619

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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)	Case No. 36-02080
)	
Case No. 39576)	**BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE LATE OBJECTION**
)	

DESCRIPTIVE SUMMARY

This brief is filed in objection to the *Motion* of Magic Valley Underground Pumpers Association and its individual members for leave to file a late objection in this subcase. Objection to the *Motion* is supported by the *Affidavit* and attached exhibits submitted herewith.

ARGUMENT

Assuming for the purposes of argument that the standard to be used for denying or granting a *Motion to File Late Objections* in the SRBA are Rules 55(c) and 60(b) of the Idaho Rules of Civil Procedure, it is necessary to consider the law as it existed at the time the license was issued, the facts preliminary to the issuance of the license and subsequent thereto, the legal effects of the

of filing thereof, the name and post-office address of the applicant, the source of the water supply, the amount of water to be appropriated, in general the nature of the proposed use, the approximate location of the point of diversion, and the point of use, stating in said notice that any protests against the proof of such application, in form prescribed by the department, shall be filed with the department within forty (40) days from the date of such notice. The Commissioner was required to cause the notice to be served on the applicant and upon such service, the applicant was required to cause the same to be published within ten (10) days from the date of such service in a newspaper printed within the county wherein the point of diversion lies. The notice was required to be published at least once each week for three (3) successive weeks. Any person, firm, association or corporation concerned in any such application could, within the time allowed in the *Notice of Application*, file with the Commissioner a written protest against the approval of such application. A hearing would be conducted upon any protests being received. (See 1967 *Idaho Session Laws*, Chapter 374, showing the language as it existed prior to 1967 amendments.) An application was filed by the United States, no protests were filed opposing the application and the Commissioner forthwith approved the application, finding that it in all respects conformed with the requirements of Chapter 2 of Title 42, Idaho Code, and with the regulations of the Department of

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" 3. In connection with permits held by the United States, whether acquired as the original applicant, by assignment or otherwise, the State Reclamation engineer may extend the time for completion of the works for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, constructions, or any arrangements which the Secretary of the Interior or his authorized representative has found to be requisite to completion of the construction of such works. The extension of time for completion of works under this provision shall automatically extend the time for completion of the one-fifth required to be done in half the time, and for making proof of application of water to beneficial use." 1949 Idaho Session Laws, C.127, p.225.

As can be seen, the legislature set no limitation on the additional period or periods of extension which may be granted by the State Reclamation Engineer to the United States. It is also significant to note that there was no provision for third parties to protest an extension nor an opportunity for the permit holder to appeal should the extension be denied.

Until 1967, proof of completion of works and proof of application of beneficial use under a permit were controlled by Sections 42-214 through 42-217, Idaho Code. These sections required that upon receipt of notice from a user of water under a permit that he is prepared to prove that the works have been completed and that they have used such water for the beneficial purpose for which the diversion of such water was intended (which

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(See letter and Memorandum of Carl E. Tappan dated January 22, 1964, Exhibits C and D attached to Ling Affidavit.)

Section 42-224, Idaho Code, further provided:

> ". . . that any one feeling himself aggrieved by the statements contained in the license issued by the department, or the refusal of the department to issue such license, may appeal therefrom to the district court of the county in which the place of use of the water claimed shall be situated. Such appeal shall be taken within sixty (60) days from the date of such license or the refusal to issue such license, and shall be perfected when the appellant shall have filed in the office of the clerk of such district court a copy of the license, . . . , a copy of the protests against the issuing of such license filed with the department, . . ."

No formal protests were filed and a timely appeal was not made to the district court.

On June 10, 1965, the State Reclamation Engineer issued a *License and Certificate of Water Right*, Water License No. 20736, to the United States of America, Bureau of Reclamation, with a priority date of September 9, 1948, authorizing diversion of 1,100 cfs of water for the irrigation of 62,604.3 acres. (Exhibit K attached to Ling Affidavit.) Prior to that date, four separate appeals were filed against the State Reclamation Engineer in the District Courts of Minidoka, Jerome, Lincoln and Blaine Counties, respectively. (Exhibit I to Ling Affidavit.) Each of the appeals was subsequently dismissed on the grounds that the letter of the State Reclamation Engineer was not an appealable license or refusal

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binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right. Magic Valley Underground Pumpers Association, Inc. has not indicated that it has a defense to the water right established by the license, but attacks the priority in the license. The opportunity to contest the validity of the license has long expired. The Magic Valley Underground Pumpers Association and its members are also barred by the provisions of the Idaho Administrative Procedure Act (IAPA). Section 67-5270, Idaho Code, provides that judicial review of agency actions shall be governed by the provisions of that chapter unless other provisions of law are applicable to the particular matter. To obtain judicial review under the IAPA, the requirements of Section 67-5271 through 67-5279, Idaho Code, must be complied with. Section 67-5273, I.C., provides that a petition for judicial review of final agency action must be filed within twenty-eight (28) days of the agency action, except as provided by other provision of law. It is clear that judicial review of the issuance of the license under IAPA has long expired. Had review been allowed under IAPA, the scope of the review would be controlled by Section 67-5279, I.C. Under this section, the court may not substitute its judgment for that of the agency as the weight of the evidence on questions of fact. It is also clear that the Magic Valley Underground Pumpers Association and its members may not seek a review of the

