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Department of Water Resources

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

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	)	SECOND AMENDED ORDER ON
	)	SUMMARY JUDGMENT
	)	
Case No. 39576	)	Subcase: See Exhibit A
	)	
	)	
	)	
_____	)	

I. PROCEDURAL AND FACTUAL BACKGROUND

This case involves the subcases listed in Exhibit A. All of the rights were confirmed in *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S. D. Idaho, Mar. 22, 1932) hereinafter referred to as (*New International Mortgage Decree*). For the claims at issue, the court in the *New International Mortgage Decree* decided the required elements under I.C. § 42-1409 except for consumptive use, period of use, and amount of irrigated acreage.

Despite the *New International Mortgage Decree*, the Idaho Department of Water Resources (IDWR) recommended in the Director's Report a reduction in some previously decreed elements for some claims. Originally, the claimants were under the impression that the reductions were based on partial forfeiture.¹ Subsequently, the District Court issued its *Memorandum Decision*

¹ The reason for the claimants' defense against partial forfeiture is understandable. At one point, the claimants were specifically told by IDWR that "anything that was claimed in excess of the amount that the information available to us supported as reasonable would be recommended for disallowal on the basis of partial forfeiture." Transcript of April 16, 1993, meeting between claimants' attorneys and IDWR (Affidavit of Pat Brown, Exhibit C). Any confusion regarding IDWR's reason for reducing these claims is further compounded by reviewing IDWR's Claims Investigation Handbook. Under that manual, IDWR has commingled the concepts of forfeiture and beneficial use. Under I.C. § 42-222, forfeiture is defined simply as the nonuse of water for a period of five years. IDWR has expanded on this definition by adopting a policy that "[f]orfeiture can also include use of water

in *Basin-Wide Issue 10 (Memorandum Decision)*, April 26, 1996) wherein it was decided that partial forfeiture was not a basis for the reduction of existing water rights. After the *Memorandum Decision* was entered, IDWR acknowledged in open court that partial forfeiture was not a basis for any of the reductions of any of the water rights at issue. Rather, the stated reason for the reduction of the rights was IDWR's policy that actual beneficial use continues to define all rights including rights confirmed under existing decrees. IDWR's policy is that beneficial use can always be reevaluated because "[w]hat is considered [a] reasonable [beneficial use] changes over time as technology improves or other circumstances change." Claim Investigation Handbook (Affidavit of Pat Brown, Exhibit B at 7-8).

Pursuant to this policy, IDWR submitted evidence, by way of Supplemental Reports, as to current beneficial use for rights previously confirmed under the *New International Mortgage Decree*. In response, the claimants assert that as a matter of law "[e]ach claimant is entitled to judgment on the previously decreed elements because the decree is the sole and unrefuted evidence concerning the establishment of the right by the original appropriator." *Claimants' Brief* at 1. Accordingly, the claimants filed summary judgment pursuing their theory. The State of Idaho intervened in these subcases by way of a *Motion to Participate*. The State's participation was limited to arguing that the policy asserted by IDWR is a valid basis to reduce rights confirmed by prior decrees.

II. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. Freeman*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452

that was beneficial at the time of the decree but is no longer beneficial because it is unreasonably wasteful under current standards. What is considered reasonable changes over time as technology improves or other circumstances change." Claims Investigation Handbook (Affidavit of Pat Brown, Exhibit B at 8).

P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350 (1982). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

While the Director's Report is not an affidavit, deposition, or admission and does not constitute any of the types of evidence contemplated under I.R.C.P. 56, the Director's Report does constitute *prima facie* evidence of a water right and exists independently of any evidence offered by way of affidavit, deposition, or admission. I.C. § 42-1411(4). In this case, the claimants argue that "the Director's Report is not the type of evidence which gives rise to a genuine issue of fact." *Claimants' Reply Brief* at 13. The claimants' assertion is erroneous because, if true, then every claimant in a one-party subcase would automatically prevail on summary judgment. One-party subcases would be reduced to self-serving proceedings. Consequently, in one-party subcases, "the summary judgment standard shall be applied to the Director's Report recommendation rather than to evidence presented by an opposing party." *In Re SRBA*, Subcase 34-02395, *Order Granting Summary Judgment* (April 30, 1996).

III. ISSUES PRESENTED

1. Whether elements of a previously decreed water right may be reduced based on beneficial use where there is no evidence of forfeiture, abandonment, adverse possession, or estoppel.
2. Whether the court may grant summary judgment for elements not confirmed under the *New International Mortgage Decree*.
3. Whether a claim may be amended through any procedure other than a *Motion to File an Amended Notice of Claim*.

IV. RECOMMENDATION

A. Elements of a Previously Decreed Water Right May Not Be Reduced Based on Beneficial Use Where There Is No Evidence of Forfeiture, Abandonment, Adverse Possession, or Estoppel.

This matter involves the reduction of one or more elements of previously decreed water rights. The traditional methods of reducing or losing a decreed or vested water right are by a claim of abandonment, forfeiture, adverse possession, or estoppel.² *Crow v. Carlson*, 107 Idaho 461, 466, 690 P.2d 916 (1984); *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976). None of these theories have been asserted by IDWR. Rather, IDWR's reduction of the previously decreed water rights at issue is based on a theory of actual beneficial use. Under this theory, IDWR and the State assert that decreed water rights are always subject to being reevaluated based on that amount of water which is actually being applied to a reasonable beneficial use.³ The claimants assert that once a water right is applied to a beneficial use, that amount of water becomes vested and cannot be lost absent any of the aforementioned traditional methods of losing a water right. The issue framed by the parties necessarily involves a discussion of the nature of a water right; how a water right is obtained, used, and lost; and what it means for a court to confirm a water right by judicial decree.

