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Department of Water Resources

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DISTRICT COURT-SE
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	)	PRELIMINARY SPECIAL MASTER'S
	)	REPORT;
Case No. 39576	)	FINDINGS OF FACT, CONCLUSIONS
	)	OF LAW
	)	
	)	For Water Right: 34-10167

I. PROCEDURAL BACKGROUND

A notice of claim was filed for this water right pursuant to I.C. § 42-1409 (1990). The Director of the State of Idaho Department of Water Resources (IDWR) examined the water system for Reporting Area 1 and investigated and abstracted the notices of claim for Reporting Area 1 (Basin 34), which includes portions of Custer, Butte, Bonneville and Jefferson Counties, State of Idaho. The *Director's Report for Reporting Area 34 (Director's Report)* contained a recommendation or abstract for the elements of this water right.

An objection to the *Director's Report* for water right 34-10167 was filed on February 26, 1993, by the United States Bureau of Land Management. A second objection to the *Director's Report* for this water right was filed by Herb Whitworth. Responses were filed by the Idaho Department of Water Resources and Herb Whitworth. A *Standard Form 5; Proposed Elements of a Water Right* was filed February 1, 1995. Mr. Whitworth, however, filed a letter February 13, 1995 informing the parties that he did not agree with the priority date as set forth in the *Director's Report*. An *Amended Standard Form 5; Proposed Elements of a Water Right* filed March 6, 1995 further indicates that Mr. Whitworth asserted an earlier priority date than that recommended in the *Director's Report*.

The only element to which IDWR did not agree was the priority date asserted by Mr. Whitworth. The *Director's Report* listed the date as May 1, 1937. An evidentiary hearing was held December 8, 1995 to decide the priority date. At the hearing IDWR stipulated to a priority date of **March 16, 1923**, one day after a prior decree was entered in *Utah Construction Co. v. Abbott*, No. 222 (E. Dist. Idaho March 15, 1923) (*U.C. Decree*). Mr. Whitworth asserted a priority date of **April 15, 1890**.

The claimant Mr. Whitworth, and the objector, the United States, participated as parties at the hearing. The Idaho Department of Water Resources attended the hearing, but did not participate as a party. *In re SRBA Case No. 39576*, ___ Idaho ___, 912 P.2d 614 (1995).¹

A *Joint Pretrial Stipulation*, signed by Mr. Whitworth, Mr. William Ferry on behalf of the United States, and Mr. Matt Howard for IDWR was admitted into evidence (Exhibit 2). The *Joint Pretrial Stipulation* established the following facts:

1. Water right 34-10167 was put to beneficial use April 15, 1890.
2. The claimant, Herb Whitworth, is a party in privity with a party to *Utah Construction Co. v. Abbott*, No. 222 (E. Dist. Idaho, March 15, 1923).

Thus, the sole contested issue is whether *res judicata* or collateral estoppel bars Mr. Whitworth from claiming a priority date before entry of the *U.C. Decree*. At trial, a copy of the *U.C. Decree* certified by the Idaho Department of Water Resources was conditionally admitted into evidence (Exhibit 4) subject to submission of a copy certified by the Federal Court. A court certified copy was submitted after trial and marked Exhibit 4a.²

II. FINDINGS OF FACT

A. ELEMENT 4, PRIORITY DATE

Herb Whitworth's predecessors diverted water and put it to beneficial use April 15, 1890. (Exhibit 2.) Approximately thirty-three years later, the U.S. District Court for the District of Idaho entered a decree adjudicating water rights of named defendants to the Big Lost River and

¹ IDWR did not give an opening statement or closing argument and did not cross-examine witnesses. However, an IDWR attorney presented direct examination of an IDWR employee, Carter Fritschle.