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RUPERT, IDAHO 83350

County Commissioners of Arapahoe, 692 P.2d 1106 (Colo. 1984). The action before the court was for declaratory and injunctive relief on the grounds that the Board of County Commissioners had acted in excess of its power which involved actions quasi-judicial in nature. The court noted the statutory requirement that such quasi-judicial actions must be appealed pursuant to C.R.C.P. 106(b). Noting that the gravamen of the complaint was that the Board had proceeded in excess of its jurisdiction, and that such review was cognizable under C.R.C.P. 106(a)(4), it held that the action therefore must be filed within the 30-day period provided by C.R.C.P. Then noting that the complaint had not been filed within that time, the court held that the failure to do so was a jurisdictional defect and the failure of the sheriff to bring the action within the requisite time period deprived the district court of subject matter jurisdiction. The court further noted that the sheriff "may not seek to accomplish by declaratory judgment what [he] can no longer accomplish directly under C.R.C.P. 106(a)(4) . . .." The Court of Appeals of Idaho reached a similar opinion in *Fox v. Boundary County Board of Commissioners*, 114 Idaho 940, 763 P.2d 313 (Id.App. 1988).

There are other legal principles which deny to the Magic Valley Underground Pumpers Association, Inc. and its members the right to relitigate the issuance of the license by the Reclamation Engineer in this case. The moving parties are barred by the

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RUPERT, IDAHO 83350

> finality. Thus, once an administrative order becomes final, the administrative decision of an adjudicatory character binds the parties to the proceeding and is res judicata, thereby precluding a subsequent judicial proceeding between the same parties regarding the matters litigated in the administrative action.
>
> Res judicata bars relitigation not only of matters determined in a previous adjudication but also matters that a party could have raised."

This general legal principle is fully applicable in this case, and forecloses the moving parties from asserting that they have a defense to the water right recommended to the United States pursuant to the license. All of the parties seeking to file the late objection, if they have any standing, must have either been present at the time of the publication of the proof to be submitted for the issuance of the license, or the preceding owners of their water rights were present. They had the opportunity to raise the issues by filing a *Verified Protest* (sworn statement) or by seeking a court review of the issuance of the license, within the statutory provisions then existing. They may not now wait thirty (30) years and seek to relitigate those matters.

There is no question that the issuance of the license by the Reclamation Engineer was a final decision. There is no question that notice was given to the public by publication as to the proof that was to be presented to the Reclamation Engineer for the issuance of the license. Finally, there is no question that no formal protests were submitted to the Reclamation Engineer to

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are seeking relief from the license. Under Rule 60(b), I.R.C.P., assuming one can ignore the statutory provisions for review, they would be required, to set aside or obtain relief from the license, to commence action within six (6) months, and at the most, one (1) year after the license was issued. For these reasons, there is no meritorious defense available nor has one been presented. It is also submitted that allowing the filing of a late objection would be prejudicial to A & B Irrigation District and the United States. It is immaterial as to whether or not each member of the Magic Valley Underground Pumpers Association was aware of the proceedings which gave rise to the issuance of the license. They or their predecessors in interest who would have standing to question the priority date of the license had notice of the proof that was to be presented to obtain a license by the United States, and numerous members of Magic Valley Underground Pumpers Association were involved in the filing of informal protests or attempting an appeal of the decision to issue the license. It is not sufficient for the members of the Association to allege that they may not have even been born at the time the license was issued. Unless they have a water right that would be affected by a change in the priority of A & B Irrigation District, they have no standing to file an objection. If they have such a water right, their predecessors in interest had the knowledge required to file an objection, and such knowledge is imputed to the members of the Association.

the license and its priority date. For one to assert that he had no knowledge as to the events because they were not born at the time does not grant them the opportunity to contest those proceedings based upon any legal premise.

CONCLUSION

It is respectfully submitted that the *Motion to File a Late Objection* by the Magic Valley Underground Pumpers Association should be denied and overruled in all respects on the grounds and for the reasons that the moving parties have failed to establish that they have a meritorious defense to be raised by the filing of an objection and that the filing of an objection at this time would be prejudicial to the rights of A & B Irrigation District.

Respectfully submitted this 16th day of June, 1995.

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By: _____
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May 1, 1964

MEMORANDUM FOR THE IDAHO STATE RECLAMATION ENGINEER CONCERNING WATER FILINGS FOR THE NORTH SIDE PUMPING DIVISION, UNIT B, MINIDOKA PROJECT, IDAHO

The United States of America, acting through the Bureau of Reclamation, and for the ultimate benefit of citizens of Idaho who obtained homesteads on this reclamation project made a water filing under the State Water Code for this project. The application was filed with the Idaho State Reclamation Engineer on September 9, 1948, and was approved on November 9, 1948. This filing was for 1333.2 cubic feet per second of public waters of the State of Idaho to be developed from an underground source of water found to exist in the area. Some questions have been raised concerning the approval of proof of completion of works and the application of water to beneficial use filed in connection with this filing. There is no argument that the project has been completed and that a water supply for 637 irrigated farms in Unit B has been developed for the homesteaders now residing on the project. In order to support the issuance of the water right license, the following facts and discussions of the questions raised are offered. As is clearly shown by this memorandum, not only is the State Reclamation Engineer authorized by law to issue a water right license for the project with a priority of September 9, 1948, but also such action is required under the pertinent Idaho water laws, is in keeping with the representations made by the state to the Congress to obtain construction of the project, is consistent with the basis upon which the settlers homesteaded the project lands, and is not in conflict with or prejudical to any other Idaho water users. Conversely, the failure to issue a water right license for the project with a priority of September 9, 1948 would be contrary to the intent of the legislature, would be prejudical to the resident owners of the farms on the project who are the beneficiaries of the project water rights, and would not be detrimental to any non-project water users since no such non-project users formally appeared in the proceeding after repeated formal publications and announcements of the opportunity so to do. Thus, it is believed that this memorandum fully supports our position that a license should be issued with a priority date of September 9, 1948.