The State and claimants agree that the establishment of a water right depends on the application of water to a beneficial use. Once water is diverted and applied to a beneficial use, a water right becomes vested. Long ago, the Idaho Supreme Court in *Malad Valley Irrigating Company v. Campbell*, 2 Idaho 411, 18 P. 52 (1888), held:

[T]he law of this territory is that the first appropriation of water for a useful or beneficial purpose gives the better right thereto; and when the right is once vested, unless abandoned, it must be protected and upheld. The legislative will

² Abandonment is a common law doctrine that requires a showing of both intent to abandon and actual relinquishment of the water right. *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981). Forfeiture is a statutory creation under Idaho Code § 42-222(2). Under a forfeiture theory, a water right is lost if not used for a period of five or more years. *Jenkins v. Idaho Department of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256 (1982).

³ For this proposition, the State cites I.C. § 42-1401B(1) which reads: "The director shall make recommendations as to the extent of beneficial use and administration of water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state."

is clearly expressed in the following language: 'As between appropriators, the one first in time is the first in right.'

Id. at 414 (emphasis added).

As previously stated, the State and claimants disagree as to whether a change in beneficial use or better evidence of beneficial use, by itself, is a basis to reduce an established or vested water right. The most widely accepted rule is that once a water right is vested, the user may use some or all of the water within the appropriation. In *McGinness v. Stanfield*, 6 Idaho 372, 55 P. 1020 (1898), the Idaho Supreme Court held:

Priority of appropriation having been established, as well as the amount of the water appropriated, and the beneficial use thereof, it seems to us that the functions of the court under the statute have reached their limit. For the court to dictate the manner in which the appropriator shall use the water so appropriated, so long as it is adapted to a useful or beneficial purpose, is going beyond its province. It is an interference with the right conferred by the statute.

*

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*

We are of the opinion that, so long as the appropriator of water applies the same to a beneficial useful purpose, he is the judge, within the limits of his appropriation, of the times when and the place where the same shall be used.

Id. at 375.

The ability of right holders to use any amount of water up to the limit of the original appropriation is followed in most western states.⁴ "Until affirmative action is taken to change the water right, the decreed amount continues to quantify the water right despite the likelihood that the water user may never actually divert that amount." *Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District*, 717 P.2d 955, 958 (Colo. 1986). "After successfully appropriating a specific amount of water, the appropriator is entitled to a water right, a full and permanent property right in that quantity of water." *Tulkisarmute Native Community Council v. Heinze*, 898 P.2d 935, 941 (Alaska 1995). "An appropriated water right is limited by the time and volume of the original beneficial use." *Neubert v. Yakima-Tieton Irrigation*

⁴

Of course, the nonuse of water can constitute forfeiture or abandonment.

District, 814 P.2d 199, 202 (Wash. 1991); *see also McDonald v. State*, 722 P.2d 598 (Mont. 1986).⁵

The only case relied upon by the State to support its proposition that beneficial use alone constitutes the limit of a decreed water right is *Basin Electric Power Cooperative v. State Board of Control*, 578 P.2d 557 (Wyo. 1978). That case does not support the State's position. First, the case involved a change-in-use proceeding. Second, like all other western states, the law in Wyoming is that the failure to beneficially apply water, in the context of abandonment, will result in the loss or reduction of a vested water right outside of a change-in-use proceeding. "Beneficial use is not a concept which is considered only at the time an appropriation is obtained. The concept represents a continuing obligation which must be satisfied in order for the appropriation to remain viable. The state's abandonment statutes are recognition of this requirement." *Id.* at 563 (citations omitted) (emphasis added). Just like Idaho, Wyoming law states that the failure to beneficially apply water under an adjudicated right ripens into a loss of the water right only when the failure to use water constitutes a forfeiture or abandonment.⁶

There are numerous reasons why a water right may not be used to the full extent of an appropriation. Economic realities may change the amount or type of crop planted. Water delivery methods may change. Weather conditions may change altering the demand for water. Any or all of these factors will necessarily change the amount of water actually and beneficially used when compared to the amount of the original appropriation. The Ninth Circuit Court of Appeals in *United States v. Alpine Land & Reservoir Co*, 697 F.2d 851 (9th Cir. 1983), best

⁵ *McDonald v. State* is factually significant when compared to these rights at issue. In *McDonald*, the petitioners had decreed water rights which were expressed in "flow rate and not in terms of volume." *Id.* at 600. This is exactly the factual scenario presented by the claimants in this case. Like the legislative directive in the SRBA, the Montana Adjudication required courts to decree rights in terms of annual volume of consumptive use. The petitioners alleged that such a requirement would "burden" their previously decreed rights and, therefore, was unconstitutional under Montana law. As to the requirement that annual volume of consumptive use be determined for previously decreed rights, the court held: "Under our opinion, in no case could the amount of water for beneficial use exceed the amount constitutionally protected for the water right holder. In no case could the priorities of water rights be disturbed. As a corollary, in no case could the expression of volume in acre feet in the water court decree delimit or burden the pre-1973 protected beneficial use under such water rights." *Id.* at 609.

