

Movant:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

LOIS J. SCHIFFER
Assistant Attorney General Environment and Natural Resources Division

BRUCE D. BERNARD
Attorney, General Litigation Section
Environmental and Natural Resources Division
U.S. Department of Justice
999 18th Street, Suite 945
Denver, Colorado 80202
(303)294-1900

RANDALL J. BRAMER
Special Assistant United States Attorney
Office of the General Counsel
United States Department of Agriculture

Counsel for the United States of America

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

IN RE: SRBA	)	
	)	Subcase Nos. See attached list
	)	
CASE NO. 39576	)	Supplemental Memorandum
	)	In Support of United States
	)	Motion for Summary Judgment

DESCRIPTIVE SUMMARY

This is a supplemental memorandum in support of the United States' Motion for Summary Judgment concerning the *res judicata* effect of the *Utah Construction* decree on the United States.

7129
RECEIVED
AUG 30 1996
Department of Water Resources

34-11447
e-fail

INTRODUCTION

The issue before the Court is whether the United States is precluded by the doctrine of *res judicata* from obtaining a decree for water rights with a beneficial use priority date earlier than March 15, 1923, the date of adjudication of the Big Lost River and its tributaries in *Utah Construction v. Abbott*, Equity No. 222 (D.E. 1923). As we demonstrated in our opening memorandum and oral argument the United States is not precluded by *res judicata* because the United States was not a party to the *Utah Construction* litigation. The United States was not served, did not participate in the adjudication and did not waive its sovereign immunity to allow its joinder in the adjudication. In this supplemental memorandum submitted at the Court's request, the United States demonstrates that it is not precluded by *collateral estoppel* from asserting a priority date earlier than March 15, 1923 and that the federal district court which presided over the *Utah Construction* litigation did not have subject matter jurisdiction over the United States at the time it entered the final decree and the order correcting errors and omissions.

FACTS

A complete recitation of the relevant facts is set forth on pp. 2-6 in the United States Memorandum in Support of its Motion for Summary Judgment, the appendix thereto and the Statement of Undisputed Facts which are incorporated by reference herein.¹ On May 9, 1996 this Court ordered the United States to file a summary judgment motion addressing the issue of whether the United States is precluded by the

¹ References to documents contained in Plaintiff's Appendix are hereinafter cited as "P. App. ____".

doctrine of *res judicata* from obtaining a decree for water rights with a beneficial use priority date earlier than March 15, 1923, the date of adjudication of the Big Lost River and its tributaries in *Utah Construction v. Abbott*, Equity No. 222 (D.E. id. 1923). The United States filed its motion and memorandum in support on June 27, 1996. No opposition was filed. Oral argument was held on July 29, 1996.

STATEMENT OF ISSUES

At the July 29, 1996 hearing on this motion, the Court requested supplemental briefing on two issues: 1) Whether the United States is precluded by the doctrine of *collateral estoppel* from obtaining a decree for water rights with a beneficial use priority date earlier than March 15, 1923? and 2) Whether the district court had jurisdiction over the United States at the time it issued its March 15, 1923 final decree or the October 21, 1925 order correcting errors or omissions?

STANDARD OF REVIEW

The appropriate standard of review for this summary judgment motion is set forth on pp. 6-7 of the United States Memorandum In Support and is incorporated by reference herein.

ARGUMENT

The United States is not precluded by *collateral estoppel* because the United States was not a party to the *Utah Construction* adjudication. The undisputed facts demonstrate that the United States was not served, did not participate in the adjudication and did not waive its sovereign immunity to allow its joinder in the

adjudication. Further, the district court did have subject matter jurisdiction over the United States because the United States was not a party to the litigation.