Background Information

The public land area which has now been developed as the North Side Pumping Division is composed entirely of public lands and is an area which has had a long history of contemplated development as a Federal reclamation project. A large area of public land, including the area included in the North Side Pumping Division, was withdrawn for reclamation development as the Minidoka Federal reclamation project shortly after the authorization of the reclamation program in 1902. From the outset, the area was proposed to be developed along with the other lands in the Burley-Rupert area as various divisions of a major project development known as the Minidoka Project. The initial area is within the Minidoka Irrigation District, is served by gravity from Minidoka Dam, and is known as the Gravity Division. The lands on the south side of the river were developed by pumping from the river, are in the Burley Irrigation District, and are known as the South Side Pumping Division.

The first storage reservoir built on Snake River is Jackson Lake and this reservoir contained additional capacity intended to be used for the development of the public lands in the Minidoka Project area. However, this additional capacity was made available during the water-short years preceding the 1920's as a supplemental source of supply to already developed lands diverting above American Falls. Thereafter, the American Falls Reservoir was built in the 1920's with sufficient capacity to provide water for the development of the North Side pumping area. Again, however, the water shortages of the 1930's showed the need for the use of the excess capacity in American Falls as a source of supplemental water supply for existing lands already developed. And, the water in American Falls was leased to the various canal companies and irrigation districts then developed in the Snake River area diverting above Milner Dam. Plans to develop the North Side pumping area were continued to be urged upon the Bureau by the various interests in the Minidoka-Rupert-Burley area and the plans to accomplish this grew out of the authorization of the next major storage reservoir in the Upper Snake River Basin, that being the Palisades Project. The basic plan was that the larger part of the leased space in American Falls Reservoir would be made permanently available to the

existing canal and irrigation districts. The remainder of the American Falls Reservoir capacity, supplemented by new storage at Palisades was set aside for a portion of the Minidoka North Side Pumping Division. This plan limited the size of the North Side Pumping Division area that could be served direct from the Snake River. This limited area is known as Unit A of the North Side Pumping Division. The remaining portion of this withdrawn public land area in the North Side Pumping Division area was to be developed in common with the Unit A area but was to be served from ground water. This basic plan was made part of the legislative history and incorporated into the bill which authorized Palisades Reservoir and the North Side Pumping Division. Thus, it can be seen that the various interests in the Snake River Basin comprising Water District No. 36 have long recognized the merits of the North Side Pumping Division area development and that development has been in contemplation over a long period of years.

The foregoing matters were the subject of much public discussion, were widely reported in the press of the local area and of the state at large, were officially announced in correspondence, and in presentations to the Congress and to state governmental officials. The information was readily available to landowners in the Minidoka-Rupert area who were seeking a source of water for private lands.

Authorization of the Project

The North Side Pumping Division was authorized by the Act of September 30, 1950, 64 Stat. 1083. This act in section 2 specifically authorized the project to be constructed and operated under the Federal Reclamation Laws in accord with the Commissioner of Reclamation's report adopted by the Secretary of the Interior on July 1, 1949, except for express modifications made in that report by the Congress, which are not pertinent here. In accordance with the provisions of the Flood Control Act of 1944, the Commissioner's report was circulated before presentation to the Congress to the various state governments for review and comment. The State of Idaho, acting through Governor Robins, reviewed the report and by letter dated August 1, 1949, on behalf of the State of Idaho, said:

"This project has been a part of the over-all planning for nearly 45 years largely because it was, even thus early, recognized that the lands involved were, by the reason of their fertility, climate, and situation and topography, well suited to intensive agricultural use.

"The project, in its major portion, will make beneficial use of Idaho's subterranean waters available in the area as demonstrated by the great amount of investigation work done by the Bureau. Developed by individual units as planned, there should be no deleterious effect on the subterranean water supply, since continuing studies by the Bureau will keep check on this feature.

"Referring again to history, when 500,000 acre-feet of American Falls Reservoir space was reserved for this project, it was naturally implied that as and when the development was feasible the obligation would be met.

"For the above reasons and since new irrigated land in Idaho is in demand and since there is presently none being developed elsewhere exclusively for veterans, this project has the hearty approval of Idaho."

Moreover, the report as reviewed by the State of Idaho, contained this material under the heading "Plan of Development":

"Unit B, with an irrigable area of 64,000 acres, will be served, as indicated earlier, with water pumped from wells. The wells, to be drilled at strategic points, will have an estimated range in capacity from 2 to 6 cubic feet per second and an average static lift of 200 feet. An estimated 309 wells will be required. From each well, small lateral systems will distribute water to several farms. Other facilities include a system of drainage wells, and 21 observation wells from which data can be obtained on regional water table fluctuations.

"Gradual development of Unit B over a period of 11 years is proposed in order to assure that the demands progressively placed upon the ground-water supply can be met satisfactorily."

The foregoing matters are of public record in House Document No. 721, 81st Congress, 2d session, the letter of Governor Robins appearing at page 7, and the discussions of the plan of development appearing at page 58. Attention is called to the fact that the "Plan of Development" section of the report as reviewed by the state indicated a development period of 11 years was proposed.