⁶ "Where the holder of an appropriation of water from a surface, underground or reservoir water source fails, either intentionally or unintentionally, to use the water therefrom for beneficial purposes for which it was appropriated, whether under an adjudicated or unadjudicated right, during any five (5) successive years, he is considered as having abandoned the water right and shall forfeit all water rights and privileges appurtenant thereto. . ." W.S. 41-3-401(a); *see also*, W.S. 41-3-402.

characterized beneficial use as a "dynamic concept, which is 'variable according to conditions,' and therefore over time." *Id.* at 855 (citations omitted).

In recognition of changing variables affecting beneficial use, the Montana Supreme Court in *McDonald v. State*, 722 P.2d 598 (Mont. 1986) stated:

In oral argument, counsel for McDonald contended that if an appropriator who formerly used flood irrigation switched to sprinkler irrigation, the appropriator would be using less water than his original appropriation allowed him. If, by reason of excessive utility rates or otherwise, the appropriator decided to return to flood irrigation, and to abandon the sprinkling, he would be deprived under an acre-feet decree of a water right guaranteed to him by the Constitution. In our view, such an appropriator would be in no different position than an appropriator, who in wet years, though entitled to 400 miner's inches of water for 60 days, used only 200 inches for 30 days. There is no doubt that he would have the right to return in dry years to the full extent of his appropriation provided he was putting the water to a beneficial use.

Id. at 604.

Although the person has a right to use water up to the limits of the appropriation, the user may not waste water. In this regard, the State is correct in that every water right is always limited by the amount of water which may be beneficially used. *See e.g., Rominiecki v. McIntyre Livestock Corporation*, 633 P.2d 1064, 1067 (Colo. 1981) (An implied limitation is read into every decree adjudicating a water right that diversions are limited to an amount of water sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion). However, mere nonuse outside a claim of forfeiture or abandonment, is not a ground upon which a vested water right may be lost. *Jenkins v. Department of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).⁷

⁷

As to the status of unused water under an appropriation, the Idaho Supreme Court in *Knutson v. Huggins*, 62 Idaho 662, 663, 115 P.2d 421 (1941) stated: "At such times as an appropriator is not using water under his appropriation and is not applying the water to a beneficial use, the water must be considered as unappropriated public water of the state and for such period of time is subject to appropriation and use by others and when the appropriator is not using water, and during season not covered by the appropriation, he must allow the water to flow down the bed of the natural channel." It follows then that at such times during the irrigation season as respondents are not using and beneficially applying water decreed to them, appellant, for such periods of time, has a right to use and beneficially apply such water. *Id.* at 669, citing *Hutchinson v. Watson Slough Ditch Company*, 16 Idaho 484, 485, 101 P. 1059 (1909).

To summarize, the priority date and amount of water one is entitled to use vests at the time an appropriation is complete. The vested right may be used up to the limits of the appropriation. A vested water right constitutes a real property right. I.C. § 55-101(1). Absent a claim of forfeiture, abandonment, adverse possession, or estoppel, a reduction in beneficial use after a water right vests is not a basis upon which a water right may be lost or reduced.

Acknowledging these principles, the claimants allege that the *New International Mortgage Decree* already determined the extent of beneficial use as to the original appropriation, and therefore, *res judicata* prevents any further reevaluation of beneficial use for the claims at issue. Generally, *res judicata* prevents any litigation "between the same parties upon the same claim or demand." *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 614, 826 P.2d 1322 (1992). "*Res judicata* prevents the litigation of causes of action which were finally decided in a previous suit." *Gubler v. Brydon*, 125 Idaho 107, 110, 867 P.2d 981 (1994). In this case, *res judicata* does not apply because the parties and cause of action under the *New International Mortgage Decree* are not identical to the parties and cause of action in the SRBA.

Absent identity of parties or cause of action, collateral estoppel could be applicable as to those issues "actually decided in the prior litigation." *Western Industrial and Environmental Services, Inc. v. Kaldveer Associates, Inc.*, 126 Idaho 541, 544, 887 P.2d 1048 (1994). The five part test for collateral estoppel is as follows:

[C]ollateral estoppel will act as a bar [if]: 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.

Id. at 544.⁸

⁸

The Idaho Supreme Court in *Western Industrial* decided that a stipulated arbitration judgment is entitled to be enforced under principles of *res judicata* or collateral estoppel. The factors the court considered in determining whether a judgment is actually decided and entitled to full application under principles of *res judicata* and collateral estoppel are as follows: [t]he parties were given notice; they were able to formulate the issues of law and fact in their memos to the arbitrator; they had the right to present evidence and legal arguments; and, most importantly, the arbitration matter was deemed to be a final resolution between the parties." *Id.* at 544. Certainly, all these factors are present under the *New international Mortgage Decree*.

Part five of the test for collateral estoppel requires that "the party against whom the issue is asserted was a party or in privity with a party to the prior litigation." *Id.* (emphasis added). IDWR is not a party to the SRBA. I.C. § 42-1401B(3); *see also, In Re SRBA Case No. 39576*, 127 Idaho 688, 905 P.2d 89 (1995). Consequently, in one-party cases where the claimant is responding to the Director's Report and no other party, collateral estoppel cannot properly be evaluated or applied.⁹ Because of IDWR's removal as a party in the SRBA, claimants in one-party cases could never assert collateral estoppel regarding a prior decree even if IDWR was, in fact, a party to a prior decree. As a result, claimants to these prior decrees would be defenseless, and prior decrees would become irrelevant.

