

JUL 26 2019

DEPARTMENT OF
WATER RESOURCES

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July 24, 2019

Craig Saxton
Idaho Dept. of Water Res.
PO Box 83720
Boise, ID 83720-0098

Re: Water Right No. 67-2097A

Dear Craig:

On October 20, 2008, the Snake River Basin Adjudication (SRBA) district court issued a *Partial Decree* for water right no. 67-2097A and a *Partial Decree* for water right no. 67-14251. On February 22, 2019, the Idaho Department of Water Resources (IDWR) sent a *Request for Correction of Error* to the SRBA district court regarding water right no. 67-2097A. That document asked the court to correct a clerical error in the *Partial Decree* for water right no. 67-2097A, due to the *Partial Decree* reciting "14.5 AFA" in the Purpose of Use element, as opposed to "14.5 CFS." Based on the request, the SRBA district court proposed issuing an amended partial decree as to water right no. 67-2097A. IDWR's request was opposed by Eckhardt Family LLLP, with the matter taken up by the SRBA district court on June 18, 2019, with statements made on the record by the parties and IDWR. During the hearing, the relationship between 67-2097A and 67-14251 was discussed by the deputy attorney general representing IDWR. On July 9, 2019, the SRBA district court issued an *Order on Rule 60(a) Notice of Court's Intent to Issue Amended Partial Decree*, denying to correct the October 20, 2008 *Partial Decree* for water right no. 67-2097A.

In order to preserve the record, enclosed herewith is the transcript of the June 18, 2019 hearing. Please include this transcript in the files for water right nos. 67-2097A and 67-14251.

Sincerely,


Chris M. Bromley

Encl.

Audio Transcription

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN RE: SRBA) WATER RIGHT NO: 67-2097A
CASE NO. 39576)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ERIC J. WILDMAN

Date: June 18, 2019 - 1:30 p.m.
Location: Snake River Basin Adjudication District Court
253 3rd Avenue North
Twin Falls, Idaho

TRANSCRIBED BY:

KAMRA TOALSON, CSR No. 756

Notary Public

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APPEARANCES

For Eckhardt Family, LLLP:

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All right. In this case a partial decree was issued for this water right on October 20, 2008. Then on February 25, 2019, the Department filed a request for a correction of error requesting that the Court correct an error in the purpose of use element of the partial decree. The request asserts that although the decree provides that 14.5 acre-feet of water may be annually diverted to storage, the quantity should be changed to provide that 14.5 cfs of water may be diverted to storage.

The Court issued a notice of Court's intent to issue an amended partial decree to correct the error and set the matter for a hearing and allowed for objections. Then on April 12, 2019, Eckhardt Family, LLLP filed an objection to the Department's request. The claimant thereafter filed a response in support of the Department's request.

So the Court has been through the file and is familiar with the issue.

So Ms. McHugh?

MS. MCHUGH: Thank you, Your Honor. And for the record, I'd like to also state that John and Christy Hoff (phonetic), the claimants, are also in the courtroom here today.

THE COURT: Okay.

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THE COURT: Let's go on the record in Case No. 39576 in the matter of the Snake River Basin Adjudication. Today's date is June 18, 2019. It's 1:30 p.m. Mountain time.

This is the time scheduled for the Court's regular monthly status conference in the SRBA. There's one matter before the Court at this time, and it's a notice of Court's intent to issue an amended partial decree in Sub-Case No. 67-2097A.

Start by identifying the parties. On behalf of the claimant, Double C&J Land Company, Incorporated, we have Candace McHugh in the courtroom. And then on behalf of the objector, Eckhardt Family, LLLP, Norm Semanko.

Are you with us on the phone today, Mr. Semanko?

MR. SEMANKO: Yes, good afternoon, Your Honor.

THE COURT: Good afternoon.

Okay. Those are the parties.

And then, also, who is appearing on behalf of the Department?

MS. COURTNEY: Your Honor, Andrea Courtney on behalf of the Department with Craig Saxton and Carter Bridgely (phonetic) in the office in Boise.

THE COURT: Thank you.