² The copy of the *U.C. Decree* certified by the Federal Court (Exhibit 4a) has page numbers for the preliminary text numbered 1-25A, but is not paginated thereafter. The copy certified by IDWR (Exhibit 4) is paginated throughout.

its tributaries. (Exhibit 4 at 10, ¶ 1; Exhibit 4a at 11-12, ¶ 1.) Mr. Whitworth's predecessors in interest were Murray and Ruth Berg Longhurst who were parties to the *U.C. Decree*. (Exhibit 4 at 5, 173-174; Exhibit 4a at 6; nos. 482-483; testimony of Carter Fritschle.)

This water right was not adjudicated in the prior decree. The *U.C. Decree* adjudicated no water rights to the Longhursts from Thousand Springs, the source from which Mr. Whitworth claims this right. (Exhibit 4 at 173-174; Exhibit 4a, nos. 482-483.) Thousand Springs is **not included** in the index of tributary streams listed in the decree.³ (Exhibit 4 at 1-2; testimony of Carter Fritschle.) One water right, however, was included in the decree from Thousand Springs for the Thousand Springs Land & Irrigation Company Ltd. (Exhibit 4 at 171; Exhibit 4a no. 478.) The language in the decree indicates it was more like an application for a water right than a decree for a water right. (Exhibit 4 at 171; Exhibit 4a no. 478.)⁴ The right for Thousand Springs Land & Irrigation Co., Ltd. was never perfected. (Testimony of Carter Fritschle.)

Thus, the question at issue is whether Herb Whitworth is barred by the doctrine of *res judicata* from claiming a priority date prior to the date of the *U.C. Decree* March 15, 1923.

B. UNCHANGED ELEMENTS

Several elements of the water right remain unchanged from the original *Director's Report*, specifically, **element 1**, name and address of the claimant; **element 2**, source; **element 5**, point of diversion; **element 6**, purpose of use; and **element 7**, period of year; remain unchanged from the original *Director's Report* for 34-10167.

C. OTHER CHANGED ELEMENTS

The remaining elements of this water right as stipulated to in the *Standard Form 5* differ from the original *Director's Report* for 34-10167.

Element 3, quantity for irrigation was reduced from 6.78 cfs to 6.34 cfs to accurately reflect the quantity of water consistent with the stipulated place of use.

³ The copy of the *U.C. Decree* certified by IDWR (Exhibit 4) contains this index. The copy of the *U.C. Decree* certified by the federal court (Exhibit 4a) does not contain an index.

⁴ The decree set forth in relevant part:
Provided, however, that this right is to be deemed a storage right and that the priority and amount of this appropriation are conditioned upon proof of beneficial use of such water being made within six years from the date of this decree before the Commissioner of Reclamation of the State of Idaho, in the manner prescribed by sections 5577-5579 Idaho Compiled Statutes.
Exhibit 4 at 171; Exhibit 4a no. 478.

Element 8, the place of use was changed to accurately reflect the legal description of the place of use and a reduction in the total number of acres from 237.0 to 222.0.

Element 9, annual volume of consumptive use was changed from 2002.5 AFY to 1965 AFY consistent with the reduction in acres in the stipulated place of use.

III. CONCLUSIONS OF LAW

Under *SRBA Administrative Order 1*, a Special Master is required to make a recommendation to the Presiding Judge as to whether and how a water right should be decreed for each subcase.

A. PRIORITY DATE

1. Standard of Review

The doctrine of *res judicata* precludes parties and their privies in a final litigation from relitigating in a second suit against the same parties, not only the same claim or demand, but also all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group*, 119 Idaho 146, 804 P.2d 319 (1990).

The doctrine of collateral estoppel precludes parties to a final judgment and their privies from relitigating the same issues in a later lawsuit. Idaho recognizes a five part test to determine whether collateral estoppel will act as a bar to later litigation: 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. *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).