The role of IDWR is to serve as an independent and technical expert to the court.¹⁰ I.C. § 42-1401B(1). Just as this court is required to accept all prior judgments until a party with proper standing can establish a legal reason to reevaluate a judgment, IDWR, as a non-party and independent expert, is obligated to accept prior decrees as being conclusive proof of the nature of a water right. Again, to rule otherwise would allow IDWR to avoid any prior decree to which it disagreed. Under these circumstances where the claimant is the only party in a subcase, it would be unfair for the claimant to bear the burden of proof to establish a water right that the same party or party in privity established under the *New International Mortgage Decree* over 60 years ago.

Under numerous different theories, courts have consistently upheld the conclusive effect of prior decrees. For example, in *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916 (1984), the plaintiff brought a quiet title action to a water right which had been previously decreed. The trial court upheld the water right holding that the prior decree was "res judicata as to all matters

⁹ The Idaho Department of Fish and Game claimed a water right confirmed by the *New International Mortgage Decree*. *See*, Subcase 36-00012. Because of this claim, the claimants assert that IDWR is in privity with Idaho Fish and Game, both being State agencies, and therefore, IDWR should be estopped from disavowing other rights confirmed by the *New International Mortgage Decree*. While IDWR is a State agency, it is not in privity with other State agencies for purposes of the SRBA. In 1994, the Legislature separated IDWR from other State agencies. "The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication." I.C. § 42-1401B(2). Consequently, the fact that Idaho Fish and game claimed a right under the *New International Mortgage Decree* is not relevant to a claim of estoppel.

¹⁰ IDWR's status as technical expert to the court is always dependent on the court accepting IDWR as an expert under I.R.E. 702. *In Re SRBA Case No. 39576*, ___ Idaho ___, 912 P.2d 614 (1995).

determined therein." *Id.* at 465. In upholding the trial court, the Idaho Supreme Court held as follows:

The 1910 Rexburg decree is **conclusive proof of diversion of the water, and of application of the water to beneficial use, i.e., the decree is res judicata as to the water rights at issue herein.** Our holding of the presumption of accuracy of the decree is in keeping with the judicial policy of deterring the reopening of judgments long after cases are decided and the files are closed.

Id. at 465 (emphasis added) (citations omitted); *see also* Masterson v. Pacific Live Stock Co. 24 P.2d 1046 (Or. 1933); *Petition for Change in Use and for Change in Place of Use for the Ekxtrom No. 1 Well, Statement of Claim No. UW-298, with a Priority Date of 1920, Town of Pine Bluffs v. State Board of Control*, 649 P.2d 657, 660 (Wyo. 1982).¹¹

Outside a claim of *res judicata* or collateral estoppel, the United States Supreme Court in *Arizona v. California*, 460 U.S. 605 (1983), held that a decree in a water adjudication is conclusive proof as to the nature of a water right. In an original jurisdiction action, various Indian tribes asked the United States Supreme Court to reevaluate the amount of practicably irrigable acres alleging that a certain amount of acreage was omitted in the initial adjudication. Despite the fact that the court retained jurisdiction over the case, the court declined to reevaluate the amount of practicably irrigable acreage based on the following rational:

First, while technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision Nevertheless **a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.** 'To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits,

¹¹ The State cited *Basin Electric Power Cooperative v. State Board of Control* for a number of purposes. One of the reasons the case was cited was for the proposition that a previously decreed water right is only *prima facie* evidence of a water right. In Wyoming, it is true that a previously decreed water right is only *prima facie* evidence of a water right in a transfer proceeding. However, until the right owner takes the affirmative step to transfer a previously decreed right, the law in Wyoming is also that a previously adjudicated right is conclusive proof as to historic beneficial use outside of a transfer proceeding: "As to its upper limitations, an adjudicated water right is synonymous with historic beneficial use and is conclusive. As to its minimum requirements, the adjudicated right may or may not be the equivalent of the right authorized by historic beneficial use depending upon whether or not, in the transfer proceedings, relevant proof of such use will establish such equivalency." *Petition for Change in Use and for Change in Place of Use for the Ekxtrom No. 1 Well, Statement of Claim No. UW-298, with a Priority Date of 1920, Town of Pine Bluffs v. State Board of Control*, 649 P.2d 657, 660 (Wyo. 1982); *see also*, *Pueblo West Metropolitan District v. Southeastern Colorado Conservancy District*, 717 P.2d 955 (Colo. 1986).

conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'

In no context is this more true than with respect to rights in real property Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-sparse part of the country. The doctrine of prior appropriation, the prevailing law in the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Id. at 619-620 (footnote omitted) (citations omitted) (emphasis added).

The conclusive effect of prior decrees was also recognized by the Idaho Legislature under I.C. § 42-1427. In reviewing the plain and ordinary meaning of I.C. § 42-1427, the Director's duty as to prior decrees is to report elements of a water right as previously decreed and to define those elements that were not previously decreed. In other words, the Legislature intended that the SRBA Court would accept previously decreed elements of a water right.

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 upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication.

I.C. § 42-1427(3).

Whatever preclusion theory is asserted and regardless of party status, a change in beneficial use after an appropriation is complete is not a basis to reduce or disallow a water right unless the change in use constitutes forfeiture or abandonment. For example, in *Hallenbeck v. Granby Ditch & Reservoir Co.*, 420 P.2d 419 (Colo. 1966), a party challenged a previously decreed right alleging that the users actual beneficial use subsequent to the decree was a basis to reduce the water right. The water right holder alleged that such an assertion amounted to a collateral attack on the decree. The objector argued that "the rule against collateral attack protects a decree only to as much of the adjudicated water as has actually and subsequently been applied to a beneficial use." *Id.* at 424. The Colorado Supreme Court disagreed holding as follows:

We do not agree, for such is still a collateral attack when the correct course of action to raise the issue is by alleging abandonment as noted above.

