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Department of Water Resources  
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ALAN G. LANCE  
ATTORNEY GENERAL

CLIVE J. STRONG  
Deputy Attorney General  
Chief, Natural Resources Division

MATTHEW J. McKEOWN  
Deputy Attorney General  
P.O. Box 44449  
Boise, Idaho 83711-4449  
Telephone: (208) 334-2400  
FAX: (208) 334-2690

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. 39576       )  
\_\_\_\_\_ )

Subcase No. See Exhibit "A"

36-30

STATE OF IDAHO'S RESPONSE TO  
MOTIONS FOR SUMMARY JUDGMENT

DESCRIPTIVE SUMMARY

The State of Idaho<sup>1</sup> ("State"), by and through the Office of the Attorney General, submits its response to the motions for summary judgment filed in the subcases listed on Exhibit "A" by Hagerman Water Right Owners, Inc. ("HWRO").

<sup>1</sup> The State of Idaho is appearing in its sovereign capacity and in its proprietary capacity on behalf of those agencies that filed claims in the Snake River Basin Adjudication: Idaho Department of Transportation, Idaho Department of Fish and Game, Idaho Department of Parks and Recreation, Idaho Department of Lands, Idaho Department of Health and Welfare, Idaho Board of Education, Idaho Water Resource Board, and Idaho Division of Military.

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## PRIOR PROCEEDINGS

On May 31, 1996, twenty-four water right claimants in the Hagerman Valley filed motions for summary judgment in their individual subcases. All of the rights at issue in these subcases were previously decreed as stipulated in New International Mortgage Bank v. Idaho Power Company, Equity No. 1602 (D. Idaho, Southern Division, March 22, 1932) (hereinafter referred to as “NI decree”). For purposes of simplification, the State will refer to these water right claimants collectively as HWRO. Along with the motions, HWRO filed a single *Brief in Support of Summary Judgment* (“HWRO Brief”). The legal argument and analysis contained in that brief appears to be common to all twenty-four claims. In addition, HWRO submitted a number of affidavits and attachments containing factual material supporting the motions for summary judgment.

On June 5, 1996, the State filed a *Motion to Participate* in all twenty-four subcases. The State argued that the legal and factual issues raised by the HWRO motions had the potential to significantly impair the State’s proprietary and sovereign interests. On June 14, 1996, this Court granted the State’s *Motion to Participate*, in part, as to the legal issues presented by the HWRO motions, but denied the right to participate in the litigation of factual matters.<sup>2</sup>

## INTRODUCTION

The legal issues raised by HWRO’s motions are not new. Once again, this Court is being asked to define the purpose of the Snake River Basin Adjudication (SRBA). This Court is being asked, again, to ignore its traditional role in general stream adjudications as the ultimate finder of

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<sup>2</sup> The State reserves its right to challenge the Special Master’s decision regarding the presentation of factual evidence before the SRBA district court judge.

fact. This Court is being urged to disregard the recommendations of the Court's "independent expert and technical assistant." Idaho Code § 42-1401B(1) (defining role of IDWR). Finally, this Court is being asked, once more, to ignore more than a century of water law and practice. For the most part, a further re-hash of the arguments raised by HWRO is unnecessary.

The purpose of the SRBA adjudication code is set out in Idaho Code § 42-1401:

(1) to provide a statutory procedure for incorporating a negotiated agreement between federal reserve water claimants and the State of Idaho into an adjudication; (2) to provide a more efficient method for adjudications; (3) to assure that state laws and procedures provide a fair and impartial forum for the adjudication of the rights of all claimants; and (4) to assure that state laws and procedures are adequate as a matter of federal law to adjudicate all water rights claimed to have been established under federal law and to administer such rights.

The overall purpose of the SRBA is explained in a report prepared by the 1994 Interim Legislative Committee on the Snake River Basin Adjudication:

If water resources in the Snake River Basin are to be managed for maximum beneficial use within the constraints of the Constitution, laws of the State and new directives of the legislature, the priority of those rights must be established.

