

**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)	Basin-Wide Issue 16
)	Subcase No: 00-92099
Case No. 39576)	(In Re: Form and Content of Final Unified
)	Decree)
)	
)	
)	MEMORANDUM DECISION AND ORDER
)	ON CHALLENGE IN THE MATTER OF
)	THE FINAL UNIFIED DECREE
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Appearances:

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Candice M. McHugh of Racine Olson Nye Budge & Bailey, Chartered, Boise, Idaho, attorneys for Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

Mitra M. Pemberton of White & Jankowski, LLP, Denver, Colorado, attorneys for the City of Pocatello.

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Vanessa Willard and David L. Negri, U.S. Department of Justice, Environment and Natural Resources Division, Denver, Colorado, attorneys for the United States.

Jane M. Newby of Beeman & Associates, PC., Boise, Idaho, attorneys for Water Mitigation Coalition.

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Chris M. Bromley and Garrick L. Baxter, Deputy Attorneys General of the State of Idaho, Idaho Department of Water Resources, Boise, Idaho, attorneys for the Idaho Department of Water Resources.

I.

PROCEDURAL BACKGROUND

1. On July 12, 2011, the Court entered an *Order* in the above-captioned matter designating the following issue as “Basin-Wide Issue 16”: “The issue pertaining to the form and content of the final unified decree to be entered upon completion of the SRBA.”

2. On July 15, 2011, the Court entered an *Order* establishing a Steering Committee to address the form and content of the final unified decree.¹ Among other things, the Steering Committee was charged with identifying issues pertaining to the form and content of the final unified decree, recommending a logical order and time frame in which to address those issues, and submitting a written report to the Court setting forth the Committee’s recommendations.

3. On November 30, 2011, the Steering Committee submitted its *Report of Steering Committee Re: Proposed Final Unified Decree*. Attached to the *Report* was a copy of the Steering Committee’s *Proposed Final Unified Decree*. Various issues pertaining to the form and content of the final unified decree were identified by the Steering Committee by way of written comments contained in the body of the *Proposed Final Unified Decree*. The issues identified were those issues the members of the Steering Committee were unable to resolve via a consensus resolution.

4. Additionally, the Steering Committee submitted its *Report of Steering Committee Re: Proposed Process for Final Unified Decree*. Among other things, the Committee proposed that the Court review the *Proposed Final Unified Decree*, make any suggested changes, and serve a copy of the *Proposed Decree* on the parties. The Steering Committee further recommended that the parties would then have the opportunity to challenge the *Proposed Final Unified Decree* – specifically issues pertaining to the form and content of the *Decree* – before this Court pursuant to the procedures and deadlines set forth by the Committee.

5. On January 30, 2012, the Court issued an ***Order Re: Proposed Final Unified Decree and Adopting Proposed Procedures and Deadlines*** adopting the *Proposed Final Unified*

¹ By *Order* of the Court dated May 18, 2011, those parties to the SRBA that wished to participate in Basin-Wide Issue 16 were required to file a *Notice of Intent to Participate* in the above-captioned subcase. Those parties that wished to volunteer to be part of a Steering Committee regarding the form and content of the final unified decree were required further to so indicate in their *Notice of Intent to Participate*. All parties that indicated a willingness to be a part of the Steering Committee were appointed as members of the Steering Committee via this Court’s July 15, 2011 *Order Establishing Steering Committee*.

Decree subject to certain modifications set forth in the *Revised Proposed Final Unified Decree* attached as an exhibit to the **Order**.

6. Timely *Notices of Challenge* to the *Revised Proposed Final Unified Decree* were filed by Sinclair Oil Corporation, et al.², A & B Irrigation District, et al.³, the State of Idaho, City of Pocatello, and the Ground Water Districts.⁴ Rangen, Inc., Fremont-Madison Irrigation District, et al.⁵, Nampa & Meridian Irrigation District, and the Municipal Providers⁶ participated in the Challenge through the filing of rebuttal briefing.

7. Oral argument on the *Notices of Challenge* was heard May 14, 2012.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on Challenge was heard before this Court on May 14, 2012. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or May 15, 2012.

III.

ISSUES RAISED ON CHALLENGE

The following issues were raised on Challenge:

Issue 1. Whether the term “persons” rather than the term “parties” should be used in reference to those who are bound by the Final Unified Decree?

² “Sinclair Oil Corporation, et al.,” refers collectively to Sinclair Oil Corporation d/b/a Sun Valley Company, Pioneer Irrigation District, Emmett Irrigation District, Seward Prosser Mellon and Thousand Springs Ranch, Thompson Creek Mining Company, Snake River Dairies, LLC, Wallach IX, LLC, Seneca Foods Corporation, Diller Miller Land Company, LLC and Miller Land Company, Inc., Newfoundland Partners, and Tree Top Ranches, L.P.

³ “A&B Irrigation District, et al.,” refers collectively to A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, and Clear Springs Foods, Inc.

⁴ “Ground Water Districts” refers collectively to Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Jefferson-Clark Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District.

⁵ “Fremont-Madison Irrigation District, et al.,” refers collectively to Fremont-Madison Irrigation District, Egin Bench Canals, Inc., Idaho Irrigation District, New Sweden Irrigation District, North Fremont Canal System, Peoples Canal & Irrigation, The United Canal Company and Snake River Valley Irrigation District.

⁶ “Municipal Providers” refers collectively to the City of Nampa, City of Meridian, and United Water Idaho.

Issue 2. Whether duplicates of partial decrees entered pursuant to federal reserved water right settlements should be included in Attachment 2 to the Final Unified Decree with a remark cross-referencing the applicable settlement documents included in Attachment 4?

Issue 3. Whether the Court should issue a new order clarifying the definitions of *de minimis* “domestic” and “stock water” claims and the procedures for adjudicating deferred claims?

Issue 4. Whether the Final Unified Decree should include language clarifying that the results of water right transfers initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree are not superseded by the Final Unified Decree?

Issue 5. Whether the Final Unified Decree should include a finding that “Each partial decree was the result of a specific factual investigation related to the underlying water right,” and that “Because the evidence adduced for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding?”

Issue 6. Whether the Final Unified Decree should include a finding that the elements of each water right reflect the extent of beneficial use as of November 19, 1987?