2. Analysis

At trial, Herb Whitworth asserted a priority date of April 15, 1890. The *Director's Report* recommended water right 34-10167 with a priority date of May 1, 1937, and IDWR later stipulated to an earlier date of March 16, 1923 one day after entry of the *U.C. Decree*. IDWR assumed Herb Whitworth's predecessor should have claimed this water right during the *Utah*

Construction litigation. Since the *U.C. Decree* did not adjudicate this water right, IDWR concluded Whitworth is prohibited from asserting a priority date prior to 1923. Neither the doctrine of *res judicata* nor the doctrine of collateral estoppel is sufficient to support that conclusion.

a. Doctrine of *Res Judicata*

Under the doctrine of *res judicata*, or “claim preclusion,” a final adjudication on a claim or demand precludes the parties to the first action, and their privies, from later relitigating against the same parties not only the same claim or demand, but in addition all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group*, 119 Idaho 146, 804 P.2d 319 (1990); *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983). Under the facts in this case, *res judicata* does not bar Whitworth from asserting a priority date prior to March 15, 1923.

There is no dispute that the *U.C. Decree* is a final adjudication. Although the court retained jurisdiction for some time after March of 1923 to correct errors and omissions, the court’s March 15, 1923 decree together with its *Order Correcting Errors and Omissions in Decree* dated October 21, 1925 constitute a “final adjudication.” (Exhibit 4 at 221-244; Exhibit 4a). It is undisputed that Whitworth’s predecessors in interest **did not litigate** a claim to this water right. Therefore, the dispositive issue is whether this water right was a “claim arising out of the same transaction” which was the subject matter of the litigation and which could have been made in the first action. In other words, were Whitworth’s predecessors required to claim this water right in the earlier litigation? The court finds Whitworth’s predecessor’s were not required to claim this right to Thousand Springs.

In determining whether the claim at issue was a claim arising out of the transaction which was the subject matter of the litigation, courts often look to the pleadings. None of the pleadings from the *Utah Construction* litigation was offered or admitted into evidence. The court is constrained to decide cases based on the record and it must do so here without benefit of the complaint or answers filed in *Utah Construction*. Thus, the court looks solely to the decree.

The decree set forth in Part I:

1. That Big Lost River is a stream with a large number of tributaries, having its entire water shed within the counties of Butte and Custer, State of Idaho, said river rising in the Lemhi National Forest in Custer County, Idaho and flowing in a general southeasterly direction through Custer [C]ounty and Butte County, Idaho and having its terminus in the Lost River Sinks situated in Townships 4 and 5 North of Range 30 East of the Boise Base and Meridian.

That there is hereby drawn within the jurisdiction of this Court for distribution for beneficial uses, under and pursuant to the terms of this decree, all of Big Lost River and its tributaries as above described, and with the exceptions hereinafter provided, are hereby decreed to constitute a single interdependent river system to be administered under the terms of this decree.

Exhibit 4 at 10, ¶ 1; Exhibit 4a at 11-12, ¶ 1.

The *U.C. Decree* was intended to adjudicate all water rights to the Big Lost River and its tributaries. Mr. Whitworth does not dispute that, rather he contends that at the time of the decree, Thousand Springs was not considered tributary to the Big Lost River. If it was known that Thousand Springs was tributary to the Big Lost River, under the doctrine of *res judicata*, the claimant would likely be barred from seeking a priority date earlier than 1923. If it was known that Thousand Springs was tributary to the Big Lost River, this water right may have been a claim "arising out of the transaction" which was the subject matter of the *Utah Construction* litigation which could have been brought. However, Whitworth's argument that Thousand Springs was not included in the decree because in 1923 it was believed Thousand Springs was not tributary to the Big Lost River is persuasive.