Moreover, in connection with the Congressional consideration of the authorization of the North Side Pumping Division, Mr. R. P. Parry of Twin Falls, Idaho, was asked by Governor Robins to appear on behalf of the State of Idaho at the hearings of the Subcommittee on Irrigation and Reclamation of the Committee on Public Lands, House of Representatives. In connection with making

a presentation in support of the early authorization and construction of the project, Mr. Parry made the following statement in August of 1949 to the Congress with respect to the Idaho state water rights that would be available for the North Side Pumping Division:

> "Mr. Parry. I believe that has been taken care of by the Bureau in this case as explained by Mr. Stinson yesterday. The Bureau made one blanket filing for all the wells that will be in this project to supply this body of Government land, and it would be my opinion that those wells would all be of equal priority there and that all of the men in there would have an equal right to a proportionate share of water out of this underground stream, which happens, according to geologists, to be really a definite stream flowing with an ascertainable current and flowing a large amount of water, because when we dry up the Snake River in the drought season at Milner Dam where we divert water for the two sides of the river, Twin Falls and Jerome, in the next 60 miles some 5,000 second-feet of water reappear even in the dryest season. That has to come from this underground stream." (Hearings before a Subcommittee on Irrigation and Reclamation of the Committee on Public Lands, House of Representatives, and a Special Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eighty-First Congress, First Session on H.R. 5506, page 88).

The joint committees of the Congress holding hearings on the authorization of the North Side Pumping Division were interested in the water rights for the project, and at their request a statement was inserted in the record as follows:

> "The committee understands that water filings with respect to underground water for unit B of the north side pumping division have been made by the United States with the State of Idaho pursuant to the provisions of section 8 of the act of June 17, 1902 (32 Stat. 388), and that as waters are developed through the well program the rights thereto will become appurtenant to the lands on which beneficial use is established. The committee has been told that, while the United States will continue to have an interest in the water rights according to these filings, the beneficial ownership of those rights will be in the water users organizations subject to defeasance only for breach of repayment arrangements." (Hearings before a Subcommittee on Irrigation and Reclamation of the Committee on Public Lands, House of Representatives, and a Special Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eighty-First Congress, First Session on H.R. 5506, page 186).

In keeping with these understandings, the Committee on Public Lands of the House of Representatives in reporting favorably on H.R. 5506, the bill which was adopted authorizing the Palisades Project and the North Side Pumping Division Project, included these words in its report (House of Representatives

Report No. 1297, Eighty-First Congress, First Session, August 22, 1949, at page 3):

> "The bill will authorize the development of unit B of the north side pumping division through the drilling of deep wells. This is a novel undertaking under the Federal reclamation law and raised considerable question concerning the handling of water rights. The committee understands that water filings with respect to underground water for unit B of the north side pumping division have been made by the United States with the State of Idaho pursuant to the provisions of section 8 of the act of June 17, 1902 (32 Stat. 388), and that as waters are developed through the well program the rights thereto will become appurtenant to the lands on which beneficial use is established. It is understood that the beneficial ownership of the water rights according to these filings will be in the water users subject to defeasance only for breach of repayment arrangements."

Congressman Sanborn of the Second Idaho Congressional District was a member of the committee at the time.

Thus, it is clear from the legislative history of the authorization of the North Side Pumping Division that state representatives advised the Congress that state water rights with a common priority of September, 1948, would be established for the veterans who were to homestead the public lands involved, and that there would be one blanket water right for all wells involved.

Timely Project Construction Has Been Accomplished

With the authorization of the project in the fall of 1950 by the Congress, construction of the project was undertaken. In keeping with well known and established legislative procedures, presidential budget requests are submitted to the Congress, open public hearings are held by the Congressional committees, and the Congress authorizes appropriations in accordance with its findings on the recommendations presented to it. These programs were made known to, and voted on, by the Congressional delegation of Idaho, and were public knowledge to the state and local officials and other citizens generally. There was ample opportunity for anyone desiring a more rapid rate of development to have presented his point of view to the Congress. The record discloses no presentation on behalf of the government of the State of Idaho for a more rapid construction of the project. The Congress appropriated funds for the construction of the project according to the following tabulation:

Fiscal year ending July 1	Amount
1950	$ 527,500
1953	150,000
1954	953,612
1955	1,898,891
1956	1,963,000
1957	2,768,000
1958	1,475,000
1959	316,000
1960	797,550
1961	320,000
1962	205,000
1963	134,619
1964	68,658

Appropriations for fiscal years 1951 and 1952 were not made due to the Korean War.

Under the program of project construction adopted by the Congress, public notices were issued throughout the United States inviting veterans of the armed forces who were qualified farmers to draw and seek an opportunity to obtain a homestead on the project. An unusually large number of veterans availed themselves of the opportunity to do so. As a result of public drawings and the screening of proposed settlers by a local board of interviewers, the veterans selected and their families were required to settle on the project and establish homes and develop the farms. The following tabulation shows the number of farm units and the years in which the settlers arrived on the project:

Number of Farm Units	Date of Entry
72	1953
85	1954
94	1955
194	1956
143	1957
35	1958
14	1961

Thus, a total of 637 farms were made available for settlement and were settled in a seven-year period.