MS. MCHUGH: I think it's important, in this particular case, what we have here is a clerical mistake that is not under Rule 60(b) that we're asking some sort of relief from judgment. It's actually a clerical error that was made between the director's report and the Court issuing the partial decree. And I believe Mr. Saxton's notice that he filed with the Court says as much.

So in this case, the director's report went out with 14.5 cfs in the purpose of use element. And somehow between the director's report, which went out to everybody, and the claimant's looked at it and all that, and the Court's issuance of the partial decree, the cfs was somehow changed to AFY, which is simply what a clerical mistake is.

And so I think the Department's request that this just be changed when the Court or the computer that was used somehow went from the director's report to the final partial decree, that that is exactly what that process that the Department is asking the Court change the clerical mistake on.

THE COURT: And maybe why that happened is, is because we've got a glaring inconsistency or ambiguity with the quantity element. Because the quantity is -- was claimed at 6.54 cfs, and it was decreed at 6.54 cfs

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1 as claimed. So then when you get down into the purpose
2 of use where it delineates a portion of the purpose of
3 use for any portion of the quantity, then you get the
4 14.5 cfs.

5 So, I mean, you know, I don't know how the
6 error happened, if the computer corrected it, but
7 there's definitely a problem. And so for the Court to
8 come in now and amend the partial decree, that's
9 internally inconsistent.

10 I mean, what are we doing here?

11 MS. MCHUGH: Yeah. Thank you. And I think
12 that's a good observation. I think one of the key
13 pieces there is "maybe," because as the Court notes,
14 there is no record as to why it would have been changed
15 from cfs to acre-feet per year.

16 And of course the reality is, is how the
17 partial decree is interpreted is actually the purview of
18 IDWR first. So certainly my client should be given the
19 benefit of the fact that the Court, on its own, without
20 a record, makes a substantive change from the director's
21 report, where there wasn't an objection, to the partial
22 decree.

23 And so in this particular case, the Court,
24 under Rule 60(a), and the process set out by IDWR
25 changing it to what the director actually recommended,

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1 would be an appropriate remedy. Then before the
2 Department, how the Department interprets it, at least
3 my client has the benefit of what was actually
4 recommended and intended to be partially decreed without
5 the Court somehow intervening maybe without any record.

6 So at that point, if there's a dispute between
7 Mr. Eckhardt and my client, or the Department, on how it
8 should be interpreted, then the Court would have the
9 opportunity, based on an actual administrative record,
10 to make a finding of fact on whether or not the partial
11 decree was or was not properly interpreted by IDWR.

12 But at this point, to allow the Court on its
13 own, with no record, to change it from cfs -- or acre --
14 from cfs to acre-feet per year is a substantive change
15 in the water right that was unintended.

16 THE COURT: Right. And I agree. I couldn't
17 do that. And quite frankly, had I caught that before
18 the notice of intent went out, I would have just -- I
19 wouldn't have done that. I would have required a 60(b)
20 motion to do that, come in and argued 60(b) motion, set
21 aside the decree, and then, you know, whatever the
22 outcome of that may be.

23 But the problem that -- you know, the problem
24 that I have is -- well, let me start by saying that the
25 error correction process was one that was developed in

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1 the interest of catching glaring obvious clerical
2 errors. Nonetheless, even through that process, it's
3 still put on the docket sheet, and it's still sent,
4 noticed up for hearing, and that's why we're here today,
5 but -- and give the parties an opportunity to object.
6 Because even if there is a clerical error, and it's an
7 obvious clerical error, there's also the issue of
8 whether there have been parties that have relied on that
9 partial decree since it's been decreed. And this
10 thing -- you know, this one was decreed in 2008.

11 So even if it is a clerical error, you know,
12 to the extent there's reliance on it, and shown
13 reliance, you know, then that creates an issue, in and
14 of itself. And in this case, changing it from acre-feet
15 per year to cfs, you know, then that really creates an
16 issue that may have relied on the quantity that was
17 decreed.

18 MS. MCHUGH: And you make a point, Your Honor.
19 However, there are only two people that are involved in
20 this particular case, and it's Mr. Eckhardt and my
21 clients.

