

RECEIVED

JAN 14 2009

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JAN 12 2009
By _____ Clerk Deputy Clerk

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

) Subcases 74-250, 74-735, 74-739, 74-741,
) (74-741A & 74-741B) and 74-7147
) (Herbst)
)
) ORDER OF PARTIAL DECREES FOR
) WATER RIGHTS 74-250, 74-735, 74-739,
) 74-741 AND 74-7147;
) ORDER DISALLOWING WATER
) RIGHTS 74-741A & 74-741B
)

I.
PROCEDURAL BACKGROUND

On April 30, 1990, Lynn A., John F., and Emma Herbst filed a *Notice of Claim to a Water Right* in the Snake River Basin Adjudication for water right claim number 74-741.¹ The Herbsts claimed a water right for irrigation of 143 acres with 4.30 cfs and for stockwater with 0.06 cfs from the Lemhi River based on a prior decree with a priority date of January 8, 1908. The prior decree was issued to John F. and/or Emma Herbst in the Lemhi Adjudication for the irrigation of 143.1 acres with 4.30 cfs and a priority date of January 8, 1908.

The Idaho Department of Water Resources ("IDWR") filed its *Director's Report for Irrigation and Other Uses, Reporting Area 23, IDWR Basin 74, Part I*, on January 23, 2006, recommending claim 74-741 to Lynn and Robin Herbst for 4.30 cfs from the Lemhi River for year-'round stockwater use and to irrigate 143.1 acres in Lemhi County from March 15 to November 15 with a priority date of January 8, 1908. The Herbsts

¹ Subcases 74-250, 74-735, 74-739, and 74-7147 are uncontested overlapping claims and are not at issue.

filed an *Objection* in subcase 74-741 on June 6, 2006, objecting to the priority date, alleging it should be May 26, 1873.

On August 22, 2007, the Herbsts were granted leave to file a *Motion to File Amended Notice of Claim* claiming the 1873 priority date.² Thereafter, IDWR filed an *Amended Director's Report, Subcase No. 74-741* on October 12, 2007, recommending no change from the original *Director's Report* because water right claim number 74-741 was previously decreed in the Lemhi Adjudication with a priority date of January 8, 1908. IDWR cited Idaho Code § 42-1420, stating that the legal doctrine of *res judicata* bars reconsideration of the nature and extent of all water rights previously adjudicated. The Herbsts filed a second *Objection* on November 27, 2007, again objecting to the priority date in the *Amended Director's Report*.

Special Master Dolan requested an I.R.E. 706 report from IDWR, detailing the underlying facts and data upon which it made its recommendation, plus an "alternative recommendation." IDWR filed its *Supplemental Director's Report Regarding Subcase No. 74-741* on July 14, 2008. It found that water right 74-741 was decreed in the Lemhi Adjudication to irrigate 143.1 acres with a priority date of January 8, 1908 – the same date claimed by John and Emma Herbst in the SRBA. IDWR again cited the doctrine of *res judicata*, but at trial, issued an attachment to its *Supplemental Director's Report*, recommending the right be split, in the event this Court holds that *res judicata* does not apply.

After a trial, the Special Master issued his *Special Master's Report and Recommendation* recommending partial decrees for uncontested overlapping claims 74-250, 74-735, 74-739, and 74-7147. In addition, the Special Master recommended that 74-741 be split and decreed as 74-741A and 74-741B, and that 74-741 not be decreed as a water right.

² *AOI* prohibits a claimant from amending a claim through an objection. *Administrative Order 1*, Section 4(d)(1)(b).

II. EFFECT OF PRIOR DECREE IN THE SRBA

The Idaho Supreme Court has held that a prior decree entered in a private adjudication is binding upon the parties (and their privies) to that decree. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). In its decision, the Court cites I.C. § 42-1401A, which defines a private adjudication as binding “those persons joined in the action and for the administration of such rights.” I.C. § 42-1401A (9). Further, with limited exception, I.C. § 42-1420 states that a “decree in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system.” I.C. § 42-1420 (1). Therefore, in the SRBA, water rights decreed in a prior adjudication are binding upon the parties (and their successors-in-interest) to that decree. Such parties bound by that earlier decree may not collaterally attack it in a later adjudication, such as the SRBA. The SRBA cannot serve as a second opportunity for parties and their successors-in-interest to re-adjudicate their prior decreed water rights. Subject to certain exceptions, this Court has consistently prohibited parties from reopening prior decrees in the SRBA.

III. THE LEMHI ADJUDICATION

The Lemhi Adjudication was commenced as a general adjudication on August 13, 1970. Thereafter, following an investigation of water uses by the Director, a list of water users was compiled and those water users were then joined as parties and required to file claims. Proposed findings of fact and conclusions of law were lodged with the court on July 9, 1974. On January 4, 1983, a *Partial Decree* was entered. The *Partial Decree* applied to all of the claims in the Lemhi Basin except as expressly excluded. The *Partial Decree* provided:

IT IS HEREBY ORDERED ADJUDGED AND DECREED that the water rights of the Lemhi River Basin with the exceptions noted above are as described in the PROPOSED FINDINGS OF WATER RIGHTS IN THE LEMHI RIVER BASIN, as amended by:

1. Special Master's Report on Specific Objections;
2. Stipulation Resolving General Objections;
3. Order Correcting Clerical Oversights in Proposed Findings of Water Rights;
- and
4. Licenses issued on or before the dates of this partial decree for permits listed in the PROPOSED FINDINGS;

all of which are incorporated herein by reference.

