/15)
01-00016	North Side Canal Co.	Snake River	08/06/1920	832.00 cfs	Irrigation (03/15 – 11/15)
01-00017	Milner Irr. Dist.	Snake River	11/14/1916	135.00 cfs	Irrigation (03/15 – 11/15)
01-00209	Twin Falls Canal Co.	Snake River	10/11/1900	3,000.00 cfs	Irrigation (03/15 – 11/15)
01-00210	North Side Canal Co.	Snake River	10/11/1900	400.00 cfs	Irrigation (03/15 – 11/15)
01-00211A	USBOR	Snake River	03/26/1903	1,726.00 cfs	Irrigation (03/15 – 11/15)
01-00211B	Burley Irr. Dist.	Snake River	03/26/1903	1,200.00 cfs	Irrigation (03/15 – 11/15)
01-00212	North Side Canal Co.	Snake River	10/07/1905	2,250.00 cfs	Irrigation (03/15 – 11/15)
01-00213	North Side Canal Co.	Snake River	06/16/1908	350.00 cfs	Irrigation (03/15 – 11/15)
01-00214A	USBOR	Snake River	08/06/1908	1,000.00 cfs	Irrigation (03/15 – 11/15)
01-00214B	Burley Irr. Dist.	Snake River	08/06/1908	544.00 cfs	Irrigation (03/15 – 11/15)
01-00219	USBOR	Snake River	12/14/1909	41,700.00 afy	Irrigation Storage (01/01 – 12/31) Irrigation from Storage (03/15 – 11/15)
01-02040	USBOR	Disallowed	Disallowed	Disallowed	Disallowed
01-02050	Milner Irr. Dist.	Snake River	07/11/1968	37.00 cfs	Irrigation (03/15 – 11/15)
01-02060	USBOR	Disallowed	Disallowed	Disallowed	Disallowed
01-02060A	A&B Irr. Dist.	Disallowed	Disallowed	Disallowed	Disallowed
01-02061	USBOR	Snake River	06/11/1956	153.00 cfs 27,121.50 afy	Irrigation (04/01 – 10/31)
01-04060	USBOR	Disallowed	Disallowed	Disallowed	Disallowed
01-10034	USBOR	Snake River	03/15/1911	53,500.00 afy	Irrigation Storage (01/01 – 12/31) Irrigation from Storage (03/15 – 11/15)
01-10189	Minidoka Irr. Dist.	Disallowed	Disallowed	Disallowed	Disallowed
01-10225	A&B Irr. Dist.	Snake River	04/01/1984	22.41 cfs	Irrigation (03/15 – 11/15)

01-10237	A&B Irr. Dist.	Snake River	07/11/1968	0.19 cfs	Irrigation (03/15 – 11/15)
01-10238	A&B Irr. Dist.	Snake River	07/11/1968	0.62 cfs	Irrigation (03/15 – 11/15)
01-10239	A&B Irr. Dist.	Snake River	07/11/1968	0.24 cfs	Irrigation (03/15 – 11/15)
01-10240	A&B Irr. Dist.	Snake River	07/11/1968	1.18 cfs	Irrigation (03/15 – 11/15)
01-10241	A&B Irr. Dist.	Snake River	04/01/1978	1.09 cfs	Irrigation (03/15 – 11/15)
01-10482	USBOR	Snake River	04/01/1940	0.54 cfs	Irrigation (03/15 – 11/15)
01-10483	Amalgamated Sugar Co.	Snake River	05/18/1926	0.61 cfs	Irrigation (03/15 – 11/15)

EXHIBIT A

Subcase Nos:

01-00004
01-00005
01-00006
01-00007
01-00008
01-00009
01-00010
01-00013
01-00014
01-00016
01-00017
01-00209
01-00210
01-00211A
01-00211B
01-00212
01-00213
01-00214A
01-00214B
01-00219
01-02040
01-02050
01-02060
01-02060A
01-02061
01-04060
01-10034
01-10189
01-10225
01-10237
01-10238
01-10239
01-10240
01-10241
01-10482
01-10483

(Subcase list: 01-4 ETAL)
6/21/11

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON PERMISSIVE REVIEW was mailed on June 21, 2011, with sufficient first-class postage to the following:

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ORDER

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FILE COPY FOR 00007

Deputy Clerk

A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the printed text "Deputy Clerk".