22 And if you will notice in the objection that
23 it's all kind of based on speculation, and that's where
24 we're at, because we actually don't know how IDWR would
25 interpret it if it had not been but for the Court's

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1 clerical error.

2 So he says it might impact the pending
3 applications before the Department. It could be a
4 problem.

5 But the fact is, is we know factually on the
6 ground between the parties that how it's actually
7 been -- how water has been stored in Jenkins Reservoir,
8 how the creek has been managed, has always been the
9 same.

10 So his objection doesn't have any factual --
11 we relied on it. At the same time, Mr. Eckhardt was a
12 party to the SRBA and didn't have any concern of the
13 director's report that went out and file an objection to
14 the cfs quantity.

15 So my client reasonably is like, I got what I
16 claimed. The cfs is there.

17 The partial decree, you know, frankly, I'm not
18 sure that there would be too many people that would look
19 that closely at the partial decree, knowing there was no
20 objections and no record created that would have changed
21 anything on the partial decree, because we went through
22 the director's report. We had that interaction. It was
23 recommended. It was noticed.

24 My clients then get the mail, the partial
25 decree, which there's no reason to believe the Court

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1 would have made a change to it, because nothing happened
2 in between.

3 So my point is, the Court should correct the
4 error that actually generated from here to allow the
5 parties -- grant it, we may very well be before you
6 fighting about what that means, whether it's
7 administrable, how the Department ends up administering
8 it between these two parties. That may very well be the
9 case, but that certainly isn't right today.

10 And by denying the opportunity to change that
11 and to make the arguments before the agency, actually
12 you decide today, without a record, the merits of my
13 clients' claim.

14 THE COURT: Okay.

15 MS. MCHUGH: So that's my support in asking
16 that you grant the Department's request. Thank you.

17 THE COURT: Mr. Semanko?

18 MR. SEMANKO: Yes, Your Honor. Thank you.

19 Just a little clarification to begin with. We
20 did file an affidavit last week, as well. Hopefully you
21 have that there in front of you.

22 THE COURT: I do have it.

23 MR. SEMANKO: That included -- thank you.

24 That included a copy of a letter from the Department of
25 Water Resources in response to an enforcement action

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1 that my client, Eckhardt Family, LLLP commenced with the
2 Department. And in that letter, on the second page, it
3 doesn't refer to the water right number, but it is
4 referring to this water right.

5 The Department specifically relies on the
6 14.5 cfs number as part of the Double C&J Ranch water
7 right, which, of course, on the face of this decree
8 that's not the case. It's not surprising then for me to
9 learn from Mr. Saxton -- since Ms. McHugh brought up his
10 name, I'll feel free to do the same -- in talking to
11 Mr. Saxton in asking him how this proposed change was
12 prompted, he said it came from the enforcement division
13 of the Department, obviously in response to our request
14 for enforcement.

15 So the Department has asked for this
16 clarification precisely for the reason of enforcing this
17 provision. So it's not theoretical. It's not some
18 potential future concern.

19 The other factual thing I'd like to point out
20 is that our client has filed numerous de minimus stock
21 water claims in this drainage, which are currently being
22 investigated by the Department to be recommended next
23 year, and that's all part of -- a good number of those
24 are part of this Jenkins Creek drainage, so another set
25 of water rights that are potentially impacted here.

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1 Your Honor, we didn't bring this objection
2 lightly. Counsel has been involved in this adjudication
3 and taken long enough to realize what a real issue is,
4 as distinguished from a not-so-real issue. And as you
5 are well aware, and counsel is well aware, the quantity
6 element of a water right is to be expressed as the rate
7 of diversion and/or a volume.

8 And here in the water right, in the quantity
9 element, you have 6.54 cfs and 345 acre-feet per year.
10 If the claimant desires to claim 14.5 cfs and/or the
11 Department wants that -- or thinks that should be
12 decreed, it is a 60(b) issue. It's not a 60(a) clerical
13 issue.