Whitworth's predecessors adjudicated 16 or 17 rights tributary to the Big Lost River. (Exhibit 4 at 173; Exhibit 4a, nos. 482-483.) This water right, derived from Thousand Springs, was one of the most important water sources on the ranch. (Testimony of Herb Whitworth.) It is uncontroverted at present that Thousand Springs is tributary to the Big Lost River. (Testimony of Carter Fritschle.) However, it is not always apparent from observing the surface flow of Thousand Springs that it is tributary. Thousand Springs often goes dry. In addition, at certain points there is no observable

water flowing into the Big Lost River from Thousand Springs. (Testimony of Carter Fritschle; testimony of Doug Rosenkrance.) Thousand Springs is fed primarily by springs and not run off water, and in some spots Thousand Springs has no channel. (Testimony of Doug Rosenkrance.) It is reasonable to infer that neither the *U.C.* court nor Whitworth's predecessors considered Thousand Springs tributary to the Big Lost River. Furthermore, it is difficult to believe Whitworth's predecessors would have diligently claimed 16 or 17 water rights, but neglected to claim one of the most important ones. Although one water right on Thousand Springs was referred to in the decree, it appears that was merely an application for a right which was never perfected. The reason for inclusion of this one right was not explained at trial, and the court finds its inclusion has little weight. Thus, the court is persuaded that at the time of the *U.C. Decree*, Thousand Springs was not considered tributary to the Big Lost River. For that reason, this water right was not required to be adjudicated at the time of the *U.C. Decree*.

b. Analysis Under Doctrine of Collateral Estoppel

A final judgment is conclusive on the parties to the judgment and their privies as to the issues determined, and precludes the parties from later relitigating the same issues. Unlike the doctrine of *res judicata*, this doctrine of collateral estoppel, or "issue preclusion," binds the parties in later litigation with outsiders as well as with parties to the first suit.

The Idaho Supreme Court has established a five-factor test to determine whether collateral estoppel will act as a bar: 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. *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).

The doctrine of collateral estoppel does not bar Herb Whitworth from claiming a priority date of April 15, 1890. Collateral estoppel is inapplicable to this subcase. Although the *U.C. Decree* was a final judgment, and Herb Whitworth is in privity with a party to the *U.C. Decree*, several key elements of collateral estoppel fail. The *U.C. Decree* has been asserted against Mr. Whitworth, but it is clear that neither he nor his predecessor had a "full and fair opportunity to litigate" this water right in the earlier case. The issue of whether Whitworth's predecessor was entitled to this water right was never litigated in the *U.C. Decree*. Since the *U.C.* court never considered this water right at all, the "issue sought to be precluded" was **not** actually decided in the prior litigation. Collateral estoppel cannot act to bar Whitworth from claiming an 1890 priority date.

B. STIPULATED ELEMENTS

The record on file for this subcase, including the *Standard Form 5*, clearly establishes the intent of the parties that this water right be decreed with the elements other than priority date as set forth in the *Standard Form 5*, and as set forth in the Findings of Fact listed above.

C. SUMMARY

Therefore, based on the file and record herein, IT IS RECOMMENDED that water right 34-10167 be **decreed** with a priority date of **April 15, 1890** and with the additional elements as set forth in the attached *Preliminary Special Master's Recommendation for Partial Decree*.

DATED September 20, 1996.


BRIGETTE BILYEU
Special Master, Reporting Area 1
Snake River Basin Adjudication

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

SPECIAL MASTER'S RECOMMENDATION FOR FRI 4: 50

PARTIAL DECREE FOR

Water Right 34-10167

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

PRELIMINARY

NAME & ADDRESS: HERB WHITWORTH
STAR ROUTE
MACKAY ID 83251

SOURCE: THOUSAND SPRINGS CREEK TRIBUTARY: BIG LOST RIVER

QUANTITY: 6.34 CFS

THE APPROPRIATOR IS ENTITLED TO THE QUANTITY OF WATER
DESCRIBED FOR STOCK WATER PURPOSES AT A POINT OF MEASUREMENT
WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED, ~~SO~~ ^{BB}
~~LONG AS THE QUANTITY DIVERTED AT THE POINT OF DIVERSION DOES NOT~~
~~CONSTITUTE UNREASONABLE WASTE.~~

THE QUANTITY OF WATER UNDER THIS RIGHT FOR STOCKWATER USE
SHALL NOT EXCEED 13,000 GALLONS PER DAY.