Issue 7. Whether the Final Unified Decree should state that the quantity element of each water right defines the maximum amount of water that may be diverted?

Issue 8. Whether the tolling of the forfeiture period during the SRBA precludes the Director from considering beneficial use in water distribution proceedings?

IV.

APPLICABLE LAW

Idaho Code § 42-1412(8) provides that “[u]pon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and general

provisions into a final decree.” Idaho Code § 42-1420 provides, subject to certain enumerated exceptions, that “[t]he decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated system”

V.

DISCUSSION

A. Discussion and Rulings on Unopposed Issues.

Issues 1 through 4 as identified above were unopposed on Challenge. For each of the unopposed issues the Court set forth on the record at oral argument that it concurred with the reasoning in support of the Challenge and would adopt the proposal advanced by the party who raised the issue. The Court will therefore proceed as follows with respect to each of the unopposed issues.

1. Issue 1: The Binding Scope of the Final Unified Decree.

In regards to Issue 1, the Court will substitute the term “person” for the term “parties” in reference to those who are bound by the Final Unified Decree.

2. Issue 2: Partial Decrees Subject to Federal Settlements.

In regards to Issue 2, consistent with the State of Idaho’s proposal, the Court will include duplicates of partial decrees entered pursuant to federal reserved water right settlements in Attachment 2 to the Final Unified Decree. Each of the duplicate decrees will be marked as a duplicate and will include a remark cross-referencing the applicable settlement documents included in Attachment 4 to the Final Unified Decree.

3. Issue 3: Issuance of a Superseding Order Clarifying Definitions and Procedures for Deferrable Domestic and Stock Water Claims.

In regards to Issue 3, the Court will issue an order clarifying the definitions of *de minimis* domestic and stock water rights as well as the procedures for adjudicating deferred claims in accordance with the State of Idaho’s proposed *Order Governing Procedures in the SRBA for Adjudication of Deferred De minimis Domestic and Stock Water Claims*. The Final Unified Decree will cite to such order.

4. Issue 4: Clarification Regarding Administrative “Changes” following Issuance of a Partial Decree.

In regards to Issue 4, the Court informed the parties that it would draft proposed language to be included in the Final Unified Decree clarifying that the Final Unified Decree does not supersede the results of water right transfers initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree. The Court proposes the following paragraph to be inserted in the Order of the Final Unified Decree as Paragraph 13 and that subsequent paragraphs be renumbered in sequence accordingly.

13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) Any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree, or; 2) Elements of a water right defined by a license, where in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

Parties will have the opportunity to review and comment on the above-proposed paragraph.

B. Discussion and Rulings on Contested Issues 5, 6, 7 and 8.

Issues 5, 6, 7, and 8 involve provisions sought by both the City of Pocatello and the Ground Water Districts to be included in the Final Unified Decree. The City of Pocatello supports the inclusion of the following provisions in the Final Unified Decree:

Each partial decree was the result of a specific factual investigation related to the underlying water right.

Because the evidence considered for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding.⁷

⁷ The *Proposed Final Unified Decree* filed by the Steering Committee included paragraph 11 in the Findings of Fact which provides “Each partial decree was the result of a specific factual investigation related to the underlying water right.” Paragraph 16 of the Order, which relates to paragraph 11, provides “Because the evidence considered for

The Court has identified these proposed provisions as Issue 5. The Ground Water Districts proposed the following alternative provisions:

The water rights elements contained in the Final Unified Decree are based on the extent of beneficial use as of the commencement of the Snake River Basin Adjudication (SRBA) on November 19, 1987.

The “diversion rate” element of each water right is the maximum permissible rate of diversion under the water right, and not a judicial determination that the maximum rate is needed at all times during the “period of use” to accomplish the designated “purpose of use.”

The tolling of the forfeiture statute during the SRBA does not preclude the Director from considering post-November 19, 1987, evidence of beneficial use in water right administrative proceedings.

The Court has identified these three proposed provisions as Issues 6, 7, and 8 respectively.

The intended purpose of the provisions proposed by both the City of Pocatello and the Ground Water Districts is to attempt to define the scope of the preclusive effect of the partial decrees included in the Final Unified Decree so as to avoid issues in future administrative proceedings regarding the admissibility pre-partial decree evidence to show historical beneficial use. The arguments in support of the provisions are twofold. First, that the water right recommendations made by the Department were primarily based on the conditions surrounding the use of water rights as of the date of commencement of the SRBA on November 19, 1987, and did not consider the conditions existing at the time the Department investigated the right. In many cases the investigation was not conducted until many years after the commencement date. Second, in 1999, the SRBA Court adopted the “tolling rule” which tolled the running of the statutory forfeiture period upon the filing of the claim until the partial decree was issued. Following the issuance of the partial decree, the five year period would begin to run again. *See Order On Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence Issue”* Subcase No. 36-02708 *et. al.* (Dec. 29, 1999). As a result, unless the statutory

each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding.” This Court previously rejected the inclusion of both provisions in the Final Unified Decree.

five year period had completely run prior to filing of the claim, parties were precluded from asserting forfeiture.

The proposed provisions attempt to prevent foreclosing the use of pre-partial decree evidence concerning the use of a water right in a post-partial decree proceeding. The concern alleged is that in any subsequent judicial or administrative proceeding, principles of *res judicata* would preclude the ability of a litigant to introduce evidence pertaining to the use of a water right during the period between the commencement date and the issuance of the partial decree. Other parties to the proceeding who agreed in principle with the intended purpose of the provisions proposed alternative language in the rebuttal briefing.

For the reasons set forth below the Court rejects the inclusion of the proposed provisions. As a general matter, the Court declines to include provisions in the Final Unified Decree for the purpose of advising or influencing tribunals in future proceedings as to the legal effect of a partial decree issued in the SRBA. The issue of what pre-decree evidence may be discoverable, relevant and/or admissible in a given future post-decree proceeding is simply an issue not properly before this Court at this time and will not be considered. Furthermore, as explained below, the adopting of “blanket” provisions such as those proposed in an attempt to address hypothetical post-decree situations not presently before the Court would result in significant unintended consequences.

1. Issue 5.

The City of Pocatello argues for the inclusion of the following provisions:

Each partial decree was the result of a specific factual investigation related to the underlying water right.