*1994 Interim Legislative Committee on the Snake River Basin Adjudication* at 1, quoting *Needed Water Resource Programs in the Snake River Basin* at 1 (1983). The report also specifically addresses the relationship between the purpose of the SRBA and the existence of prior decrees:

There are presently a number of decrees affecting surface and ground water tributary to the Snake River Plain. These decrees were created and operate in a vacuum. They do not acknowledge the existence of other tributaries they may affect or rights listed in the decrees are or may be subordinate to other rights not listed. These decrees are not vehicles for management of the entire system.

*Id.* All of these statements undercut HWRO's contention that the rights in these subcases "should be decreed as previously established and confirmed by decree." *HWRO Brief* at 3.

The respective roles of this Court, IDWR and SRBA claimants were exhaustively litigated, and ultimately decided, in Basin-Wide Issues No. 2 and 3. This Court is the finder of fact with the responsibility to enter a final decree containing all water rights that exist in the Snake River Basin. Idaho Code § 42-1412. IDWR develops recommendations "as to the extent of beneficial use and administration of each water right" claimed under State law in the SRBA. Idaho Code § 42-1401B(1). Claimants have the ultimate "burden of persuasion for each element" of their claimed rights. Idaho Code § 42-1411(5). The Idaho Supreme Court has upheld the constitutionality of each of these provisions.

### SUMMARY OF ARGUMENT

This Court should deny HWRO's motions for summary judgment because these subcases present disputed issues of material fact. The factual disputes center around discrepancies between the elements of water rights claimed by HWRO and the recommendations for those same rights contained in IDWR's Director's Report for Basin 36. HWRO attempts to avoid these factual disputes by presenting legal theories that would radically alter the prior appropriation doctrine and negate the effect of the SRBA adjudication code. HWRO also advances erroneous theories of *res judicata*, estoppel and agency/principal law.

### ARGUMENT

#### I. All Water Rights In Idaho Are Limited To Reasonable Beneficial Use Both At The Date Of Establishment And During Subsequent Exercise.

HWRO argues that this Court must limit itself to "evidence that addresses how much water was *originally* appropriated and diverted to a beneficial use" in decreeing HWRO's water

rights. *HWRO Brief* at 6 (emphasis added). In essence, HWRO is asking this Court to recognize that the description of a water right contained in a prior decree is the beginning and the end of the analysis in a subsequent adjudication. HWRO asserts that this is the “true rule” in Idaho for determining the extent of a water right. *HWRO Brief* at 6. However, the Idaho Constitution, the Idaho Code and the Idaho Supreme Court’s consistent case law all make it obvious that HWRO is wrong. Water rights are limited by beneficial use both at the time of their establishment and during subsequent exercise.

While any one of a number of cases demonstrate the beneficial use requirement placed on the exercise of water rights, a case relied on by HWRO makes the point in the context of a previous decree. To support the position that water right determinations should only be based on the amount of water originally appropriated, HWRO cites Jenkins v. State. Department of Water Resources, 103 Idaho 384, 389, 647 P.2d 1256 (1982). *HWRO Brief* at 8. HWRO, in connection with Jenkins, argues that the NI decree is the “sole evidence before this court” because it “establishes the facts about how much was appropriated and beneficially applied upon the appurtenant lands up to the time of the decree.” *HWRO Brief* at 8. A more thorough analysis of Jenkins, however, demonstrates that the case does not support HWRO’s position.

In Jenkins, appropriators’ rights were adjudicated by a decree in 1930. *Id.* at 385. Jenkins sought to transfer points of diversion of two separate water rights in 1978. Thereafter, several water users protested the proposed transfers. The district water master recommended that the Department deny the transfer because he had found that “no water had been diverted from Cottonwood Creek for use on Jenkins land for the previous 18 years.” *Id.* at 386.