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO A
TOTAL COMBINED DIVERSION RATE OF 31.44 CFS.

COMBINED RIGHT NOS.: 34-00755, 34-00757, 34-00758, 34-00766,
34-10164, 34-10167, 34-00363, 34-00364, 34-00760, 34-00764,
34-10166, 34-10165

PRIORITY DATE:

~~03/16/1993~~ 4/15/1890 BB

POINT OF DIVERSION:

T08N R22E S03 LOT 2 (SEHWNE)
T09N R22E S34 SWSEW

Within CUSTER COUNTY

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE
IRRIGATION
STOCKWATER

PERIOD OF USE
Irrigation Season
01-01 12-31

QUANTITY
6.34 CFS
0.02 CFS

PLACE OF USE:

IRRIGATION	Within CUSTER County			
T08N R22E S02 Lot 4	(MHW) 31.0	SWNW 40.0	NESW 20.0	NLSW 9.0
	SESW 3.0			
S03 Lot 1	(NEHE) 39.0	Lot 2 (NWNE) 12.0	SWNE 6.0	SENE 29.0
T09N R22E S34	SWSE 16.0	SESE 17.0		
222.0 ACRES TOTAL				

USE OF THIS RIGHT WITH RIGHTS LISTED ABOVE IN QUANTITY IS
LIMITED TO TO THE IRRIGATION OF A COMBINED TOTAL OF 786 ACRES IN
A SINGLE IRRIGATION SEASON.

Place of use for STOCKWATER is same as IRRIGATION

CONSUMPTIVE USE:

USE OF THIS RIGHT WITH RIGHTS LISTED ABOVE IN QUANTITY IS
LIMITED TO A COMBINED CONSUMPTIVE USE VOLUME OF 1965.0 AF.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT FOR
STOCKWATER USE IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL
USE.

DATED: SEP 20 1998

SPECIAL MASTER'S RECOMMENDATION

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

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

In Re SRBA

Case No. 39576

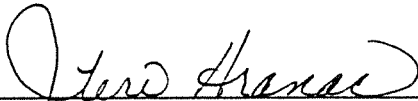
) Subcase: 34-10167

)
) NOTICE OF ISSUANCE OF
) PRELIMINARY SPECIAL
) MASTER'S REPORT AND
) RECOMMENDATION
)

On September 20, 1996, Special Master Brigitte Bilyeu issued a *Preliminary Special Master's Report and Recommendation* for subcase 34-10167 pursuant to *SRBA Administrative Order 1*, sections 11 (e) and (f).

The *Preliminary Special Master's Report and Recommendation* is served only on parties to the subcase and is not served on the Presiding Judge. Parties to this subcase may file a *Motion to Reconsider* or a *Motion to Correct Clerical Errors* with the Special Master, but must do so within 10 days after receipt of the *Preliminary Special Master's Report and Recommendation*.

DATED: September 20, 1996.


Deputy Clerk

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1996 SEP 20 PM 4:50

DISTRICT COURT-SRBA
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FILED _____

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
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In Re SRBA

Case No. 39576

) Subcase: 34-10167

)
) CERTIFICATE OF MAILING
)

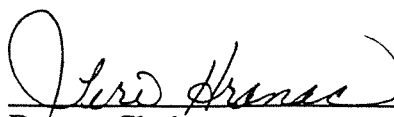
I certify that a true and correct copy of the *Preliminary Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law for Water Right 34-10167* and *Notice of Issuance of Preliminary Special Master's Report and Recommendation* were mailed on September 20, 1996 with sufficient first-class postage prepaid to the following:

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

Herb Whitworth
Star Route
Mackay, ID 83251

United States Dept. of Justice
550 West Fort Street, MSC 033
Boise, ID 83724

DATED: September 20, 1996.



Deputy Clerk