* * *

To reiterate, where the water in question has been once appropriated, and adjudicated decrees have entered which are noncontestable due to the passage of time, such an attack cannot be made. See *Arnold v. Roup*, 61 Colo. 316, 322, 157 P. 206, 209 (1916) where this court said in disposing of a similar contention:

The Simon ditch decree of 1892 is absolute. It settled the volume and priority of the ditch, and left no conditional provision as to volume open for future ascertainment and settlement in the same proceeding, * * *. Beneficial application was adjudicated, and is not a condition left open by the decree for future ascertainment and settlement

Id. at 424-425; *see also*, *City of Westminster v. Church*, 445 P.2d 52 (Colo. 1968).

Citing both *Hallenbeck* and *Westminster*, the Colorado Supreme Court in *Weibert v. Rothe Brothers, Inc.*, 618 P.2d 1367 (Colo. 1980), outlined the role of beneficial use in a water adjudication:

A decree in a water adjudication confirms that steps have been completed to effect an appropriation. One of those steps is application of water to beneficial use. Continuation of beneficial use of the amount of water which would be produced by diversions at the claimed rate from the date of initiation of the appropriation to the date of the decree is not an issue in a water adjudication proceeding.

Id. at 1372.

Taking all these principles into consideration, it is helpful to review how IDWR applied the theory that continuing beneficial use is the limit to decreed water rights. For example, water rights 36-00061, 36-00062, and 36-00063 were confirmed under the *New International Mortgage Decree*. All the water rights were decreed to the same owner and are "from the same source for the same uses on the same lands." *Report Regarding Claim To Water Right No. 36-00063*, at 3.¹² IDWR recommended water rights 36-00061 and 36-00062. However, water right 36-00063 was

¹² "As noted above, the claimant claimed right nos. 36-00061, 36-00062, and 36-00063; each of these claimant are to water from the same source for the same uses on the same lands. The claimant claimed 2.22 cfs under right no. 36-00061, 0.28 cfs under right no. 36-00062, and 0.80 cfs under right no. 36-00063. These are the same amounts for which each right is decreed in the *New International Mortgage decree*. The claimant claimed a total of 3.3 cfs for irrigation; the claimant also claimed 0.07 cfs for stock water and 0.04 cfs for domestic use on each of the three claims. IDWR recommended a total of 2.42 cfs, which includes 2.22 cfs pursuant to 36-00061, which has the earliest priority, and 0.20 cfs pursuant to 36-00062, which has the next earliest priority, and recommended 36-00063 for disallowal." *Report Regarding Claim To Water Right No. 36-00063* at 3.

recommended for disallowal. IDWR did not find that water right 36-00063 was forfeited or abandoned. Rather, IDWR disallowed the water right because any use of the water right would exceed IDWR's determination of beneficial use of water for that particular place and purpose of use. Applying their theory and evidence of beneficial use, IDWR came to the unilateral determination that the claimants did not need water right 36-00063.

For these water rights, IDWR is not questioning the evidence on beneficial use that was considered by the court under the *New International Mortgage Decree*. IDWR has no knowledge of how these water rights have been used since the water rights were confirmed. In fact, IDWR acknowledged in open court that their knowledge on beneficial use for these water rights is limited to information from 1986 to the current date. Because of better science and technology, IDWR's position is that their determination of beneficial use for water rights 36-00061, 36-00062, and 36-00063 is correct and what was once determined to be a beneficial use under the *New International Mortgage Decree* is wrong. Basically, IDWR is asserting that there is "better" evidence on beneficial use for these disputed water rights. Any attempt to reevaluate water rights, or elements to particular water rights, decided under a prior decree based on "better" evidence would constitute a collateral attack on a prior decree.

Additionally, any reduction of previously decreed rights based solely on actual beneficial use creates some practical problems. First, any decreed right will always be subject to collateral attack based on an allegation that what was once decreed no longer constitutes a reasonable beneficial use. Second, a decreed right could be reduced absent any period of nonuse or intent to abandon. When asked what test would be applicable to a claim that a right no longer constitutes a reasonable use of water, the State responded that it is one of "reasonableness." Under this standard, the potential loss of a property right would be reduced to a purely subjective determination based on the decision-makers own concept of what constitutes a reasonable beneficial use of water. Any objectivity that exists under a claim of forfeiture or abandonment would be lost.

The ruling of this court does not in anyway alter the well-established rule that the failure to beneficially apply water for a period time or nonuse accompanied with intent to abandon will result in the loss of a water right. Under a forfeiture or abandonment theory, continuing

beneficial use is highly relevant. However, in this case, neither abandonment nor forfeiture have been claimed by IDWR as a basis for reducing the water rights at issue.

For all these reasons, the court finds that the *New International Mortgage Decree* is conclusive proof as to the water rights at issue for those elements of the rights which were actually decreed. Those elements specifically defined were as follows: ownership, source of water, quantity, priority date, purpose of use, point of diversion, and place of use. The only elements not defined were annual volume of consumptive use, period of use, and number of irrigated acres.