Because the evidence considered for each partial decree varied, the Final Unified Decree does not address what evidence is admissible in any subsequent proceeding.

The City of Pocatello argues the provisions are “necessary to guide future courts in disputes over the controlling effect of partial decrees to make clear that despite the fact that all partial decrees are included in the Final Unified Decree, each partial decree was litigated separately, and the litigation considered separate facts and may have been limited in its scope of inquiry by operation of law.” The City of Pocatello asserts further the proposed provisions are

necessary to establish that litigants are bound only as to those specific issues that were actually litigated in the SRBA.

This Court rejects the proposed provisions for several reasons. First, including the proposed provisions in the Final Unified Decree is inconsistent with the operation of Idaho Code § 42-1420, which provides that subject to certain exceptions “The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system” The proposed provisions would therefore have the unintended consequence of calling into question the conclusive effect of every uncontested right, as well as every uncontested element for those rights that were contested. In the SRBA, the majority of the water rights claimed and recommended were not contested. For those water rights that were contested, not every element of the right was necessarily contested. The proposed language would therefore not only undermine Idaho Code § 42-1420 but would also undermine the very purpose of the SRBA by calling into question the binding effect of the partial decree as to all such uncontested rights and/or elements.

Second, the proposed language misstates the significance of decreeing uncontested rights in the SRBA. Issuing partial decrees for uncontested rights in the SRBA is not identical to the issuance of a default judgment in a non-SRBA case. The significance of decreeing uncontested rights was previously explained in *Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman (A.L. Cattle)*, Subcase No. 65-07267 *et. al.*, (Jan. 31, 2001). In that case, A.L. Cattle sought to set aside numerous state-law based partial decrees entered uncontested in favor the United States. In seeking to set aside the partial decrees, one of the arguments presented was the over-riding preference for having a case decided on its merits as opposed to the entry of default. The SRBA Court rejected this argument reasoning that in the SRBA even though a claim is uncontested the claim is nonetheless “decided on its merits.” The Court reasoned:

The SRBA presents its own unique set of circumstances. In a non-SRBA case, the entry of a default or default judgment typically occurs when a party fails to take some required action. Although *AOI [SRBA Administrative Order I]* incorporates the standards for setting aside a default and default judgment and applies these standards by analogy, water right claims that proceed uncontested through the SRBA are not entirely analogous to a default situation. First, uncontested claims are prosecuted by claimants who are usually active in their subcase but face no objectors. Second, although uncontested, the claims are still in fact “decided on the merits.” Idaho’s statutory scheme for the SRBA, together

with *AOI* procedure, set forth a comprehensive process for adjudicating both uncontested and contested state based claims. This process affords additional procedures and safeguards not otherwise present in non-SRBA cases.

To illustrate, a claim of a water right is filed in accordance with Idaho Code § 42-1409. IDWR then investigates the nature and extent of the claim. I.C. § 42-1410. The director then prepares and files a director's report for the claim. I.C. § 42-1411. The director's report constitutes prima facie evidence of the nature and extent of the water right. I.C. § 42-1411(4) [internal footnote omitted]. Either the claimant or any other party to the SRBA can file objections and/or responses to objections to the director's report. I.C. § 42-1412.

...
Director's reports that are uncontested are typically decreed as reported. I.C. § 42-1411(4). Although this is what normally occurs, the SRBA Court retains discretion to apply law to the facts and render its own conclusion regarding uncontested water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995). The district court can also delay entry of a partial decree for the uncontested portions of the director's report if the court determines that an unobjected claim may be affected by the outcome of a pending contested matter. I.C. § 42-1412(7). Ultimately the claim is subject to a final review by the court prior to the entry of a partial decree.

...
In sum, in the SRBA "deciding a case on the merits" must be placed in proper context.

Id. at 8–9.

Accordingly, the language proposed by the City of Pocatello ignores the significance of SRBA procedure for processing uncontested rights and would have the unintended consequence of putting every uncontested right or element at issue in the future. The SRBA would have accomplished nothing as concerns those rights. Next, even if the Department's examination may have relied on conditions as they existed as of the commencement of the SRBA, with the exception of the tolling rule, nothing precluded parties from contesting the Department's recommendation based on post-commencement date conditions surrounding a particular water right.

Further, the tolling rule only stopped the running of the forfeiture statute from the time the claim was filed until the partial decree was entered. After entry of the partial decree, the tolling of the forfeiture rule is lifted and the right could be subject to forfeiture in whole or part in a subsequent proceeding. Consequently, despite the issuance of a partial decree, the right is not immune from being reevaluated for forfeiture in a future proceeding. The SRBA Court

explained this in *Memorandum Decision and Order on Challenge; and Order of Partial Decree (Wood v. Troutt)*, Subcase No. 65-5663B (May 9, 2002), wherein the Court stated:

Because of the magnitude of the case and the way the SRBA is procedurally structured a “point in time” approach must be taken with respect to investigating, reporting and adjudicating the rights. For example, absent subsequent administrative changes, IDWR reports the status of a water right as of the date of inception of the SRBA.

This does not mean the decreed right is insulated from forfeiture. Once the partial decree is issued for the water right, the non-user has five years within which to put the water to beneficial use before the decreed right is subject to forfeiture. In Idaho a decreed right is not insulated from forfeiture, however, it has long been established that once the decree is issued the statutory time period for non-use begins to run anew. Thus after the partial decree is issued five years of non-use must accrue before the water right is again subject to forfeiture. In *Graham v. Leek*, 65 Idaho 279, 283, 144 P.2d 475, 479, the Idaho Supreme Court made this point clear in holding: [A] decreed right is not immune from a showing that it has been abandoned [forfeited], and such showing does not impeach the decree upon which the right was based, **where evidence received with reference to the abandonment [forfeiture] relates to a time subsequent to the decree.** *Id.* (citing *Albrethesen v. Wood River Land Co.*, 40 Idaho 49, 231 P. 418, 422 (1924).

Id. at 21–22 (emphasis in original). Therefore, in the context of an administrative transfer proceeding even without the proposed language, a litigant is not prevented from asserting forfeiture after the running of the five year period. In the context of a delivery call, even if the five year period had yet to run, as a result of any non-use, a litigant defending against the call is not precluded from asserting that the senior making the call is not using the full decreed quantity at that time to accomplish the purpose of use of the right.