After the district court affirmed the findings of the water master, Jenkins appealed to the Idaho Supreme Court. Jenkins appealed the district court’s finding that there was “no point of

diversion on Cottonwood Creek for 2.4 cfs of decreed water” because that finding “was erroneous in view of the [prior] decree of the federal court.” *Id.* at 389. In other words, Jenkins made the same argument that HWRO is presenting to this Court in these subcases, that Idaho law does not permit a finding that is inconsistent with a prior decree. The Idaho Supreme Court rejected Jenkins’ argument because the 1930 decree only “established that there had been diversion on Cottonwood Creek and that the water was beneficially used upon the land to which it was appurtenant *up to the time of the decree.*” *Id.* In the Supreme Court’s view, the 1930 decree did not shed any light on conditions subsequent to the date of the decree:

The decree does not establish that the 2.4 cfs of water has continued to flow from one creek to the other, nor does it establish that Jenkins or his predecessors continued to apply that water to a beneficial use on the land following the 1930 decree.

*Id.* Ultimately, the Supreme Court affirmed the district court’s decision denying Jenkins’ Cottonwood Creek right. *Id.* at 390.

If HWRO’s “true rule” is really the law in Idaho, which it is not, then it was an error for the Jenkins court to look beyond the contents of the 1930 decree in an attempt to relate beneficial use to the actual exercise of the right. Clearly, the court in Jenkins recognized that the decree alone cannot determine a water right. While the contents of a prior decree are probative of a claimant’s rights, the bottom line is that reasonable beneficial use is the measure and the limit of a water right. Neither HWRO nor any other claimant is relieved of that requirement by virtue of a prior decree.

This Court’s recent *Special Master’s Recommendation Re: Basin-Wide Issue 12*, dated June 12, 1996, is consistent with the analysis contained in Jenkins. In response to the argument that decrees for *de minimis* stockwater rights should specifically reference the further limitations

of actual beneficial use, this Court explained that “a remark that water is limited to the amount of water beneficially used is not necessary because Idaho law already limits the use of water to an amount which may be beneficially used.” *Special Master's Recommendation Re: Basin-Wide Issue 12* at 5. In support of its conclusion, this Court cited Article 15, section 3 of the Idaho Constitution (appropriation of waters limited to beneficial use) and Idaho Code §§ 42-101 and 42-104. *Id.* This Court’s approach is consistent with the Idaho Constitution and binding Supreme Court precedent.

Because water rights are determined in Idaho by evidence of not only the decree creating them, but by evidence of their actual continuing use, the NI decree cannot be the “sole evidence before this court which is probative of or material to the measure of each claimant’s right.” *HWRO Brief* at 8. Evidence of subsequent use must be allowed in determination of HWRO’s water rights. Therefore, summary judgment is inappropriate.

II. The Recommendations Contained In The Director’s Report Are *Prima Facie* Evidence Of The Elements Of Each Right.

HWRO argues that IDWR’s recommendations “are irrelevant and immaterial because they do not relate to the establishment” of HWRO’s rights. *HWRO Brief* at 2. HWRO further argues that the NI decree “constitutes the sole evidence before this court which is probative of or material to the measure of each claimant’s right based on the amount of water originally appropriated and applied to beneficial use.” *Id.* at 8. To the extent that these arguments are based on the belief that a water right is not limited by the subsequent application of that right to a beneficial use after the NI decree, HWRO is incorrect for the reasons set out in section I, above. However, HWRO’s arguments fail to recognize the role created for IDWR by the SRBA adjudication code.

The water right recommendations prepared by IDWR “constitute *prima facie* evidence of the nature and extent of the water rights acquired under state law.” Idaho Code § 42-1411(4).

While acknowledging this standard, HWRO attempts to minimize its impact:

[W]hile the Director’s Report may constitute *prima facie* evidence under I.C. § 42-1411(4), that presumption is rebutted by the affidavits and the prior decree. The presumption has no further effect, i.e. the bubble created by the presumption is broken.

*HWRO Brief* at 4. While it is true that contradictory evidence overcomes the *prima facie* status afforded IDWR’s recommendations, the recommendations cannot be disregarded. This Court must still determine whether the evidence submitted by claimants is more convincing than the evidence presented by IDWR. The legislature intended for IDWR’s recommendations to be before this Court as it considers the arguments in these subcases. Thus, this Court must require HWRO to meet the “burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in the director’s report.” Idaho Code § 42-1411(5). That burden goes beyond merely brandishing a sixty-six year old decree and demanding that this Court ratify every provision without further examination.<sup>3</sup>

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<sup>3</sup> This Court should be particularly reluctant to simply ratify the NI decree when, in many cases, the claims, objections and affidavits filed by HWRO are not consistent with the contents of the NI decree.