Meantime, the portion of the project to be developed by diversion of water on the Snake River, known as Unit A, was approved for a state water right under permit No. 26216. Governor Smylie approved this permit on February 29, 1956, with a time for completion of works of March 5, 1961, but with proof of beneficial use of water being required no sooner than March 1, 1971.

In view of the foregoing, it appears fully supported that the development of the project has been as rapid as is reasonably possible, considering the large-scale investment involved, the number of people involved, and other settlement and public problems concerned. The development program is consistent with the eleven-year period estimated in the project plan contained in the report reviewed and approved by the Governor of Idaho by his letter of August 1, 1949.

Status of So-Called Objectors

The statutory procedure for obtaining a water certificate provides for publication of the notice of the initial filing of an application for permit, 42-203 Idaho Code. This was done in connection with the water right permit for the North Side Pumping Division and no one filed a protest. Under the provisions of 42-203 Idaho Code any private landowner could have done so. The legislature has provided no requirement for the publication of notice or the filing of a protest or a procedure for a hearing relating to a request of a permit holder for an extension of the time to complete his project. Moreover, the legislature has provided that a notice shall be published when construction of a project is completed. The law also requires notice of proof of the application of water to a beneficial use of the project. Sections 42-214 and 42-217 Idaho Code. These notices were published in connection with the issued permit applicable to the North Side Pumping Division, but no duly or properly verified protests were filed with the Idaho State Reclamation Engineer's office as is required by these statutes. Moreover, no person appeared at the time and place set in the published notice for the taking of proof to make any protest or make any statements.

In these circumstances, the holder of the issued water right permit who has (1) paid the required fees to the state for the permit, (2) published the required public notices, (3) complied with the required proof taking procedure established by law, and (4) provided the required verified statements as required by law, is entitled to have the proof accepted on the basis of the record made in accordance with the statutory procedures. Matters raised outside the record cannot properly be considered by the state official charged

with the responsibility of taking the actions with respect to the completion of an issued water right permit.

On the other hand, none of the persons objecting to the issuance of a water right license with a priority of September 9, 1948, would be prejudiced by the issuance of the water right license with such a priority, since it would give them the opportunity to appeal the decision if they so desired, and it is appropriate that these persons be required to bear the burden of the expense of any such appeal, rather than the developers and settlers of the project who have met all the expenses of proceeding with the processing of the water right application and of developing the project itself.

Applicable Appeal Procedures

It has been suggested that the permit holder was required to appeal from the decisions of the State Engineer which failed to approve the applications of the permit holder for an extension of time to complete the project works and submit the proofs of completion of works and of the application of water to a beneficial use. And the failure of the permittee to so appeal within 60 days after the issuance of the State Engineer's decision is suggested as being binding upon the permit holder.

There is no support for this suggestion in the state water code.

The Idaho legislature has not required a water right permit holder to appeal from each intermediate procedural action taken by the State Engineer in processing a validly granted water right permit through to the issuance of a water right license. An interpretation that would require an appeal from each intermediate decision in the administrative process in connection with the perfecting of a state water right does violence to the applicable statutes and would place an undue burden of untimely litigation on the courts and on permit holders who have in good faith proceeded to invest funds in the development of a water project in reliance on a water right permit.

The only statutory provision which could possibly require a permit holder to appeal in the circumstances involved with respect to the water right permit for the North Side Pumping Division is section 42-204 Idaho Code as amended,

which statutory provision was cited in Mr. Kulp's decision of April 5, 1956. But consider the language of this section as applied to the duty to appeal.

> "The approval of an application shall be endorsed thereon, and a record made of such endorsement in the Department of Reclamation. The application so endorsed shall constitute a permit and shall be returned to the applicant, and he shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and to perfect the proposed appropriation.". . .
>
> "Any applicant feeling himself aggrieved by the endorsement made by the Department of Reclamation upon his application may appeal therefrom to the district court of the county in which the point of diversion of the proposed appropriation shall be situated. Such appeal shall be taken within sixty days from the return of the application by the Department of Reclamation, and shall be perfected when the applicant shall have filed in the office of the clerk of such district court a copy of the application, certified by the Department of Reclamation as a true copy, together with the petition to such court, setting forth the appellant's reason for appeal. Such appeal shall be heard and determined upon such competent proof as shall be adduced by the appellant, and such like proof as shall be adduced by the Department or some person duly authorized in its behalf." (Emphasis supplied.)

This language clearly applies to situations in which an applicant for a water right permit is issued a permit with endorsements thereon with which the applicant is dissatisfied. He then can appeal and have his complaint decided judicially before the applicant proceeds to invest money in reliance on an issued water right permit. This procedure obviously is a sound one. In the situation involved on the North Side Pumping Division, however, the matter of concern is not the endorsement on the application for a permit, rather, it is the proper determination of the time established by statute to complete the project and make proofs of completion and of beneficial use of the water after the persons involved are no longer applicants for a permit but are holders of an issued permit and after the permit holder has undertaken the construction of the project and there are established settlers on the project utilizing the water. In the absence of a statutory directive to a water right permit holder to prosecute an appeal to the courts, a permit holder is not required to so prosecute an appeal concerning each administrative action of the State Engineer in connection with the procedural steps necessary to secure a water right license. To do so would lead to a multiplicity of suits, would unduly

burden not only the courts and the administrative process of the State Engineer's office, but would also greatly inconvenience the holder of the issued water right permit.