Most, if not all, of the diversion rates decreed for each respective water right exceed the presumptive amount of one second foot per acre or .02 cubic feet per second as set forth under I.C. § 42-220. No irrigator may use more than .02 cubic feet per second "unless it can be shown . . . to the court in making such decree, that a greater amount is necessary" I.C. § 42-220. The court in the *New International Mortgage Decree* specifically set forth findings as to why a large amount of water is necessary for the successful irrigation of crops in the Hagerman Valley:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, That all of the land described in the complaint of the plaintiff, and in the answers, cross-complaints, and counter-claims of the defendants and intervenors, and each of them, is semi-arid in character and requires the artificial application of water or irrigation in order to produce thereon ordinary agricultural crops; that said land is situate in what is known as the Hagerman Valley, east of and adjacent to the Snake River, and that the same lies between the rim rock, or canyon wall, to the east of the Snake River and said Snake River; that the subsoil of said valley underlying said valley and all of the same is shattered, fissured lava flow, upon which has been deposited layers of clay and gravel, interspersed with water worn boulders, fragments of rock, and the soil is composed mainly of decomposed lava rock, oxidized lava rock and sand, and that owing to the nature of the soil and subsoil, the coarse texture and the mechanical composition of the soil and its free drainage, **and said land and all of the land in Hagerman Valley requires a large amount of water, as hereinafter specified, for its successful irrigation and production thereon of ordinary agricultural crops.**

New International Mortgage Decree at 2-3 (emphasis added).

Therefore, where a claimed element matches a previously decreed element, regardless of whether the Director's Report states a different element, the court finds that there is no question of material fact and summary judgment will be granted to those elements as a matter of law. If

a claimed element does not match a previously decreed element, the court will assume that a right to the unclaimed decreed element or portion thereof was waived. Under this scenario, summary judgment will be granted as to those claimed elements that match elements contained in the Director's Report.

B. Summary Judgment May Be Granted for Some of the Elements Not Decided Under the New International Mortgage Decree.

1. Consumptive Use

One of the elements the court is required to decree is consumptive use. I.C. §§ 42-1412(6) and 42-1411(2). The claimants concede that this element was not adjudicated by the court under the *New International Mortgage Decree*. The claimants assert an annual volume of consumptive use of 3.75 acre feet per annum. IDWR asserts an annual volume of consumptive use of 3.5 acre feet per annum.

In support of their respective positions, the claimants submitted the affidavits of Dr. Charles Brockway, Mr. McFadden and Mr. Jones, and IDWR submitted a Report Regarding Consumptive Use in the Hagerman Area. Prior to being considered by the court, both the affidavits and reports must pass the admissibility test originally established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Under this test, scientific or technical evidence cannot be considered by the court until the court has performed its gatekeeping function in ensuring that the evidence offered is both reliable and relevant.¹³ *State v. Parkinson*, ___ Idaho ___, 909 P.2d 647 (1996); *see also* I.R.E. 702; *State v. Rodgers*, 119 Idaho 1047, 812 P.2d 1288 (1991); *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992); *State v. Faught*, 127 Idaho 873, 908 P.2d 566 (1995). For the purposes of summary judgment, the court finds that the affidavits and reports are both relevant and reliable and, therefore, will be considered by the court.

The methods used to determine consumptive use by the claimants and IDWR were not the same. The claimants' expert, Dr. Brockway, determined consumptive use under a "Yield of

¹³

In determining reliability, the court may consider any or all of the following: (1) whether the technique can and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether the known or potential rate of error is acceptable; and (4) whether the theory or technique is "generally acceptable" in the relevant scientific community.

Irrigated Alfalfa" methodology. Under this method, the source of water, whether the water is from irrigation or precipitation, is irrelevant. IDWR determined consumptive use under the "FAO Blaney-Criddle" methodology. Under this method, the source of water is relevant.

Under IDWR's theory, the definition of "consumptive use" under I.C. § 42-1401A(2)¹⁴ takes into account only that amount of water provided by irrigation. IDWR's theory does not take into account average precipitation. IDWR explained the legal basis for their theory as follows:

Technical literature considers the consumptive use (CU) for irrigated cropland to be provided by two components, irrigation and precipitation. Measurements of quantities of water required for growing crops typically identify the total CU, without specifying whether this amount is provided by irrigation or by precipitation.

On the other hand, the CU for irrigation defined by Idaho statute, and thus the CU reported by IDWR for the recommendations of water rights, is the amount of water that must be provided by the irrigation system. This amount is technically the consumptive irrigation requirement (CIR), which is computed by subtracting the effective precipitation (EP) from the evapotranspiration (ET).

Report Regarding Consumptive Use in the Hagerman Area at 2.

The aforementioned quote isolates the only significant difference between the theories advanced by IDWR and the claimants. The issue is whether average precipitation should be subtracted from total consumptive use. This issue has not been adequately argued or briefed. Therefore, the court withholds any ruling until the issue has been fully developed.

2. Amount of Irrigated Acres

One of the elements the court must decree is the number of irrigated acres. I.C. § 42-1409(1)(h). The court in the *New International Mortgage Decree* did not make any findings as to the number of irrigated acres for the water rights at issue. Rather, the court found that the parties had "the use, and the right to use, for irrigation, domestic, power and other purposes on the lands set after their respective names" *Id.* at 7. Since the court in the *New International*

¹⁴ Under I.C. § 42-1401A(2) "'Consumptive use' means the amount of water that does not remain in the water system after use or is not returned to the water system through return flows or seepage, whether or not treatment for purposes of maintaining water quality is required before the water may be returned to the water system. 'Consumptive use' for an irrigation water right shall be based upon the most water consumptive crop that can be grown in the area during the period of year when water is used for irrigation."