For these reasons, the Court finds the language proposed by the City of Pocatello to be unnecessary and would result in significant unintended consequences.

2. Issue 6.

The Ground Water Districts proposed the inclusion of the following provision in the Final Unified Decree:

The water rights elements contained in the Final Unified Decree are based on the extent of beneficial use as of the commencement of the Snake River Basin Adjudication (SRBA) on November 19, 1987.

At oral argument, the Ground Water Districts proposed the following modifications (underlined and in bold) to address concerns raised by other parties to the proceeding:

The water right elements contained **in the partial decrees attached to the Final Unified Decree** are based on the extent of beneficial use **of the water right on or before** the commencement of the SRBA, November 19, 1987, **except that partial decrees for water rights with a priority date subsequent to November 19, 1987, are based on the extent of beneficial use on or before the priority date of the water right.**

The Court rejects the inclusion of the proposed language for the following reasons. First, the proposed language consists of another “blanket” provision which does not apply to all rights. While the Department may have based its recommendations on the conditions as they existed as of the commencement date for the SRBA, the partial decree issued for the right does not necessarily reflect those same conditions. As explained previously, parties were not precluded from contesting a recommendation based on post-commencement circumstances. To the extent an objector prevailed, the partial decree may not reflect the right as it existed as of the date of the commencement. For example, to the extent a forfeiture period ran prior to the filing of the claim, then forfeiture could be successfully litigated.

The proposed language also does not account for administrative transfers occurring after the commencement of the SRBA. Any such administrative transfers would be memorialized in the partial decree. A quick review of Court records reveals that administrative transfers occurring after the commencement of the SRBA affected approximately 13,000 water rights during the pendency of the SRBA. Because the proposed provision would not apply to all partial decrees, the Court finds the provision to be somewhat misleading.

Finally, the inclusion of the proposed language would again result in creating an ambiguity regarding the binding effect of a partial decree. The language could be interpreted in a manner so as to conclude the decree is binding only as to the date of commencement of the SRBA. A water right holder is then left with the burden of establishing the use of the right for the period between the commencement of the SRBA and the issuance of the partial decree.

3. Issue 7.

The Ground Water Districts also propose the following finding of fact and/or conclusion of law to be included in the Final Unified Decree:

The “diversion rate” element of each water right is the maximum permissible rate of diversion under the water right, and not a judicial determination that the maximum rate is needed at all times during the “period of use” to accomplish the designated “purpose of use.”

This issue was previously addressed in the SRBA when a request was made to insert a similar remark in the face of each individual partial decree which provided that “in the event of a water call, the quantity associated with actual beneficial use will apply.” The SRBA Court denied the request on the basis that beneficial use is an implicit limitation in every water right decree and therefore the language was unnecessary. The SRBA Court held as follows:

Implicit in the quantity element, as contained in a decree, is that the right holder is putting to beneficial use the amount decreed. As the Idaho Supreme Court has stated: “Idaho’s water law mandates that the SRBA not decree water rights ‘in excess of the amount actually used for beneficial purposes for which such right is claimed.’” However, the quantity element in a water right necessarily sets the “peak” limit on the rate of diversion that a water right holder may use at any given point in time. In addition to this peak limit, a water user is further limited by the quantity that can be used beneficially at any given point in time (i.e. there is no right to divert water that will be wasted). The quantity element is a fixed or constant limit, expressed in terms of rate of diversion (e.g. cfs or miners inches), whereas the beneficial use limit is a fluctuating limit, which contemplates both rate of diversion and total volume, and takes into account a variety of factors, such as climatic conditions, the crop which is being grown at the time, the state of the crop at any point in time, and the present moisture content of the soil, etc. The Idaho Constitution recognizes fluctuations in use in that it does not mandate that non-application to a beneficial use for any period of time no matter how short results in a loss or reduction to the water right.

Finally, it is a fundamental principal of the prior appropriation doctrine that a senior right holder has no right to divert, (and therefore to “call,”) more water than can be beneficially applied. . . .

Memorandum Decision and Order on Challenge, Subcase Nos. 36-00003A et al. (Nov. 23, 1999) at 41. No appeal was taken from that decision.

The Ground Water Districts argue that despite the SRBA Court’s ruling, efforts have been made in non-SRBA proceedings to preclude the Director from considering evidence showing that a water user can accomplish his or her beneficial use with less than the full rate of diversion shown on their SRBA decree based on the argument that consideration of such evidence is a collateral attack on the SRBA decree. The Ground Water Districts argue that to date such efforts have failed but not without great expense.

The Court rejects the inclusion of the provision for the reasons previously relied on by the SRBA Court. Although attempts may have been made to preclude the Director from considering such evidence, it appears the case law is being developed on that topic as the issues arise. For example, in *American Falls Reservoir District #2 v. IDWR*, 143 Idaho 862, 868, 154 P.3d 433, 439 (2007), the Idaho Supreme Court reviewed the Director's conclusion that "[b]ecause the amount of water necessary for beneficial use can be less than the decreed or licensed amount, it is possible for a senior to receive less than the decreed or licensed amount, but not suffer injury." The senior water right holders making the call argued that in responding to a delivery call the Director is required to deliver the full decreed quantity according to priority. The Supreme Court rejected the argument holding that "[i]f this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water." *Id.* at 876, 154 P.3d at 447. The Court acknowledged the difference between water rights administration and water adjudications: "water rights adjudications neither address, nor answer, the questions presented in delivery calls." *Id.* Further that water adjudications do not determine whether waste is taking place or how each water right on a source actually is diverted and used and how it affects rights on that source. *Id.* at 877, 154 P.3d at 448.

In its *Memorandum Decision and Order on Petition for Judicial Review, A&B Irr. Dist. v. IDWR, et al.*, Minidoka County Case No. 2009-647 (May 4, 2010), this Court in its capacity to hear administrative appeals from the Department, held that conditions surrounding the use of a water right are not static and circumstances can exist where a senior making a call may not require the full decreed quantity. This Court cited examples such as the failure to irrigate the full number of decreed acres, efficiencies and improvements in the delivery system, cropping decisions, and climatic conditions. *Id.* at 30–31. Ultimately this Court acknowledged that the quantity decreed is not conclusive as to whether or not all the water being diverted is being put to beneficial use in any given irrigation season. *Id.* at 31. This decision is currently on appeal. Idaho Supreme Court Docket No. 38403. Accordingly, once the case law on this issue is more fully established, the need to repeatedly litigate similar issues in subsequent administrative proceedings should be alleviated. However, in the context of an administrative proceeding, the issue also implicates related issues regarding any presumptive weight given to a partial decree, as

well as applicable burdens and standards of proof. These related issues also need to be addressed in conjunction with an allegation that less than the decreed quantity is necessary to accomplish the designated purpose of use. The proposed provision is silent as to these issues and could result in the unintended consequence of rendering such issues moot. Accordingly, this issue is more appropriately addressed through case law on a more developed record.