The Permit Holder Has Proceeded Within the Times Required by Statute and is Entitled to the Issuance of a Water Right License

The statute governing the limitation of time for the completion of project construction by a water right permit holder and the submitting of the proofs of such completion and the proofs of application of water to a beneficial use is 42-204 Idaho Code as amended. In pertinent part, this statute reads as follows:

> "In its endorsement of approval on any application the department shall require that actual construction work shall be complete within a period of five years from the date of such approval, and that one-fifth of such work of construction shall be done within one-half the period of time allowed for the completion of such works but may limit the application to a less period of time for the completion of such works than is asked for, and likewise the perfecting of the proposed right for a less period than is named in the application, and such endorsement shall give the date when such work shall be completed, also the date when beneficial application of the water to be diverted by such works shall be made for the purposes intended; Provided that:
>
> "1. In cases where the applicant is prevented from proceeding with his work by his failure to obtain necessary consent or final approval or rejection from the federal government because of the pendency of an application for right of way or other matter within the jurisdiction of the United States, or by litigation of any nature which might bring his title to said water in question, the department of reclamation upon proper showing of the existence of any such condition, and being convinced that said applicant is proceeding diligently and in good faith, shall extend the time so that the amount of time lost by such delays shall be added to the time given in the original permit for each and every action required.
>
> "2. The time for completion of works under any permit involving the construction of a reservoir of more than 200,000 acre feet capacity or for the appropriation of water to be impounded in such reservoir of more than 200,000 acre feet capacity, or a diversion of more than 25,000 acre feet in one (1) irrigation season for a project of no less than 5,000 acres, may upon application to the state commissioner of reclamation supported by a showing that additional time is needed on account of the time required for organizing, financing, and constructing works of such large size, be extended by the state commissioner of reclamation for an additional period of seven (7) years, but not to exceed twelve (12) years in all from the date of permit, and that extension of time for completion of works under this proviso shall automatically extend

> the time for completion of the twenty per cent (20%) required to be done in half (1/2) the time, and for making proof of application of water to beneficial use: Provided, that no such extension shall be granted unless the applicant for such extension shall show that there has been actually expended toward the construction of said reservoir or diversion (including expenditures for the purchase of rights of way and property in connection therewith) at least $100,000.
>
> "3. In connection with permits held by the United States, whether acquired as the original applicant, by assignment or otherwise, the state reclamation engineer may extend the time for completion of the works for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, construction, or any arrangements which the secretary of the interior or his authorized representative has found to be requisite to completion of the construction of such works. The extension of time for completion of works under this provision shall automatically extend the time for completion of the one-fifth required to be done in half the time, and for making proof of application of water to beneficial use."

In the situation with respect to the water right permit for the North Side Pumping Division, (1) the pace of progress of construction of the project works was a matter within the jurisdiction of the United States acting through the Congress, (2) the project involves the diversion of more than 25,000 acre-feet of water in one irrigation season on a project of more than 5,000 acres with an expenditure in excess of $100,000 having been made towards construction, and (3) the holder of the permit is the United States acting through the Secretary of the Interior pursuant to the Federal Reclamation Laws. On the basis of these facts, it is clear that the North Side Pumping Division fits into each one of the three exceptions made by the legislature to a time period of five years for the construction of the works under a water right permit.

Attention is called to the fact that numbered exception 1 specifically states that the Department of Reclamation upon the proper showing of the existence of the conditions specified in the exception and being convinced that the applicant is proceeding diligently and in good faith, "shall extend the time so that the amount of time lost by such delays shall be added to the time given in the original permit in each and every action required. Thus, this language makes an extension mandatory upon the State Reclamation Engineer.

It is recognized that numbered exception 2 was made applicable by amendment of that provision into the above-quoted form by legislative enactment in 1963. Again, however, this shows that the legislature intended that large-scale projects such as the North Side Pumping Division should be allowed sufficient time to accomplish the development of the project, having in mind the fact that completion of a large project does require more time than a small individual project.

Most importantly, however, it is quite clear that under any interpretation of the language of numbered exception 3, the North Side Pumping Division qualifies for an extension of time. No showing could possibly be made that the project does not clearly come within this legislative direction for an extension of the time for completion of the construction of project works.

The Legislative History of Idaho Water Laws Supports the Validity of the Permits

At the 1949 session of the Idaho legislature, specific action was taken by the legislature to adjust the Idaho state water right procedures as applied to the projects authorized by the Act of September 30, 1950. This enactment is chapter 127 of the Idaho Session Laws which amended section 41-204 of the Idaho Code (now section 42-204 quoted in part above).

The title of this amendatory act reads:

> "Amending section 41-204, Idaho Code Annotated, as amended by chapter 145, 1935 laws, regular session, as amended by chapter 161, 1941 laws, regular session, relating to permits of the Department of Reclamation for the commencement of work to construct irrigation canals and requiring bonds for same: excepting the United States acting through the Bureau of Reclamation of the Department of the Interior from the necessity of giving bonds; authorizing State Reclamation Engineer to extend time for completion of works in connection with permits held by the United States."

This title itself makes it quite clear that it was the intention of the legislature to authorize the State Engineer to extend the time for completion of works in connection with permits held by the United States. Also, the new language inserted in section 42-204 makes it quite clear that the specific intention of the legislature in enacting this amendatory legislation related directly to the projects authorized in the Upper Snake River, particularly

the Palisades Dam and the related North Side Pumping Division. The situation prevailing in 1949 was that a filing had been made for Palisades Reservoir by the Watermaster of Water District No. 36 which was being assigned to the United States. The new language says: "In connection with permits held by the United States whether acquired as the original applicant, by assignment, or otherwise." Thus, this language clearly had application to Palisades Reservoir. It also had application to the North Side Pumping Division by reason of the fact that in 1949 the United States was involved in the Korean situation, and it was well known that public works projects of the United States were being delayed by reason of this involvement.