III. The Doctrine Of *Res Judicata* Does Not Bind The State Of Idaho To The New International Decree.

The Idaho Department of Fish and Game (IDFG) is a successor in interest to water right claim no. 36-00012. This right was once held by Kate and James Bedal. The Bedals were original parties to the NI decree. HWRO seizes upon this fact to argue that “the ‘State of Idaho, Department of Water Resources’ is bound by the 1932 decree entered in the [sic] New International Mortgage due to res judicata and the fact that it is in privity with the Department of Fish and Game.” *HWRO Brief* at 15. This argument is incorrect.

As an initial matter, it is unclear whether HWRO is arguing that IDWR, alone, is bound by the terms of the NI decree or if HWRO is arguing that both IDWR and the State are bound. Indeed, it appears that HWRO is not recognizing the different roles created for IDWR and the State by the SRBA adjudication code. IDWR develops recommendations for each water right claimed under State law in the SRBA. Idaho Code § 42-1401B(1). IDWR is not a party to the SRBA and cannot act as a water right claimant. Idaho Code §§ 42-1401B(2) and (3). All other State agencies, including the State of Idaho, acting on its own behalf, may “file a claim and appear separately in” the SRBA. Idaho Code § 42-1401C(1). Therefore, whatever the merits of HWRO’s *res judicata* arguments might be, the SRBA adjudication code precludes both HWRO and this Court from treating the State and IDWR interchangeably.

The Idaho Supreme Court has adopted the “transactional” approach to *res judicata*:

[I]n an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit.

Weldon v. Bonner County Tax Coalition, 124 Idaho 31, 35, 855 P.2d 868 (1993), *quoting* Diamond v. Farmers Group, 119 Idaho 146, 150, 804 P.2d 319 (1990). In the specific context of water rights, the Idaho Supreme Court has held that “decrees fixing rights of parties to the waters of a stream, though general in form, are binding only on the parties and their privies.”<sup>4</sup> Lambrix v. Frazier, 31 Idaho 382, 386, 171 P. 1134 (1918). Thus, whether the issue is framed as the application of *res judicata* generally, or as the application of *res judicata* to a prior water rights decree, the only question is: was the State a party or in privity with a party to the NI decree? The answer is, no.

The State was not a party to the NI decree. HWRO does not allege that it was. Since the State was not a party to the NI decree, HWRO must prove that the State is in privity with a party to the NI decree in order to bind the State to the decree. The Idaho Supreme Court has ruled that parties are in privity with each other when the one party “derives his interest from one who was a party to” the original action. Weldon, 124 Idaho at 35 (citing cases). In this case, the State did not derive any interest from the NI decree. The fact that one subdivision of the State, IDFG, is basing its proprietary water right claim on the NI decree does not bind the rest of the State because each State agency is entitled to “appear separately in” the SRBA. Idaho Code § 42-1401C(1).

Finally, HWRO’s approach to *res judicata* does not recognize the fact that State agencies, and the State of Idaho, have both sovereign and proprietary rights at stake in the SRBA. In

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<sup>4</sup> This rule is limited to *in personam* private adjudications. By contrast, the decree in an *in rem* general stream adjudication, conducted in compliance with the McCarran Amendment, is binding on the world. *See, e.g.*, Idaho Code § 42-1420(1) (“decree entered in a general stream adjudication . . . shall be binding on all persons [parties] and conclusive as to the nature and extent of the water rights of all persons”).

particular, the potential application of *res judicata* to a particular State agency cannot be expanded to limit the ability of other agencies to fulfill their governmental responsibilities. HWRO's attempt to constrain the entire State government because one subdivision has acquired a water right based on the NI decree is completely misplaced.

IV. Neither Estoppel Nor The Law Of Agency And Principal Precludes Either IDWR Or The State From Challenging The Contents Of The New International Decree.

In a fairly confusing section of its brief, HWRO blends the law of estoppel and agency/principal to argue that either IDWR or the State, or both, is bound to alleged earlier statements and positions concerning HWRO's rights. *HWRO Brief* at 17-20. Neither theory is correct.

a. Estoppel Does Not Bind The State To The New International Decree.