The *Partial Decree* expressly excluded any of the rights on Geertsen Creek and its tributaries which were subject to a separate partial decree. The *Partial Decree* also excluded the United States Forest Service claims which were at issue in *U.S. v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012 (1978).

On July 29, 1985, a *Notice of Entry of Judgment* was entered, providing that final judgment for the water rights covered by the *Partial Decree* was entered January 4, 1983. Accordingly, all water users within the Lemhi River Basin who were joined as parties, subject to the express exclusions as provided in the *Partial Decree*, who either filed claims or failed to file claims were bound by that *Partial Decree* and subsequent final judgment.

On October 14, 1992, a minute entry order was filed which provided:

- 1) The December 30, 1982 [January 4, 1983] partial decree shall be considered to be a final decree in this matter.
- 2) The United States shall be dismissed without prejudice certainly to bring their claims as reserved under the partial decree.
- 3) It was ordered in the alternative, that this matter be consolidated with the Snake River Basin Adjudication with the jurisdiction, in Twin Falls, so the procedures can be followed that have been established by the sitting Judge there, Daniel C. Hurlbutt.
- 4) The Lemhi County court, within the Seventh Judicial District, does not have the facilities to process the claims that the forest service has filed. Prior to this, they were all done by the Department of

Water Resources and not by the Clerk of the Court. It is the understanding of this court, the claims to be processed, whether it be refiling of the forest service claims or any new claims, shall be filed in Twin Falls.

- 5) The issue of whether or not the order of this court is res judicata, that decision is properly addressed in the Snake River Basin Adjudication.

Although the October 14, 1992 order provided that the December 30, 1982 order and *Partial Decree* be considered a final decree in the Lemhi Adjudication, the *Partial Decree* and *Notice of Entry of Judgment* was a final judgment as to those parties whose claims were subject to the *Partial Decree*. Accordingly, under principles of *res judicata*, law-of-the-case, and the holding in *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409, (1997), any water user or successor-in-interest whose claim was decreed or who failed to file a claim is bound by the *Partial Decree*.

Claims in the SRBA can vary from the elements in the prior decree to account for subsequent changes in circumstances such as abandonment, forfeiture, and accomplished transfer, or to correct errors.³ However, evidence of an earlier use or larger quantity than previously decreed does not fit within either of the above exceptions and constitutes a collateral attack on the prior decree.

The Court makes two observations in this respect. First, the fact that the present owner of a previously decreed water right may now have evidence of an earlier use or larger quantity than was previously decreed does not mean that an error or oversight occurred when the predecessor-in-interest filed (or failed to file) the claim in the prior adjudication. There are other plausible explanations. For instance, claims can be made in a manner so as to avoid contests. Existing differences between users over water rights can be worked out prior to the claims being filed so as to avoid litigation in the adjudication process. Settlements such as these may dictate what each user eventually claims in the adjudication. Therefore, parties or their successors-in-interest to the prior decree are entitled to rely upon the prior decree, at least to the extent that the scope of the right will not be expanded beyond what was previously adjudicated.

³ For example, corrections to legal descriptions and the like which do not result in expanding the previously decreed right.

Next, allowing a claimant to reopen a prior decree to present evidence of earlier use or larger quantity than was previously decreed completely undermines the principles of *res judicata* and the Supreme Court's ruling in *State v. Hagerman Water Right Owners*, as well as law-of-the-case in the SRBA. This is not the only case before the Court involving a collateral attack on the Lemhi Decree. Based on the facts and circumstances of this case, an exception in this case would render the effect of the prior decree meaningless and would require that the Court allow the same exception in all cases. This would be contrary to the Court's past rulings involving other prior decrees.

IV. DISCUSSION AND ORDER

In this case, the claimants are seeking an earlier priority date than was previously decreed in the Lemhi Adjudication. The Court finds this to be a direct collateral attack on the prior decree. The *Special Master's Report and Recommendation* correctly noted the application of *res judicata*, but ultimately left the determination with this Court as to whether the relief sought was appropriate. While this Court acknowledges the seeming unfairness of binding the claimant to the prior decree, if the Court permitted the decree to be collaterally attacked in this case, it would have to make the same exception in all cases where evidence of earlier use or greater quantity was discovered. In the course of the SRBA proceedings, this Court has already denied parties the ability to collaterally attack prior decrees. An exception in this case would be contrary to this Court's ruling in other similarly situated cases.

Therefore for the reasons set forth above, IT IS ORDERED that water rights 74-250, 74-735, 74-739, and 74-7147 are hereby decreed as set forth in the attached *Partial Decrees Pursuant to I.R.C.P. 54(b)*.