4. Issue 8.

The Ground Water Districts also propose the following provision be included in the Final Unified Decree.

The tolling of the forfeiture statute during the SRBA does not preclude the Director from considering post-November 19, 1987, evidence of beneficial use in water right administrative proceedings.

The Ground Water Districts argue the provision is necessary so as not to construe the tolling of the forfeiture period from prohibiting the Director from considering actual beneficial use of a water right in response to water delivery calls. More specifically, the Ground Water Districts argue that when responding to delivery calls, the Director is tasked with determining how much water is reasonably needed to meet the senior's current water demands. The Ground Water Districts argue that in making this determination the Director considers the senior right holders current water needs as well as his or her water needs during prior years of similar climatic conditions and water availability. Since filing a claim in the SRBA does not prevent a water user from making use of his or her water right, the Ground Water District's argue the Director must be permitted to consider actual beneficial use of the water, irrespective of whether the statutory forfeiture period is tolled.

The Court rejects the inclusion of the provision for the following reasons. First, the tolling rule was limited solely to preventing forfeiture actions that relied on any period of non-use following the filing of the claim through the entry of partial decree. The tolling rule did not address water rights administration and what evidence of pre-decree use, if any, may or may not be relevant in any subsequent administrative proceeding. Given this limited purpose, the Court rejects the argument that an inference can be drawn that the tolling rule somehow has implications regarding the ability of the Director to consider pre-decree evidence in responding to a delivery call or other administrative proceeding. Second, and most importantly, the issue of

what pre-decree evidence may be discoverable, relevant and/or admissible in a given future post-decree proceeding is not properly before this Court. Trying to address the issue in the hypothetical on an undeveloped record through the inclusion of a “blanket” provision not only invades the province of a future tribunal but also results in unintended consequences.

In summary, the provisions proposed by the City of Pocatello and the Ground Water Districts extend beyond what is necessary for the Final Unified Decree. Attempting to address issues of administration in the hypothetical with “blanket” provisions is not only unnecessary but runs the risk of undermining the effect of the Final Unified Decree. This is particularly true when such issues can be addressed in an appropriate forum if and when they arise.

VI. ORDER

BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. With respect to issue 1, it is hereby ordered that the term “persons” rather than the term “parties” should be used in reference to those who are bound by the Final Unified Decree.

2. With respect to issue 2, it is hereby ordered that duplicates of partial decrees entered pursuant to federal reserved water right settlements should be included in Attachment 2 to the Final Unified Decree with a remark cross-referencing the applicable settlement documents included in Attachment 4 to the Final Unified Decree.

3. With respect to issue 3, the Court holds that a new order clarifying the definitions of *de minimis* “domestic” and “stock water” claims and the procedures for adjudicating deferred claims shall be issued by this Court.

4. With respect to issue 4, this Court holds that the Final Unified Decree should clarify that the results of administrative changes initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree are not superseded by the Final Unified Decree. Accordingly, the Court proposes the following paragraph to be inserted in the Order of the Final Unified Decree as Paragraph 13 and that subsequent paragraphs be renumbered in sequence accordingly.

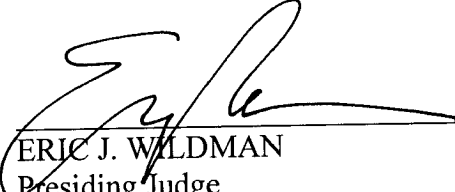
13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) Any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree, or; 2) Elements of a water right defined by a license, where in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

If any party wishes to suggest modifications to the above language, they may do so in conjunction with a timely *Motion to Reconsider*.

5. With respect to issues 5, 6, 7, and 8, the requests by the City of Pocatello and the Ground Water Districts that this Court adopt into the Final Unified Decree the respective remarks sought by those parties in their *Notices of Challenge* are hereby denied.

6. The modifications addressed by this *Memorandum Decision and Order* are set forth in the *Second Revised Proposed Final Unified Decree*, attached hereto as Exhibit A, via the use of strikethrough formatting. The deletions are evidence by way of strikethrough, while the additions are underlined.

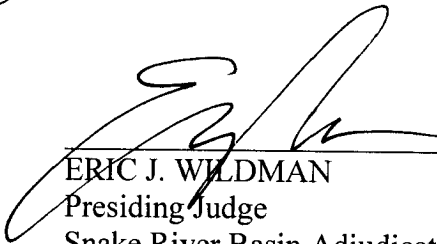
Dated 6 / 28 / 2012


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

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: June 28, 2012


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

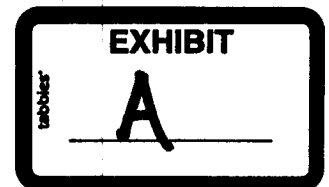
IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
)
) SECOND REVISED PROPOSED FINAL
) UNIFIED DECREE
Case No. 39576)
)
)
_____)

I. PROCEDURE

On June 17, 1987, the State of Idaho, ex rel. A. Kenneth Dunn in his official capacity as Director of the Idaho Department of Water Resources, filed a petition in the above-entitled Court seeking commencement of a “general adjudication inter se of all rights arising under state or federal law to the use of surface and ground waters from the Snake River basin water system and for the administration of such rights.” *Petition* at 2. On November 19, 1987, this Court issued its *Commencement Order* thereby initiating the above-entitled general stream adjudication of all rights to the use of the waters of the Snake River Basin within the State of Idaho pursuant to Idaho Code § 42-1406A (Supp. 1987).¹ The *Commencement Order* adopted by reference this Court’s October 14, 1987, *Memorandum Opinion on Commencement of Adjudication* as “further findings of fact and further conclusions of law as permitted by I.R.C.P. 52(a).” *Commencement Order* at 4.