HWRO argues that "IDWR has represented that the decree and partial forfeiture were the basis for the recommendation in this case, including when it was a party to this case." *HWRO Brief* at 17. Since the HWRO claimants "have relied to their detriment on those representations," the argument continues, "this Court should estop the State of Idaho, including IDWR, from taking a position inconsistent with the 1932 Decree, in order to prevent manifest injustice." *Id.* at 17, 19. This argument overlooks the plain language of the SRBA adjudication code and common principals of the law of estoppel.

To successfully litigate an equitable estoppel claim, HWRO must prove four elements:

- (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) the party asserting the estoppel did not know or could not have discovered the truth; (3) the false representation or concealment was made with the intent to be relied upon; and (4) the person to whom the representation was made or from the facts were concealed relied and acted upon the representation or concealment to his prejudice.

Twin Falls Clinic and Hospital Bldg. v. Hammill, 103 Idaho 19, 22, 644 P.2d 341 (1982). Furthermore, “[e]stoppel . . . cannot ordinarily be applied to a governmental agency acting in its sovereign capacity.” Brandt v. State, 126 Idaho 101, 105, 878 P.2d 800 (1994). Even when trying to assert estoppel against the government in its proprietary capacity, “a party . . . ‘must establish affirmative conduct going beyond mere negligence.’” Cadwalder v. U.S., 45 F.3d 297, 299 (9th Cir. 1995), *quoting* Yerger v. Robertson, 981 F.2d 460, 466 (9th Cir. 1992).

In this case, it is impossible for HWRO to succeed on its estoppel claim for three reasons. First, HWRO has not alleged either a false representation or a concealment of a material fact in its brief. The alleged misinformation HWRO complains of is a question of law. Second, the basis for IDWR’s recommendations is clearly set out in the Idaho Code and is available for all to read. Finally, HWRO cannot demonstrate any detriment that their confusion between “partial forfeiture” and “reasonable beneficial use” has created.

The “inconsistent” position that HWRO complains of is that IDWR claims to be developing recommendations based on reasonable beneficial use. *See, e.g., HWRO Brief* at 10-11. HWRO claims that IDWR has previously explained its recommendations as being based on partial forfeiture. *HWRO Brief* at 9. This is a question of a law, not fact. In order for estoppel to be successful, HWRO must demonstrate some “false representation or concealment of a *material fact*.” Hammill, 103 Idaho at 22 (emphasis added). HWRO’s brief does not allege any factual misrepresentation on the part of either IDWR or the State. Therefore, HWRO’s estoppel arguments must fail.

Ultimately, no matter what IDWR has said, or what HWRO thinks IDWR has said, one thing is clear. Idaho Code § 42-1401B(1) states that IDWR “shall make recommendations *as to the extent of beneficial use* and administration of each water right under state law” (emphasis

added). Any party can easily determine from this section that the “extent of beneficial use” is the basis for IDWR’s recommendations. By contrast, the phrase “partial forfeiture” is not included in the SRBA adjudication code. Based on its brief, HWRO’s belief that partial forfeiture is the basis of IDWR’s recommendations seems to have been gleaned from IDWR’s Claims Investigation Manual and the transcript of a meeting between HWRO’s attorneys and IDWR staff. HWRO’s ultimate election to rely on the alleged statements of law by IDWR employees instead of the plain language of the SRBA adjudication code does not give rise to an estoppel claim. Neither IDWR nor HWRO has the power to change the mandate of section 42-1401B(1). Since it is impossible for HWRO to argue that it “could not have discovered” what is plainly stated in section 42-1401B(1), Hammill, 103 Idaho at 22, HWRO’s estoppel arguments must fail.<sup>5</sup>

The last argument offered by HWRO in support of its estoppel claim is that HWRO relied on alleged statements related to partial forfeiture to its detriment:

The doctrine applies here because, if beneficial use is the basis for IDWR’s recommendation and is different from partial forfeiture of a decreed right, IDWR misrepresented how it recommended the rights and the claimants relied on those misrepresentations by objecting and pursuing litigation, including on partial forfeiture, for over three years and at significant cost.