I. The United States Is Not Barred By The Doctrine Of *Collateral Estoppel*

In his Basin-Wide 5A decision, Judge Hurlbutt ruled that prior decrees have no *res judicata* effect in the SRBA because there was not identity of parties or issues. *In re SRBA, No. 39576, Memorandum Decision on Basin-Wide Issue 5A*, subcase no. 91-00005A (July 19, 1996) p. 5-6. The Court found, however, that *collateral estoppel* may be applicable in certain situations:

[w]hen identity of parties and cause of action are lacking, this court shall accord prior decrees the legal recognition due under the theory of collateral estoppel to the extent that particular issues were actually determined....Whenever parties advance claims under prior decrees, this court shall recognize elements of water rights that were actually decided.

Memorandum Decision on Basin-Wide Issue 5A, supra, at pp. 5-6. The Idaho Supreme Court has established a five-factor test to determine whether *collateral estoppel* applies:

1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation. *Special Master's Report and Recommendation on Basin-Wide 5B*, subcase no. 91-00005B (June 28, 1996) p. 3, citing *Western Industrial and Environmental Services, Inc., v. Kaldveer Associates, Inc.*, 126

Idaho 541, 544, 887 P.2d 1048, 1051 (1994); *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1987).

A. The United States Cannot Be Barred By *Collateral Estoppel* Because It Was Not A Party Or In Privity With A Party To The Prior Litigation.

The United States cannot be barred by *collateral estoppel* because it was not a party or in privity with a party to the prior litigation. *Anderson, supra*, 731 P.2d at 179 citing *Bernard v. Bank of America National Trust & Savings Association*, 19 Cal.2d 807, 122 P.2d 892 (1942). The evidence clearly supports our contention that the United States did not participate in any fashion in the adjudication of water rights resulting in the 1923 *Utah Construction* decree. The United States was not served in the adjudication when it was commenced in 1919. P. App. 163. Nor was the United States subpoenaed in accordance with the requirements of the district court at any time during the course of the adjudication.² P. App. 163. The United States did not file any claims in the adjudication prior to entry of the final decree in 1923. P. App. 163. Nor is there any evidence to suggest that the United States was joined or consented to joinder at any time prior to entry of the final decree. The United States made no special appearances and did not appear before the Court at any time. The United States did not appear at any hearings during the adjudication and was not granted or denied any water rights in the final

² The final decree specifically identifies all parties who were subpoenaed in the adjudication and bound by the decree. P. App. 163. The United States is not identified. *Id.* There is no reference to service on the United States in subpoenas and proofs of service filed in the District Court. *Id.*

decree. P. App. 167-392. In sum, the evidence clearly shows that the United States was not joined and did not participate in litigation resulting in the 1923 final decree.³

II. The Federal District Court Did Not Have Subject Matter Jurisdiction Over The United States Since The United States Was Not Joined As A Party.

Subject matter jurisdiction of the federal district courts may be based on either federal question jurisdiction or diversity jurisdiction. 28 U.S.C. 1331, 1332. The *Utah Construction* litigation was filed in federal district court based on diversity jurisdiction. P. App. 21-26. Diversity jurisdiction is applicable in civil actions where the matter in controversy exceeds \$50,000 and is “between citizens of different states”. 28 U.S.C. 1332 (a). The citizenship requirement was met by the Utah Construction company’s status as a Utah corporation which was diverse from the defendants who were largely Idaho residents.

It is well settled that the federal district court’s subject matter jurisdiction extends over those parties named in the complaint or subsequently joined in the litigation.⁴ As is demonstrated in our opening memorandum and above, the United States met neither of these criteria. The United States was not named in the complaint or amended complaint as a defendant or plaintiff. During the course of the litigation there were no actions taken to

³ In addition, the United States cannot be barred by *collateral estoppel* because it did not have a full and fair opportunity to litigate entitlement to water rights in the Big Lost River Basin. As is evident from the facts set forth in our opening memorandum, the United States was not served with notice or joined in the *Utah Construction* litigation. The United States took no action which would suggest that it had any opportunity to litigate. The United States made no appearances and filed no pleadings. In sum, the United States did not have any opportunity to litigate the priority date issue and *collateral estoppel* does not apply.