¹ Idaho Code § 42-1406A was added by section 1 of chapter 18, 1985 Idaho Sess. L. at 28. Section 42-1406A was subsequently amended by section 11 of chapter 454, 1994 Idaho Sess. L. at 1452-53, and now appears as an uncodified law in the 1994 Idaho Session Laws.



As set forth in the *Memorandum Opinion on Commencement of Adjudication*, Idaho Code § 42-1406A (Supp. 1987) required that the adjudication be commenced within the terms of the McCarran Amendment, 43 U.S.C. § 666. This Court determined that for the adjudication to come within the terms of the McCarran Amendment the entire Snake River Basin water system within the State of Idaho had to be adjudicated. This Court defined the entire Snake River Basin water system within Idaho as follows:

Beginning at the point where the southern boundary line of the state of Idaho meets the western boundary line of the state of Idaho, then following the western boundary of the state north to the northern boundary of the Clearwater Basin, in Idaho, in section 36, T. 36 N., R. 6 W., B.M., then following the northern watershed divide of the Clearwater River Basin north and east to the eastern boundary of the state of Idaho in section 4, T. 42 N., R. 11 E., B.M., then following the eastern boundary of the state southeast to the northern boundary of the Bear River Basin in section 35, T. 10 S., R. 46 E., B.M., then following the northern watershed divide of the Bear River Basin, in Idaho, southwest to the southern boundary of the state of Idaho in section 26, T. 16 S., R. 28 E., B.M., then following the southern boundary line of the state of Idaho west to the point of beginning.

Commencement Order at 5. A map showing the boundaries of the Snake River Basin water system is attached for illustrative purposes as Attachment 1, as required by Idaho Code § 42-1413 (2003). The following counties are wholly located within the boundaries of the Snake River Basin water system:

Ada	Canyon	Idaho	Owyhee
Adams	Clark	Jefferson	Payette
Bingham	Clearwater	Jerome	Teton
Blaine	Custer	Lemhi	Twin Falls
Boise	Elmore	Lewis	Valley
Bonneville	Fremont	Lincoln	Washington
Butte	Gem	Madison	
Camas	Gooding	Minidoka	

Commencement Order at 5. The following counties are partly located within the boundaries of the Snake River Basin water system:

Bannock
Caribou
Cassia
Latah

Nez Perce
Oneida
Power
Shoshone

Id. at 6.

The *Commencement Order* also determined that “all classes of water uses . . . within the water system [must] be adjudicated as part of the Snake River Basin adjudication.” *Id.* at 6. On January 17, 1989, however, this Court entered its *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses* that allowed claimants of *de minimis* domestic and stock water rights, as defined in Idaho Code § 42-1401A(5) and (12) (Supp. 1988), to elect to defer adjudication of their claims; provided, all such claimants “shall be joined as parties in this proceeding and will be bound by all decrees entered in this case, including the final decree.” *Findings of Fact* at 3.

The *Commencement Order* directed the Director of the Idaho Department of Water Resources (“Director”): 1) to investigate the water system as provided in Idaho Code § 42-1410 (Supp. 1987); 2) to prepare the notice of order commencing a general adjudication containing that information required by Idaho Code § 42-1408A(1) (Supp. 1987); 3) to serve notice of the order commencing a general adjudication in accordance with chapter 14, title 42, Idaho Code; and 4) to file with this Court affidavits and other documents stating the persons served with a notice of order commencing the adjudication. *Commencement Order* at 7-8.

Based upon the claims submitted, the files and records of the Idaho Department of Water Resources and the Court, the examination of the ditches, diversions, lands

irrigated, and other uses of water within the water system, the Director's Reports and evidence herein, this Court enters the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

1. All requirements for joinder of the United States as a party under state and federal law, including but not limited to 43 U.S.C. § 666, have been satisfied.
2. The Nez Perce Tribe participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Notice of Claim to a Water Right Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance* (March 18, 1993).
3. The Northwestern Band of the Shoshoni Nation participated in this proceeding by filing notices of claim for water rights reserved under federal law and by filing a general notice of appearance with the Court. *Partial Protective Filing by the Northwestern Band of the Shoshoni Nation of Notices of Claim for Water Rights Reserved Under Federal Law* (filed with Dept. of Water Res. March 25, 1993); *Notice of Appearance on Behalf of the Northwestern Band of the Shoshoni Nation* (March 22, 1993).
4. The Shoshone-Bannock Tribes sought and were granted intervention in this proceeding. *Order Granting Permissive Intervention by the Shoshone-Bannock Tribes* (April 12, 1993).
5. The Shoshone-Paiute Tribes of the Duck Valley Indian Reservation sought and were granted intervention in this proceeding. *Motion to Intervene and Request for Expedited Hearing* (SRBA Consolidated Subcase No. 51-12756, Jan. 12, 1999); *Order Granting Tribes' Motion to Intervene, Order Requiring Written Status Reports and Order for Scheduling Conference Reports* (SRBA Subcases Nos. 51-12756 et al., Dec. 6, 1999).

6. The Director served notice of the commencement of the Snake River Basin Adjudication (“SRBA”) in accordance with chapter 14, title 42, Idaho Code and the orders of this Court. This included service of the notice of commencement on the State of Idaho and the United States; service of the notice of commencement on all other persons by publication; service of the notice of commencement by posting in each county courthouse, county recorder’s office and county assessor’s office in which any part of the water system is located; service of the notice of commencement by mail on each person listed as owning real property on the real property assessment roll within the boundaries of the Snake River Basin water system; and filing of a copy of the notice of commencement in the office of the county recorder in each county in which any part of the water system is located.

7. In addition to the steps taken in paragraph 6, the Idaho Department of Water Resources also served notices of commencement on persons who may have used water within the water system, but were not listed as owners of real property. The sources of information the Idaho Department of Water Resources reviewed for this purpose were: 1) water right records of the Idaho Department of Water Resources for each basin wholly or partly within the water system; 2) cooperating farm/ranch operator records of the United States Department of Agriculture, Agricultural Stabilization and Conservation Service for each basin wholly or partly within the water system; and 3) mining claim records on federal land of the United States Department of Interior, Bureau of Land Management for each basin wholly or partly within the water system.