*HWRO Brief* at 19, n.2. As the State pointed out above, HWRO’s objections go to a legal issue, not a factual question. Note, also, that HWRO’s belief that it has suffered some detriment hinges

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<sup>5</sup> See also State v. Adams, 90 Idaho 195, 202, 409 P.2d 415 (1965) (“government is not estopped by previous acts or conduct of its agents with reference to the determination of tax liabilities or by failure to collect the tax, nor will the mistakes or misinformation of its officers estop it from collecting the tax”); Young v. Idaho Dept. of Law Enforcement, 123 Idaho 870, 874, 853 P.2d 615 (App. 1993) (estoppel does not apply when actual information was available to plaintiff).

on the difference between measuring water rights based on beneficial use and reducing rights based on partial forfeiture. The State agrees with IDWR's observation that any discussion of the difference in result between beneficial use and partial forfeiture is largely a question of "semantics." *HWRO Brief* at 12. However, the SRBA is a determination of the water rights of all claimants, not a forfeiture proceeding.

All that HWRO had to do to clarify its confusion is read the SRBA adjudication code. *See* Idaho Code § 42-1412(6) ("district court shall enter a partial decree determining the nature and extent of the water right"); predecessor statute, Idaho Code § 42-1412(8) ("district court shall enter a partial decree determining the nature and extent of the water right"). Estoppel simply is not available as a remedy for HWRO's failure to understand the concept of a general stream adjudication.

b. IDFG Has Neither The Actual Authority Nor The Apparent Authority To Bind The State To The New International Decree.

HWRO bases its agency/principal arguments on the fact that both IDWR and IDFG "are agencies of the State of Idaho which have acted at all relevant times for and on behalf of the State of Idaho." *HWRO Brief* at 17. According to HWRO, this means that the "State of Idaho is bound by the actions of its agent, the Department of Fish and Game." *Id.* at 18. The cases cited by HWRO do not support this premise.

In Pitner v. Federal Crop Insurance Corporation, 94 Idaho 496, 491 P.2d 1268 (1971), the Idaho Supreme Court set out guidelines for when an agent of the government can bind the government, as a whole, to the agent's actions:

It is a generally accepted principle that an agent of the federal government can bind the United States to any agreement he is actually authorized to make. . . . We believe that an agent of the federal government should also be able to bind the United States to

any agreement which Congress has empowered his department or agency to make, even where he is not actually authorized to do so . . . .

Pitner, 94 Idaho at 502.<sup>6</sup> Assuming, for the purposes of argument, that this approach also applies to agents of the State, there are two scenarios where the State could be bound by IDFG's status as a successor in interest to the NI decree.

The first scenario is where IDFG is "actually authorized" to bind the entire State to the contents of the NI decree. Neither the Fish and Game Commission, the Director or any other IDFG employee has been specifically empowered to bind the entire State to the NI decree, or any other decree. The second scenario is where the Idaho legislature "empowered" IDFG to enter into agreements, or take other action, that would have the effect of binding the entire State to the NI decree. In other words, IDFG would have the apparent authority to bind the entire State under this scenario.

HWRO has not cited, and the State is not aware of any, legislation that gives IDFG this apparent authority. For instance, Idaho Code § 36-104(7), which permits IDFG to acquire property, does not give IDFG the ability to bind the entire State to water rights decrees. Indeed, the only legislation on point is Idaho Code § 42-1401C which allows each State agency to "appear separately" in the SRBA. This provision strongly suggests that the legislature did *not* intend for other agencies, or the State as a whole, to be bound by the interests or positions of other State agencies in the SRBA.

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<sup>6</sup> White v. Doney, 82 Idaho 217, 351 P.2d 380 (1960), cited by HWRO, simply reiterates the distinction between actual authority and apparent authority in a more general context.

A final reason why HWRO's agency/principal arguments are wrong is that they lead to the conclusion that the State cannot challenge IDWR's recommendations. As counsel for the State recently explained to this Court:

There's nothing in [the Director's Report] that can't be rebutted or challenged. And that's what the State in its proprietary capacity would do if it felt like it got a raw deal from the director, just like every other claimant will presumably do if they feel like the director hasn't dealt with their claims in an appropriate manner.