14 And I'd go so far as to say that the
15 Department should be reviewing this and identifying any
16 overlapping water rights that are impacted by this
17 particular particularity by this strange 14.5 cfs being
18 embedded down in the purpose and period of use while the
19 quantity claimed, and in the director's report, is
20 6.54 cfs, 345 acre-feet per year.

21 So we do believe this is something that goes
22 well beyond a simple 60(a) request for relief and would
23 ask that this particular clarification not be granted
24 and that the claimant be left to file whatever
25 additional request for relief that he wants to.

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1 This has been out for over ten years, and this
2 issue had just come up obviously in response to the
3 enforcement action that we commenced, and the Department
4 is seeking to correct this.

5 But I also have to say, from talking to
6 Mr. Saxton, that when I asked him about this 14.5 versus
7 6.54, he said his suggestion was that the 14.5 should go
8 up in the quantity element, which, of course, is where
9 it would belong. The problem is, that wasn't claimed,
10 and my understanding is he was told that can't happen,
11 for obvious reasons.

12 And with that, we're happy to answer any
13 questions. Thank you.

14 THE COURT: No. Does the Department wish to
15 be heard?

16 MS. COURTNEY: Your Honor, a couple of points
17 I think are necessary. But, first, I just want to
18 make --

19 THE COURT: Hold on, Ms. Courtney. You're
20 breaking up. Are you on a speaker phone?

21 MS. COURTNEY: Yeah. I'm going to pull it
22 off, because Carter and Craig won't be able to hear your
23 response. But, yes, I was hearing that, that feedback.
24 I apologize.

25 A couple of things. The claimant in the claim

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1 had the 14.5 cfs in the diversion to storage purpose of
2 use, but the overall quantity that the claimant claimed
3 was only 6.54 cfs. And the Department has seen other
4 claimants, not in just this case, but other claimants
5 where sometimes their quantities don't match up.
6 A little bit more about that in a second. But
7 that, in and of itself, the Department did notice that
8 inconsistency, but that -- it wouldn't be a reason, as
9 far as the Department was concerned, not to make the
10 change, not to make the error correction.
11 The second point concerns that very letter
12 that Mr. Semanko attached to the affidavit. That letter
13 concerned a variety of Double C&J Land Company's water
14 rights. And in the paragraph that he's pointed out to
15 you that Nick Miller from our western regional office
16 wrote, it doesn't specify which particular water right,
17 and certainly 2097A is part of Double C&J Land Company's
18 group of rights. But the paragraph starts off with
19 explaining that the Department has reviewed the water
20 right.
21 Double C&J Land Company has 67-14251, which I
22 know was not an issue here for the error correction, but
23 just to put that letter in perspective, the priority
24 date for that one is 1881. It's also on Jenkins Creek.
25 And there's a diversion to storage purpose of use, the

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1 14.5 cfs.
2 So I know that what Mr. Miller was conveying
3 was not the matter here, but I think the suggestion that
4 the Department is already interpreting the partial
5 decree for 2097A in a particular light needs to be
6 corrected. 14251 already allowed Double C&J Land the
7 14.5 cfs diversion to storage on the same source with
8 the same POD's, the same place of use.
9 So the letter that's submitted really doesn't
10 show IDWR's interpretation of 2097A. It reflects the
11 entire body of water rights for Double C&J Land Company.
12 THE COURT: All right. Thank you.
13 Any response to that?
14 Or let me -- Mr. Semanko, does that raise
15 anything with you before I let Ms. McHugh have the last
16 word?
17 MR. SEMANKO: No, Your Honor. I think I
18 acknowledged that that water right number wasn't
19 specifically mentioned in the letter. But obviously the
20 14.5 cfs diversion rate does stand out, and it does
21 still beg the question of why did the Department, the
22 enforcement division, in particular, request the 2097A
23 be, quote, unquote, corrected at this time.
24 The timing is not coincidental in our mind.
25 But, otherwise, Ms. Courtney's point is well taken.