8. The Director has completed an examination of the Snake River Basin water system and submitted Director's Reports to this Court in conformance with the requirements of chapter 14, title 42, Idaho Code and the orders of this Court.

9. As required by title 42, chapter 14, Idaho Code and this Court's orders, claims to water rights arising under state or federal law to the use of the surface and ground waters from the Snake River Basin water system have been adjudicated resulting in the issuance of partial decrees that have been certified as final pursuant to I.R.C.P. 54(b).

10. Idaho Code § 42-1412(8) (2003) provides that: "Upon resolution of all objections to water rights acquired under state law, to water rights established under federal law, and to general provisions, and after entry of partial decree(s), the district court shall combine all partial decrees and the general provisions into a final decree." The Court finds that the conditions of Idaho Code § 42-1412(8) (2003) have been met with respect to the water rights identified in Attachments 2, 4, 5 and 6 and the general provisions in Attachment 3, enabling the Court to issue this Final Unified Decree.

III. CONCLUSIONS OF LAW

1. The SRBA is a general stream adjudication *inter se* of all water rights arising under state or federal law to the use of surface and ground waters from the Snake River Basin water system and for the administration of such rights.

2. The State of Idaho is a party to this proceeding.

3. The Director was withdrawn as a party to this proceeding in 1994. Idaho Code § 42-1401B (2003); *State of Idaho, ex rel. Higginson v. United States*, 128 Idaho 246, 256-57, 912 P.2d 614, 624-25 (1995).

4. The United States is a party to this proceeding under 43 U.S.C. § 666.

5. This Final Unified Decree is conclusive as to the nature and extent of all rights of the United States to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, including, but not limited to, water rights held by the United States in trust for any Indian tribe, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

6. The Nez Perce Tribe, the Northwestern Band of the Shoshoni Nation, the Shoshone-Bannock Tribes, and the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation are parties to this proceeding.

7. The *Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe and the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board* with its six attachments dated January 30, 2007 (“*Nez Perce Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Nez Perce Consent Decree* is conclusive as to the nature and extent of all rights of the Nez Perce Tribe to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

8. The *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* with its four attachments, dated August 2, 1995, and *Order Amending Partial Final Consent Decree*

Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin to Correct Clerical Error, I.R.C.P. 60(a) with its Appendix Containing Amendments to Consent Decree, dated August 24, 2005 (collectively “*Shoshone-Bannock Consent Decree*”), are included in Attachment 4 and are hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Bannock Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Bannock Tribes to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

9. The *Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho* with its three attachments, dated December 12, 2006 (“*Shoshone-Paiute Consent Decree*”), is included in Attachment 4 and is hereby incorporated into this Final Unified Decree by reference. The *Shoshone-Paiute Consent Decree* is conclusive as to the nature and extent of all rights of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19, 1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

10. This Final Unified Decree is conclusive as to the nature and extent of all rights of the Northwestern Band of the Shoshoni Nation to the use of the waters of the Snake River Basin water system within the State of Idaho with a priority date before November 19,

1987, except for those water rights expressly exempted by Idaho Code § 42-1420 (2003) or by order of this Court.

11. Claimants in each of the SRBA basins received notice of the commencement of the SRBA in accordance with chapter 14, title 42, Idaho Code and orders of this Court. These notice procedures satisfy constitutional due process requirements. *LU Ranching Co. v. U.S.*, 138 Idaho 606 (2003).

IV. ORDER

NOW THEREFORE this Court ORDERS, ADJUDGES AND DECREES as follows:

1. This Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987, except the following described water rights shall not be lost by failure to file a notice of claim, as provided in Idaho Code § 42-1420 (2003):

- a. Any domestic and stock water right, as defined in Idaho Code § 42-111 (1990), Idaho Code § 42-1401A(5) (1990), and Idaho Code § 42-1401A(12) (1990), the adjudication of which was deferred in accordance with this Court's ~~January 17, 1989 *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*, as well as this Court's March 22, 1995 *SRBA Administrative Order No. 10: Order Governing Procedures in the SRBA for Domestic and Stock Water Uses* ("Administrative Order 10")~~ June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*;

- b. A water right application for permit filed under chapters 2 or 15, title 42, Idaho Code;
- c. A water right permit issued under chapters 2 or 15, title 42, Idaho Code, unless the Director required the permit holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code;
- d. A water right license issued under chapters 2 or 15, title 42, Idaho Code, if proof of beneficial use was not filed with the Department of Water Resources before November 19, 1987, unless the Director required the license holder to file a notice of claim in accordance with subsection (7) of section 42-1409, Idaho Code; and
- e. A claim to a water right under federal law, if the priority of the right claimed is later than November 18, 1987.

All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed. Any water rights with a priority date subsequent to November 18, 1987, were not required to be claimed in the SRBA, but to the extent any such water rights were claimed in the SRBA and a partial decree issued, the partial decree is conclusive as to the nature and extent of the right.

2. All partial decrees issued by this Court are set forth in Attachments 2 and 4 to this Final Unified Decree and are incorporated herein by reference.

3. Attachment 2 consists of a name index, a water right number index, and a copy of all partial decrees issued by this Court, ~~except for those water rights partially decreed and/or otherwise memorialized in a consent decree issued in conjunction with the approval of a federal reserved water right settlement set forth in Attachment 4.~~

4. General provisions decreed by this Court are set forth in Attachment 3 to this Final Unified Decree and are incorporated herein by reference.

5. Attachment 4 consists of the federal and tribal reserved water rights partially decreed and/or otherwise memorialized in a consent decree issued in conjunction with the approval of a federal reserved water right settlement, including all consent decrees and all attachments thereto, all partial decrees issued by this Court as part of the respective settlements, and all Federal, State and/or Tribal legislation necessary to enact and approve the water right settlements. In the case of any conflict between this Final Unified Decree and the partial consent decrees approving reserved water right settlements, the partial consent decrees approving the reserved water right settlements as set forth in Attachment 4 shall control. Duplicates of the partial decrees included under Attachment 4 are also included under Attachment 2.

6. All claims to water rights filed in this proceeding that were decreed disallowed by this Court are set forth in Attachment 5 to this Final Unified Decree and are incorporated herein by reference.