*Rptr's. Tr. Basin-Wide Issue No. 10* at 151. If HWRO's agency theory is correct, and it is not, then IDWR, as an agent of the State, could bind the State and all other agencies to its recommendations. That possibility was raised before the Supreme Court, and rejected, in the appeal of Basin-Wide Issues No. 2 and 3.

V. HWRO Completely Misinterprets Idaho Code § 42-1427.

HWRO argues that, by enacting Idaho Code § 42-1427(1)(b), the "Legislature acknowledged that the existence of a water right is to be determined by the amount of water diverted and beneficially applied by the original appropriator when the right was originally established." *HWRO Brief* at 20 (emphasis in original). HWRO further argues that section 42-1427 allows for the "use of contemporary conditions to recommend or decree existing, decreed rights" only when evaluating elements that were omitted from previous decrees. *Id.* at 21. These premises are nowhere to be found in the actual language of section 42-1427. In fact, HWRO is completely missing the point of section 42-1427.<sup>7</sup>

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<sup>7</sup> Idaho Code § 42-1427 is one of three provisions in the SRBA adjudication code typically referred to as the "amnesty statutes." The constitutionality of the amnesty statutes was considered in Basin-Wide Issue No. 4. Currently, Basin-Wide Issue No. 4 is pending before the Idaho Supreme Court. HWRO's arguments surrounding the meaning of section 42-1427 will probably be resolved by the Supreme Court in the near future.

Idaho Code § 42-1409(4) requires claimants to submit a Notice of Claim to IDWR. Section 42-1409(1) sets out the different water right elements that claimants are required to claim in the Notice of Claim. Many of the elements contained in section 42-1409(1) are not contained in earlier decrees. In many cases, claimants, through no fault of their own, are unable to complete the Notice of Claim form because the prior decree contains insufficient information.

By enacting Idaho Code § 42-1427, the legislature was attempting to prevent claimants from being penalized as a result of the Notice of Claim process simply because their prior decree does not provide adequate information. Section 42-1427(2) authorizes IDWR to develop recommendations, to the extent that IDWR deems it necessary, for those elements that are absent in ambiguous prior decrees:

If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or *decree based on the beneficial use of the water right as of the date of the commencement of the adjudication* (emphasis added).<sup>8</sup>

This brief passage is the only operative language in section 42-1427. Its sole purpose is to put claimants who have ambiguous licensed or decreed rights on a level playing field with other claimants as IDWR processes their claims. HWRO's attempt to transform section 42-1427 into a

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<sup>8</sup> The italicized passage of section 42-1427 also undercuts HWRO's argument that the requirement of beneficial use is limited to the establishment of the water right. By referring to "beneficial use of the water right as of the date of the commencement of the adjudication," the legislature plainly anticipated that beneficial use is an ongoing requirement that applies to the exercise of water rights. The legislature also anticipated that IDWR would perform investigations to determine the extent of reasonable beneficial use. None of the parties to Basin-Wide Issue No. 4 challenged this aspect of section 42-1427(2).

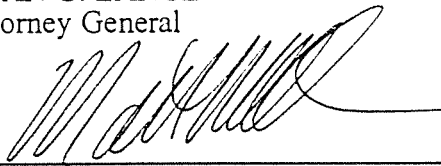
limit on IDWR's ability to investigate claims and develop recommendations based on those investigations is misguided and should be rejected.

CONCLUSION

HWRO's motions for summary judgment should not be granted because the proper resolution of the legal issues raised by its motions demonstrates that significant factual issues exist in these subcases. HWRO cannot be allowed to vindicate its rights by turning Idaho water law on its head. Rather, HWRO must do what every other SRBA claimant must do: present evidence proving that IDWR's recommendations are incorrect.

DATED this 25th day of June, 1996.

ALAN G. LANCE  
Attorney General

A handwritten signature in black ink, appearing to read 'Matthew J. McKeown', written over a horizontal line.