This legislative intent is further shown by the action of the 1951 legislature when, in adopting a special procedure for obtaining ground water rights, it specifically recognized and confirmed previously pending ground water filings by including this language in section 42-226 Idaho Code:

> "All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed."

And by including this language in section 42-229:

> "All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of sections 42-201 - 42-225, Idaho Code, may be completed under the provisions of said sections and rights to the use of ground water may be thereby required."

Although the language used by the legislature in 1949 indicated only that the State Reclamation Engineer "may extend the time," the Idaho Supreme Court has made it quite clear that such legislative enactments are to be considered in terms of the situation with which the legislature was intending to deal. In the recent case of Messenger v. Burns, 382 P. 2d 913, the Supreme Court said:

> "In construing a statute, it is the duty of this court to ascertain the legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, 'such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like.'"

Even more persuasive are the Idaho Supreme Court's interpretations of the word "may" when considered in connection with a statute dealing with the responsibilities of public officials. In Shea v. Owyhee County, 66 Idaho 159, 156 P. 2d 331, the court had this to say:

> "In the case of Hayes v. Los Angeles County, 99 Cal. 74, 33 P. 766, construing a similar statute, syllabus 2 recites:
>
> > 'The word 'may,' in said section, means 'shall.' And, thus construed, the board having no discretion to allow or reject a claim for taxes actually paid a second time, on a refusal to allow such claim, action therefor lies against the county, without also making the state party defendant.'
>
> "In the body of the decision, it is held:
>
> > 'It is urged by respondent that the Code, by providing that the board of supervisors may by order provide for refunding taxes, etc., paid more than once, made it optional with that body whether to do so or not, and that the board, in this instance, having refused to refund, its action is conclusive upon the plaintiff. Where the public interest or private right requires that the thing should be done, then the word 'may' is generally construed to mean the same as 'shall.' People v. (Board of) Supervisors of Livingston County, 68 N.Y. (114), 119. Where the statute directs the doing of a thing for the sake of justice, or the public good, the word 'may' is the same as the word 'shall.' Rex v. Barlow, 2 Salk. 609. Where a statute directs a thing to be done for justice's sake, 'may' means 'shall.' Silvey v. United States, 7 Ct. Cl. (305), 334. Where persons or the public have an interest in having the act done by a public body, 'may,' in such a statute, means 'must.' Phelps v. Hawley, 52 N.Y. (23), 27; People v. (Board of) Supervisors of Otsego Co., 51 N.Y. 401. See (In re) Estate of Ballentine, 45 Cal 696. In Supervisors v. United States, 4 Wall. 435 (18 L. Ed. 419), a statute of Illinois provided that the board of supervisors 'may, if deemed advisable, levy a special tax,' etc. Mr. Justice Swayne sums up the authorities on the question as follows: 'The conclusion to be adduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language,--whenever the public interest or individual rights call for its exercise,--the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.' Applying the rule enunciated in the foregoing cases, and it is apparent that

> a sound and just rule of construction requires the permissive word 'may,' in section 3804, supra, to be construed as 'shall.''
>
> "The Grimes v. Raney case, supra, places its holding on grounds of 'Legislative intention', but in view of the criticism in said case and of the innumerable decisions to the effect that 'Where the public interest or private right requires that the thing should be done, then the word 'may' is generally construed to mean the same as 'shall'', such holding would seem unjustified."

Again, in Malone v. Van Etten, 67 Idaho 294, 178 P. 2d 382, the Idaho Supreme Court in determining the duty of the Public Utilities Commission said:

> "In considering sec. 59-804, I.C.A., and the use of the words 'said application may be granted and the commission may issue a permit as prayed for upon good cause shown', may should be construed as must where the applicant for the permit has fully complied with each and every statutory requirement. We think the rule is well settled that: 'Where the public interest or private right requires that the thing should be done, then the word 'may' is generally construed to mean the same as 'shall.'" Hayes v. Los Angeles County, 99 Cal. 74, 33 P. 766, at page 768.

It is clear that the Idaho legislature in enacting chapter 127 of the Idaho Session Laws of 1949 intended to specifically authorize the State Reclamation Engineer in connection with permits held by the United States to extend the time for completion of the work recognizing the complexity of large projects undertaken by the federal government. It is also clear that the legislature in effect directed the State Reclamation Engineer to grant appropriate extensions of time upon application by the federal government. In view of the above quoted decisions of the Idaho Supreme Court it also appears that the court would consider it mandatory upon the State Engineer to issue such extensions of time.

With No Valid Basis Existing in the Record For Not So Doing, the State Engineer Has Authority to Issue to the Water Right Permit Holder the Water Right License

The suggestion has been made that the water right permit be canceled. It is clear, however, from section 42-311 Idaho Code that such action is to be taken only when the Department of Reclamation shall deem it advisable "to clear the records of its office" of permits. It is also clear from section 42-219 Idaho Code that where a water right permit holder has complied with the procedures of the statute with respect to completion of works and submission

of proofs, that a water right license is to be issued, notwithstanding meeting of time periods set out in the water right permit. This section further indicates that on irrigation projects such as the North Side Pumping Division, involving an area of more than 25,000 acres, the water right shall relate to the entire project even though the proof shall have been made after the dates stated in the permit.