⁴ As set forth in our opening memorandum at pp. 9-13, absent the express consent of Congress, neither a Forest Service official nor the state or federal court has authority to dispose of federal water rights not claimed. The Property Clause, Article IV, Sec. 3, U.S. Const., together with the Supremacy Clause, is the fundamental constitutional basis for the doctrine of sovereign immunity. Therefore, if in the prior action, the United States was not properly joined pursuant to a valid, clear, waiver of sovereign immunity, that prior action is not binding on the United States. A court, whether federal or state, has no authority to divest the United States of its property based on the action or inaction of a federal official, at least not in the absence of a valid waiver of sovereign immunity which is clearly and unambiguously stated.

bring the United States into the litigation. The United States did not seek to intervene and no party sought its joinder as "necessary" or indispensable party. In sum, the United States was never a party to the *Utah Construction* litigation and, therefore, was not within the subject matter jurisdiction of the district court.⁵

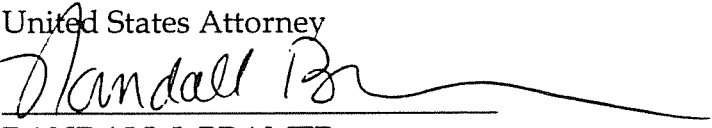
CONCLUSION

The United States respectfully requests that this Court enter an order stating that the United States is not precluded by the doctrine of *res judicata* or *collateral estoppel* from obtaining a decree for water rights with a beneficial use priority date earlier than March 15, 1923, the date of adjudication of the Big Lost River and its tributaries in *Utah Construction v. Abbott*, Equity No. 222 (D.E. 1923).

Respectfully submitted

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division

BETTY H. RICHARDSON
United States Attorney


RANDALL J. BRAMER
Special Assistant United States Attorney
U. S. Department of Justice
380 E. Parkcenter Blvd., Suite 330
Boise, ID 83706
(208) 387-0835

⁵ Since the district court lacked jurisdiction over the United States in the *Utah Construction* litigation, the status of the two rights decreed to the United States in the Order correcting Errors and Omissions is unclear. Since the Director's Report in Basin 34 was issued, however, the United States has withdrawn one of those decreed rights, notice of claim no. 34-11955 (Antelope Guard Station). As to the other claim, notice of claim no. 34-11952 (Wildhorse Guard Station), no objections were filed. The United States believes that notwithstanding its disposition of this motion, the Court may based on the evidence submitted decree the latter uncontested right in its decree for Basin 34.

BRUCE BERNARD
Attorney, General Litigation Section
Environment and Natural Resources Division
U. S. Department of Justice
999 - 18th Street, Suite 945
Denver, CO 80202

DATED this 29TH day of AUGUST, 1996

List of Affected Subcases

United States' Motion for Summary Judgment Concerning The *Res Judicata* Effect Of
The *Utah Construction* Decree On The United States

34-11447

34-11509

34-11576

34-11580

34-11645

34-11659

34-11661

34-11662

34-11946

34-11947

34-11948

34-11949

34-11950

34-11951

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of August, 1996, I served a true and correct copy of the foregoing **Supplemental Memorandum In Support of United States Motion for Summary Judgment** using the following methods:

1. **Original by facsimile to:**

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

2. **Copies by United States First Class Mail, postage prepaid to:**

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

Young Harvey Walker
Rt. 1, Box 200
Arco, ID 83213

Gordon Fulton
Star Route
Mackay, ID 83251

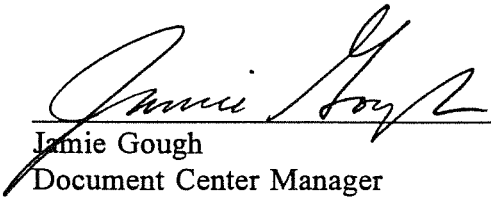
Vernon Roche
Star Route
Mackay, ID 83251

Wiley Smith
Star Route
Mackay, ID 83251

Herb Whitworth
Star Route
Mackay, ID 83251

Courtesy Copy to:

Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098



Jamie Gough
Document Center Manager
CACI, Inc. Commercial