MATTHEW J. McKEOWN  
Deputy Attorney General  
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 25th day of June, 1996, I served a true and correct copy of the foregoing STATE OF IDAHO'S RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT by placing the same in the United States mail, postage prepaid or in the Statehouse Mail, addressed as follows:

DICK J VEENENDAAL  
SIGRID E VEENENDAAL  
BOX 512  
221 WILLOW LANE  
HAGERMAN ID 83332

DOYT H SIMCOE  
ROXIE J SIMCOE  
562 SUNRISE BLVD N  
TWIN FALLS ID 83301

EDNA MAE REA  
853 EAST 2830 SOUTH  
HAGERMAN ID 83332-5641

GEORGE J KORBIS  
NELLIE W KORBIS  
966 PIONEER ROAD  
HAGERMAN ID 83332

BASIL LESTER ZINK  
MYRLE HYDE ZINK  
POST OFFICE BOX 455  
HAGERMAN ID 83332

DAVID HARDER  
US DEPT OF JUSTICE  
550 W FORT STREET BOX 033  
BOISE ID 83724-4378

DIRECTOR  
IDWR  
STATEHOUSE MAIL

EDITH VERNON  
2722 SOUTH 900 EAST  
HAGERMAN ID 83332

MARK POTTER  
SUSAN POTTER  
ROUTE 1  
HAGERMAN ID 83332

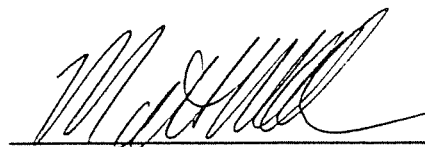
MATTIE P GRIGG  
GOLDEN T GRIGG  
POST OFFICE BOX 278 A  
HAGERMAN ID 83332

ROGER SHAFFER  
BOX 123  
HAGERMAN ID 83332

MILDRED CULBERTSON  
ROUTE 1 BOX 379  
HAGERMAN ID 83332

PATRICK D BROWN  
HEPWORTH NUNGESTER &  
LEZAMIZ CHTD  
POST OFFICE BOX 389  
TWIN FALLS ID 83303-0389

FRANK ERWIN  
PEGGY ERWIN  
ROUTE 1 BOX 453  
HAGERMAN ID 83332



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MATTHEW J. McKEOWN  
Deputy Attorney General  
Natural Resources Division  
p6177nma

## EXHIBIT "A"

### List of Subcases

|                                                   |           |
|---------------------------------------------------|-----------|
| Lynn J. Babington and Karen L. Babington          | 36-00003C |
| Walter J. Bonning, II and Judy L. Bonning         | 36-001088 |
| Dale E. Boyer and Elaine Boyer                    | 36-00079  |
| William E. Norris, David L. and Linda C. Cropper, |           |
| Blaine Richard and Vivian Cropper, Dave and       |           |
| Nancy Anderson                                    | 36-00047  |
| Mildred Culbertson                                | 36-10409  |
| Frank C. Erwin and Peggy Erwin                    | 36-00092  |
| Michael J. Fleming                                | 36-00064B |
| Keith L. Fuell and Jolene Fuell                   | 36-00086C |
| Frank L. Glauner and Jean Glauner                 | 36-00039E |
| Mattie P. Grigg                                   | 36-10283B |
| George J. Korbis and Nellie W. Korbis             | 36-00039N |
| Marilyn J. Miller                                 | 36-00085A |
| Howard L. Morris and Rhonda K. Morris             | 36-00061  |
| Howard L. Morris and Rhonda K. Morris             | 36-00062  |
| Howard L. Morris and Rhonda K. Morris             | 36-00063  |
| Mark Potter and Susan Potter                      | 36-00039J |
| Edna M. Rea                                       | 36-00003A |
| Roger Shaffer                                     | 36-00034B |
| Doyt H. Simcoe and Roxie Simcoe                   | 36-00003F |
| Richard D. Simon                                  | 36-00035J |
| Dick J. Veenendaal and Sigrid E. Veenendaal       | 36-00039C |
| Edith L. Vernon                                   | 36-00003E |
| Paul E. Watkins and Inez S. Watkins               | 36-00106  |
| Basii Lester Zink and Myrie Hyde Zink             | 36-00103F |