As indicated previously, no protests were properly served upon the State Engineer or upon the permit holder in connection with the processing of the water right permit to its statutorily required form of a water right license. This is true notwithstanding the State Engineer's office publishing a notice concerning the request of the permit holder for an extension of time in 1955 even though such notice was not required by the Idaho statutes. It is true that the State Engineer's office has received informal letters indicating personal preferences about the matter of extending the time as requested by the permit holder. These letters, however, were not served upon the permit holder. No one appeared formally in the proceeding setting out any facts with respect to their relationship to the public waters involved under the permit holder's water right permit or alleging any facts as to any conflict between the project water supply and the lands of a protestant.

Not only were no timely or proper protests filed in any formal manner on the completion of the water right permit to a water right license, but also no one has any valid basis for alleging any real conflict or interference. The State Engineer in his decision of April 5, 1956 himself found this to be the fact in the following language:

> "Geological Survey Circular 371, Ground Water in the North Side Pumping Division, Minidoka Project, Minidoka County, Idaho, says: 'Local lowering of water levels by sustained heavy pumping in the North Side Pumping Division and adjacent areas probably will cause low-order regional lowering of water levels.'
>
> "It is the opinion of the State Reclamation Engineer that water rights initiated in the vicinity of the Project since 1948 would not be seriously injured by approval of the Application for extension of time and it is also the opinion of the State Reclamation Engineer that the water rights of the Project as a whole would not be seriously injured by denial of the Application for Extension of time."

It has been clearly held by the Idaho Supreme Court in Big Wood Canal Company v. Chapman, 45 Idaho 380, 263 Pac. 45, that in upholding the water right permit procedures undertaken by the Big Wood Canal Company that a water right license is valid where there has been substantial compliance with the statutes and that actions taken by the legislature in revising then applicable statutes to permit a longer period of time for the completion of the procedural steps under the state water right procedures was valid as against the complaints of those who would have benefited had the water right license been forfeited.

It appears clear from the statements provided to the State Engineer's office concerning this matter that the real complaint in the statements is not against the administration of the state water right procedures but rather against the applicable law relating to the obtaining of a water right permit and license as established by the legislature. It is clear that the legislature intended and did establish the procedure whereby a large community water project can be undertaken and developed over a period of years with that water project having a priority date for its water supply relating back to the initiation of the enterprise, even though adjacent later developments proceed to completion before the entire community project is developed. This is a matter for legislative policy determination and once the legislative policy has been determined the project which has been undertaken under that policy is entitled to receive the water right license in accordance with the policy as established by the legislature.

Conclusion

The foregoing demonstrates clearly that the applicable law relating to water right procedures not only authorized but in fact directed an extension of time for the completion of the procedures for the North Side Pumping Division. Also, there was an administrative recognition by the State Engineer's office of a defacto postponement of the time for the making of proofs of completion and the application of water to beneficial use.

In the light of discussions between the representatives of the Bureau of Reclamation and Mr. Carter subsequent to Mr. Carter's letter of January 17, 1961, as disclosed in Mr. Nelson's letter to Mr. Tappan dated May 1, 1964, it

seems clear that his statement in the letter that:

> "In statutory theory, this permit is now subject to cancellation but as a matter of practice it would not be cancelled."

was construed and understood by him and the Bureau of Reclamation as an extension of time for completion of works. The Assistant Attorney General, of course, was unaware of this understanding at the time he wrote his opinion of February 28, 1964. No question is raised by anyone as to whether the State Reclamation Engineer had authority to grant this extension. Likewise, no question is raised by anyone that timely action was taken in submitting proof of application to beneficial use.

Thus, the project did in fact comply with all statutory requirements and most certainly there is no basis for canceling the permit and no requirement that it be canceled.

There, therefore, remains the sole question as to what should be the proper date of priority. Mr. Kulp in his decision of April 5, 1956, held that the wells drilled after November 5, 1955 would have a priority of that date and wells drilled before that date would have a priority date of September 9, 1948. It is our view that this order is invalid and was issued without statutory authority. This is recognized by the Assistant Attorney General in his opinion of February 28, 1964. He said:

> "As noted above, Kulp's order of April 5, 1956, divided the dates of priority under Permit No. 20736 around November 5, 1955. There is no indication in that order of what statutory or other basis Kulp utilized in making that portion of the order, and our research reveals none."

Moreover, the North Side Pumping Division Unit B is operated as a unit with all water users participating therein, sharing a common water supply and common expenses. This arrangement is in keeping with the project authorization, written into a project repayment contract which was voted on by the water users and has been confirmed as lawful by a court confirmation proceedings in the district court. Thus, it is both impractical from an engineering point of view to operate the project and distribute the water on the basis of the project having separate priority dates, and even if practical such an

operation would be in conflict with the contractual arrangements which have been approved and confirmed as lawful for the project under applicable Idaho law.

In view of the foregoing, the proper date of priority for all the wells should be in accordance with the terms of the permit, that is, September 9, 1948.

There being no formal appearances or objections, even after several publications and widespread public announcements, the license should be issued with a priority of September 9, 1948 and any burden of appealing the same should be on the so-called objectors rather than on the project.

Respectfully submitted,

William Burpee
Field Solicitor