Mortgage Decree did not decide irrigated acres, this court is not prevented from determining the amount of irrigated acres.

For some of the claims, there is a dispute as to the amount of irrigated acres. In all these disputed cases, the claimants submitted affidavits establishing irrigated acreage. In response, IDWR submitted affidavits of their field agents describing the extent of their examination and opinion as to irrigated acreage. The conflicting evidence creates a material question of fact. Therefore, summary judgment may not be granted as a matter of law as to the number of irrigated acres.

3. Purpose of Use

Under the *New International Mortgage Decree*, the court recognized the following purposes of use: "irrigation, domestic, power, and other purposes." *Id.* at 7. In reviewing these uses, the court notes that for each right a particular quantity of water was decreed but was not allocated between the particular uses. IDWR has not explained and the claimants have not argued or established how these decreed rights should be allocated between uses. Until there is some showing before the court, the court will withhold any finding as to how these decreed rights should be allocated between different uses.

Additionally, in comparing most of the Notices of Claims with the Director's Report, there is no dispute as to purpose of use. However, there is a dispute when comparing the purpose of use claimed on summary judgment with the Director's Report. As stated in Section C, *infra*, the claimants will be limited to their Notice of Claim unless the claimants are granted leave to amend their claim. Some of the claimants have properly claimed purposes of use not expressly recognized under the *New International Mortgage Decree*. Presumably, these purposes are asserted under the "other purposes" catchall provision.

Under the "other purposes" section, the *New International Mortgage Decree* could recognize only those purposes of use for which water had been applied to a beneficial use. The court could not recognize prospective uses or uses that did not exist at the time the Decree was entered. "Other purposes of use" will be recognized under the *New International Mortgage Decree* if the claimants can provide some foundation and identify with some particularity the nature of the use in question, when the use was perfected, and how the particular use was perfected.

Purposes of use such as "aesthetics" and "wildlife" will not be accepted in the context of a summary judgment on conclusory statements that these uses existed at the time the *New International Mortgage Decree* was entered and have continued since that date.

4. Period of Use

The court is also required to decree period of use. I.C. § 42-1409(1)(g). This element was not decided under the *New International Mortgage Decree*. Initially, there was a dispute as to the period of use for the irrigation season between the Notices of Claim and Director's Report. Under Basin-Wide Issue 5, the District Court held that the period of use for irrigation claims will be decreed as "irrigation season." Therefore, as a matter of law, the period of use for irrigation claims will be decreed as "irrigation season."

5. Remarks

Originally, IDWR included remarks for most rights at issue. In the Supplemental Director's Reports, IDWR deleted those remarks. The only rights still in dispute are rights 36-00061 and 36-00062 where IDWR included combined use statements. Until the court has heard argument on these combined use statements, the statements will remain as part of rights 36-00061 and 36-00062.

6. Split Rights

Many of these claims involve split rights. Unless there is a claim of adverse possession, forfeiture, or abandonment, a decreed right may be transferred in whole or in part along with land appurtenant to that right. "A division of a tract to which water is appurtenant, without segregating or reversing the water right, works a division of such water right in proportion as the land is divided." *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916 (1984), citing *Hunt v. Bremer*, 47 Idaho 490, 493, 276 P. 964 (1929), citing *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911). Therefore, as to quantity previously decreed under the *New International Mortgage Decree*, the split rights shall reflect the original decreed quantity reduced in proportion to the amount of land subdivided.

In this case, the evidence before the court does not reveal whether the quantity claimed for split rights represent a pro rata reduction from the quantity originally decreed. Until that evidence

is before the court, summary judgment will not be granted unless there is no disagreement between the claim and Director's Report.

7. Stock Water Rights

In reviewing the rights including stock water as purposes of use, the court notes that the Supplemental Director's Reports are not consistent with this court's *Recommendation on Basin-Wide Issue 12 (BWI 12)*. All stock water rights shall be recommended consistent with *BWI 12*.

C. Whether a Claim May Be Amended Through Any Procedure Other Than a Motion to File an Amended Claim.

In many instances, the claimants requested summary judgment on an element where the amount claimed on summary judgment does not match the element in the initial claim. For these types of elements, the claimants have not moved to amend their claim. Rather, the claimants assert that claims may be amended by objection since objections constitute a "pleading."

Amending a claim is a procedural matter. Normally, the Idaho Rules of Civil Procedure would govern over procedural matters. I.R.C.P. 1(a). However, the Idaho Supreme Court has recognized that the Idaho Rules of Civil Procedure will not cover all procedural matters which take place in district court and that the rules are not designed to be all inclusive. *Davison's Air Service, Inc. v. Montierth*, 119 Idaho 967, 812 P.2d 274 (1991). The Idaho Supreme Court has already recognized that water adjudications are unique lawsuits and that the Idaho Rules of Civil Procedure do not address all the procedures necessary for the SRBA to function. Therefore, "it was necessary for the Legislature to provide special procedural rules for the initiation of the SRBA." *In Re SRBA*, ___ Idaho ___, 912 P.2d 614, 622 (1995). The claim procedure created under Title 42, Chapter 14, is unique and not covered under the Idaho Rules of Civil Procedure. Therefore, the procedure for filing claims under Title 42, Chapter 14, will govern. Under I.C. § 42-1409A, a claimant must seek leave of the court prior to amending a claim.¹⁵