Further, IT IS ORDERED AND ADJUDGED that water right claim number 74-741 is hereby decreed as originally recommended.

Further, IT IS ORDERED AND ADJUDGED that alternative water right claims 74-741A and 74-741B are disallowed with prejudice and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated Jan. 9, 2009



JOHN M. MELANSON
Presiding Judge
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)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 74-00250

NAME AND ADDRESS: ROBIN R HERBST
PO BOX 21
TENDON, ID 83467

LYNN A HERBST
PO BOX 21
TENDON, ID 83468

SOURCE: AGENCY CREEK TRIBUTARY: LEMHI RIVER

QUANTITY: 0.30 CFS

PRIORITY DATE: 10/01/1909

POINT OF DIVERSION: T19N R24E S20 SWNESW Within Lemhi County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	0.30 CFS

PLACE OF USE:	Irrigation	Within Lemhi County
	T19N R24E S20	NESW 10.0
	15.5 Acres Total	SESW 5.5

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

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

PAGE 1
Jan-12-2009

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)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 74-00739

NAME AND ADDRESS: ROBIN R HERBST
PO BOX 21
TENDON, ID 83467

LYNN A HERBST
PO BOX 21
TENDON, ID 83468

SOURCE: LEMHI RIVER TRIBUTARY: SALMON RIVER

QUANTITY: 1.33 CFS

PRIORITY DATE: 04/01/1873

POINT OF DIVERSION: T19N R24E S32 SWSE Within Lemhi County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	1.33 CFS

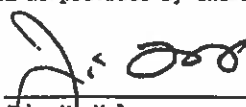
PLACE OF USE: Irrigation Within Lemhi County
T19N R24E S20 NESW 15.8 SESE 5.5
S29 NENE 23.0
44.3 Acres Total

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

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


John M. Melanson
Presiding Judge of the
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)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 74-00741

NAME AND ADDRESS: ROBIN R HERBST
PO BOX 21
TENDON, ID 83467

LYNN A HERBST
PO BOX 21
TENDON, ID 83468

SOURCE: LEMHI RIVER TRIBUTARY: SALMON RIVER

QUANTITY: 4.30 CFS

PRIORITY DATE: 01/08/1908

POINT OF DIVERSION: T19N R24E S29 SENW Within Lemhi County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	4.30 CFS
	Stockwater	01-01 TO 12-31	0.06 CFS

PLACE OF USE:	Irrigation	Within Lemhi County
	T19N R24E S17	NESW 22.0
		SBSW 32.0
		NWSE 5.0
	S20	SWSE 3.0
		NENW 34.0
		NWNW 11.0
		SWNW 4.0
		SENW 26.0
		NESW 6.0
	143.0 Acres Total	

Stockwater Within Lemhi County
Same as Irrigation

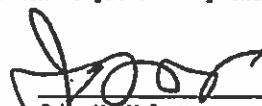
This right authorizes the irrigation of 143.1 total acres.

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

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


John M. Melanson
Residing Judge of the
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)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 74-07147

NAME AND ADDRESS: ROBIN R HERBST
PO BOX 21
TENDON, ID 83467

LYNN A HERBST
PO BOX 21
TENDON, ID 83468

SOURCE: LEMHI RIVER TRIBUTARY: SALMON RIVER

QUANTITY: 0.88 CFS

This right when combined with all other rights shall provide no
more than .02 cfs per acre nor more than 3.0 afa per acre for
irrigation of the lands above.

PRIORITY DATE: 11/16/1981

POINT OF DIVERSION: T19N R24E S20 NESW Within Lemhi County
S29 NWSW
SENW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 11-01	0.88 CFS 132.00 AFY

PLACE OF USE:	Irrigation	Within Lemhi County
	T19N R24E S17 SWSW 3.1	SESW 8.1
	S20 NWNW 19.0	SWNW 13.0
	NWSW 0.9	
	44.1 Acres Total	

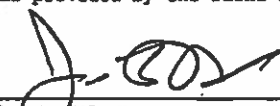
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

Use of water under this water right will be regulated by the
watermaster of State Water District No. 74.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance
with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

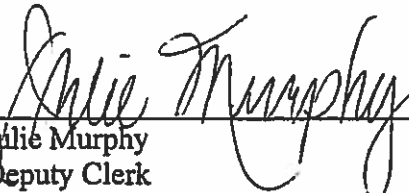

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I hereby certify that true and correct copies of the **ORDER OF PARTIAL DECREES FOR WATER RIGHTS 74-00250, 74-00735, 74-00739, 74-00741 AND 74-07147; ORDER DISALLOWING WATER RIGHTS 74-00741A AND 74-00741B**, were mailed on January 12, 2008, by first-class mail to the following:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Lynn A. Herbst
Robin R. Herbst
Represented by:
Paul L. Arrington
113 Main Ave W, Ste 303
Twin Falls, ID 83304-0485


Julie Murphy
Deputy Clerk