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1 Thank you.
2 THE COURT: Thanks.
3 Ms. McHugh?
4 MS. MCHUGH: Not to belabor the issue, but
5 thank you, Your Honor, on behalf of Double C&J, with
6 Ms. Courtney's comments, just a couple of things.
7 First of all, the affidavit that Norm --
8 Mr. Semanko filed was at the end of last week. I was
9 not in the office, and it wasn't e-mailed to me. It was
10 e-mailed to my partner who happens to be out of the
11 country. So I did just now review it in full. So I
12 apologize for not having reviewed that earlier.
13 But looking at that and then also at
14 Mr. Semanko's point that people had relied on it, and
15 the Court's point on that, because there is this
16 companion water right, to give you a full picture,
17 that's why it's important for this particular water
18 right to just have the error corrected, because then the
19 issue of how it's going to be interpreted by the agency
20 is in the proper place, and then the parties can
21 actually create a record before the agency on what
22 may -- what enforcement action may or may not be
23 appropriate and how they -- the water rights should and
24 should not be administered.
25 So simply having the Court change it to what

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1 the director actually recommended in this case doesn't
2 prejudice either party, because then we have an
3 opportunity to still go before the agency, in the
4 actions that are pending before the agency, and get the
5 agency's actual words. And at that point, if there's
6 something the Court needs to review relative to that,
7 that's the appropriate time and place.
8 So, again, I ask that the Court correct the
9 error. Thank you.
10 THE COURT: Okay. Well, I will take it under
11 advisement and consider it fully submitted for a
12 decision and issue a written opinion.
13 All right. Anything else in this matter?
14 MS. MCHUGH: Nothing further.
15 THE COURT: Okay. Then we'll be adjourned
16 until 2:30.
17 MR. SEMANKO: Thank you, Your Honor.
18 MS. COURTNEY: Thank you.
19 (End of audio.)
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REPORTER'S CERTIFICATE

I, KAMRA TOALSON, CSR No. 756, Certified
Shorthand Reporter, certify:

That the audio recording of the proceedings were
transcribed by me or under my direction.

That the foregoing is a true and correct
transcription of all testimony given, to the best of my
ability.

I further certify that I am not a relative or
employee of any attorney or party, nor am I financially
interested in the action.

In witness whereof, I set my hand and seal this
23rd day of July, 2019.



KAMRA TOALSON, CSR NO. 756

Notary Public

Post Office Box 2636

Boise, Idaho 83701-2636

My commission expires May 23, 2024

A	3:8;4:12 and/or (2) 12:7,10 Andrea (1) 3:22 annually (1) 4:7 apologize (2) 13:24;16:12 appearing (1) 3:20 applications (1) 9:3 appropriate (3) 7:1;16:23;17:7 April (1) 4:14 argued (1) 7:20 arguments (1) 10:11 aside (1) 7:21 asserts (1) 4:6 attached (1) 14:12 audio (1) 17:19 aware (2) 12:5,5	12:1 brought (1) 11:9	10:13 closely (1) 9:19 coincidental (1) 15:24 commenced (2) 11:1;13:3 comments (1) 16:6 companion (1) 16:16 Company (3) 3:11;14:21;15:11 Company's (2) 14:13,17 computer (2) 5:17;6:6 concern (2) 9:12;11:18 concerned (2) 14:9,13 concerns (1) 14:11 conference (1) 3:6 consider (1) 17:11 conveying (1) 15:2 copy (1) 10:24 corrected (4) 6:6;15:6,23;16:18 correction (4) 4:4;7:25;14:10,22 Counsel (2) 12:2,5 country (1) 16:11 couple (3) 13:16,25;16:6 course (3) 6:16;11:7;13:8 COURT (35) 3:1,7,18,25;4:4,11,18,25;5:6, 7,17,20,22;6:7,13,19,23;7:5,8, 12,16;9:25;10:3,14,17,22; 13:14,19;15:12;16:2,25;17:6,8, 10,15 Courtney (6) 3:22,22;13:16,19,21;17:18 Courtney's (2) 15:25;16:6 courtroom (2) 3:12;4:24 Court's (6) 3:5,8;4:11;5:13;8:25;16:15 Craig (2) 3:23;13:22 create (1) 16:21 created (1) 9:20
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