Except for the obligation of claimants to seek leave to amend a claim, I.C. § 42-1409A is not inconsistent with I.R.C.P. 15(a) and 15(b). Under these rules, parties in a standard civil

¹⁵ AO 1 § 6(e)(1)(c), as proposed, states that "[a] claimant may not amend a claim by filing an objection or a response (see Section 6e(2)).

case may amend their claim without leave of the court in limited circumstances. For example, under I.R.C.P. 15(a) a party can amend their pleading at any time either before a responsive pleading is served. Under I.R.C.P. 15(b), a pleading can be amended by the express or implied actions of the parties during trial. Because filing fees are dependent on what is claimed, parties cannot amend their claim in the SRBA without permission of the court. Additionally, courts must have the ability to ensure that any amended claim is not intended to completely bypass procedural due process requirements unique to the SRBA.

In cases where there is a broad amendment, the court may find it necessary to request an additional investigation by IDWR. In cases where the amendment is insignificant and all concerned consent to the amendment, the court may simply require further filing fees. The bottom line is that parties must seek leave of the court to amend their claim. How a claim is amended will depend on the circumstances.

V. CONCLUSION

To summarize, the court finds as follows:

1. Previously decreed rights cannot be reevaluated or reduced based on continuing beneficial use unless there is a claim of abandonment, forfeiture, adverse possession, or estoppel. Therefore, summary judgment will be **granted** for all elements actually decided under the *New International Mortgage Decree*;
2. The court will **withhold** any determination of consumptive use pending further development on the issue of whether average precipitation is subtracted from an overall determination of consumptive use;
3. The amount of irrigated acres was not decided under the *New International Mortgage Decree*. For some claims, a material issue of fact exists as to the proper amount of irrigated acres, and therefore for those types of claims, summary judgment is **denied**.
4. Purpose of use for irrigation, domestic and power (where applicable) will be **granted** as those purposes of use were specifically recognized under the *New International Mortgage Decree*. "Other purposes of use" recognized under the *New International Mortgage Decree* will be recognized if the claimants properly amend their claims and present foundation as to the nature

of use, when the use was perfected, and how the use was perfected. Therefore, any purpose of use claimed under "other purposes" is **denied**.

5. The period of use for irrigation claims is the "irrigation season."

6. Split rights will be recognized to the full extent of the rights under the *New International Mortgage Decree* but will be reduced in proportion to the land subdivided. The court will **withhold** any determination of elements involving split rights until there is evidence that the elements claimed for split rights reflect a pro rate reduction from what was decreed under the *New International Mortgage Decree*.

7. Stock water rights shall be recommended and decreed consistent with this court's prior recommendation under *BWI 12*.

8. A claim can only be amended by an Amended Notice of Claim. Where the claimants have requested an element that was not contained in the original Notice of Claim, summary judgment will be **denied**. The sole exception to this rule is when the Director's Report or Supplemental Director's Report is consistent with an element not originally claimed. The claimants may stand by their original Notice of Claim, and when consistent with the findings contained in this recommendation, summary judgment will be granted as to those elements.

The court will **withhold** any specific findings until the unresolved issues specifically mentioned herein have been addressed.

The prior *Orders on Summary Judgment* are hereby withdrawn.

IT IS SO RECOMMENDED

DATED September 13, 1996.


FRITZ X. HAEMMERLE
Special Master, Reporting Area 2
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **SECOND AMENDED ORDER ON SUMMARY JUDGMENT** was mailed on September 13, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
P. O. Box 44449
Boise, ID 83711-4449

Edna Mae Rea
853 East 2830 South
Hagerman, Idaho 83332-5641

Director of IDWR
P O Box 83720
Boise, ID 83720-0098

George J & Nellie W Korbis
966 Pioneer Road
Hagerman, Idaho 83332

Edith Vernon
2722 South 900 East
Hagerman, Idaho 83332

Mattie P & Golden T Grigg
P O Box 278 A
Hagerman, Idaho 83332

Frank C & Peggy Erwin
Route 1, 453
Hagerman, Idaho 83332

Mildred Culbertson
P O Box 386
Hagerman, Idaho 83332

Mark & Susan Potter
Route 1
Hagerman, Idaho 83332

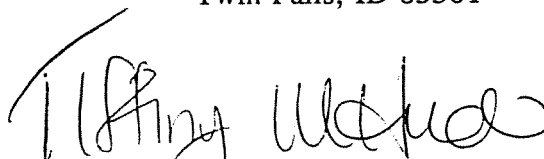
Patrick D Brown
P O Box 389
Twin Falls, Idaho 83303

Basil Lester & Myrle Hyde Zink
P O Box 455
Hagerman, Idaho 83332

Roger Shaffer
Box 123
Hagerman, Idaho 83332

Dick J & Sigrid E Veenendaal
Box 512, 221 Willow Lane
Hagerman, Idaho 83332

Doyt H & Roxie J Simcoe
562 Sunrise Blvd. N
Twin Falls, ID 83301



Deputy Clerk

EXHIBIT A

Subcase Nos:

36-00003A
36-00003C
36-00003E
36-00003F
36-00034B
36-00035J
36-00039C
36-00039E
36-00039J
36-00039N
36-00047
36-00061
36-00062
36-00063
36-00064B
36-00079
36-00085A
36-00086C
36-00092
36-00103F
36-00106
36-00108B
36-10283B
36-10409