7. The water right numbers for those water rights of record with the Idaho Department of Water Resources that were required to be claimed but were not claimed in this proceeding and therefore were decreed disallowed by this Court are set forth in Attachment 6 and are incorporated herein by reference. The portion of any disallowed water right that was deferrable pursuant to this Court's ~~January 17, 1989, Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, as amended by Administrative Order No. 10~~ issued by this Court on ~~March 22, 1995~~ in Case No. 39576 June 28, 2012, Order Governing

Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims is not affected by this paragraph.

8. This Final Unified Decree is binding against all ~~parties~~ persons including any ~~parties~~ persons that deferred filing of domestic and/or stock water claims pursuant to this Court's ~~January 17, 1989, Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses~~ June 28, 2012, Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims, which is set forth in Attachment 7 to this Final Unified Decree, and is incorporated herein by reference.

9. The adjudication of deferred domestic and stock water claims and the administration of such rights prior to their adjudication shall be governed by this Court's ~~January 17, 1989, Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses~~ June 28, 2012, Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims and applicable state law.

10. All water rights based on beneficial uses, licenses, permits, posted notices, and statutory claims required to be claimed in this proceeding are superseded by this Final Unified Decree. Provided, however, this Final Unified Decree does not supercede the third-party beneficiary contractual rights conferred on certain classes of water rights pursuant to the "Contract to Implement Chapter 259, Sess. Law 1983" as authorized by 1983 Idaho Sess. Laws 689 and codified as Idaho Code § 61-540 (2002). The scope of third-party beneficiaries and contract rights are defined in this Court's *Order on State of*

Idaho's Motion for Partial Summary Judgment on Issue No. 2. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011) as included in Attachment 9.

11. All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provisions of this Court.

12. This Final Unified Decree shall not be construed to define, limit or otherwise affect the apportionment of benefits to lands within an irrigation district pursuant to chapter 7, title 43, Idaho Code.

13. This Final Unified Decree shall not be construed to supersede or affect otherwise the following: 1) Any administrative changes to the elements of a water right completed after the entry of a partial decree but prior to the entry of this Final Unified Decree, or; 2) Elements of a water right defined by a license, where in accordance with Idaho Code § 42-1421(3) (2003), a partial decree was issued based on a permit prior to the issuance of the license.

14. The time period for determining forfeiture of a partial decree based upon state law shall be measured from the date of issuance of the partial decree by this Court and not from the date of this Final Unified Decree. State law regarding forfeiture does not apply to partial decrees based upon federal law.

15. The decreed water rights shall be administered in the Snake River Basin water system in accordance with this Final Unified Decree and applicable federal, state and tribal law, including the administrative provisions set forth in the federal reserved water right settlement agreements in Attachment 4.

16. Nothing in this Final Unified Decree shall be interpreted or construed as exempting the holder of a decreed water right based on state law from exercising or changing such right in compliance with applicable Idaho law.

17. This Court retains jurisdiction of this proceeding to: a) resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources; and b) adjudicate any domestic or stock water rights deferred under this Court's ~~January 17, 1989, Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses~~ June 28, 2012, Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims. Any order amending or modifying this Final Unified Decree, including the attachments hereto, will be entered on the register of action for Civil Case No. 39576 in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, and will be filed with the Idaho Department of Water Resources in lieu of issuing an Amended Final Unified Decree. Attachment 8 contains instructions on how to access any orders amending this Final Unified Decree.

18. The incorporation by reference of partial decrees and orders of this Court contained in the Attachments to this Final Unified Decree does not constitute a reissuance of such partial decrees and orders.

19. This Final Unified Decree, including the entirety of Attachments 1 through 10 listed below, shall be entered in the records of the clerk of the District Court for the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

Attachment 1

Snake River Basin Water System Map

- Attachment 2 Partially Decreed Water Rights ~~Other Than Those Contained in Partial Federal Reserved Water Right Consent Decrees Set Forth in Attachment 4~~, including a name index and a water right number index, consisting of ___ pages.
- Attachment 3 General Provisions, consisting of ___ pages
- Attachment 4 Federal and Tribal Reserved Water Right Settlements, including all Consent Decrees and all Attachments thereto, all Partial Decrees issued by this Court as part of the Respective Settlements, and all Federal, State and/or Tribal Legislation Necessary to Enact and Approve the Water Right Settlements consisting of ___ pages.
- Attachment 5 List of Water Right Numbers for Filed Water Right Claims Decreed as Disallowed consisting of ___ pages.
- Attachment 6 List of Water Right Numbers for Unclaimed Water Rights Decreed as Disallowed, consisting of ___ pages.
- Attachment 7 ~~January 17, 1989, Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses June 28, 2012, Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims~~, consisting of 406 pages.
- Attachment 8 Instructions on Searching the Final Unified Decree.
- Attachment 9 *Order on State of Idaho's Motion for Partial Summary Judgment on Issue No. 2. Subcase No. 00-91013 (Basin-Wide Issue 13) (July 12, 2011).*
- Attachment 10 *Register of Actions*, Twin Falls Case No. 39576 (i.e., SRBA Main Case).

20. A certified paper and electronic copy of the entire Final Unified Decree shall be provided to the Director. The Director shall record the Final Unified Decree excluding all Attachments other than the name index in Attachment 2 and Attachments 7 and 8 in

the office of the county recorder of each county in which the place of use or point of diversion of any individual decreed water right in the Final Unified Decree is located.

The Director shall maintain a copy of the Final Unified Decree for public inspection.

DATED this ___ day of _____, 2012.

ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

ATTACHMENT 1

SNAKE RIVER BASIN WATER
SYSTEM MAP, consisting of 1 page.

DRAFT

ATTACHMENT 2

PARTIALLY DECREED WATER RIGHTS ~~OTHER THAN THOSE CONTAINED IN PARTIAL FEDERAL RESERVED WATER RIGHT CONSENT DECREES SET FORTH IN ATTACHMENT 4,~~ INCLUDING A NAME INDEX, AND A WATER RIGHT NUMBER INDEX, consisting of ____ pages.

TABLE OF CONTENTS

1.	NAME INDEX to ____.	Pages	__
2.	WATER RIGHT NO. INDEX to ____.	Pages	__
3.	PARTIAL DECREES to ____.	Pages	__

ATTACHMENT 3

GENERAL PROVISIONS,
consisting of ___ pages.

DRAFT

ATTACHMENT 4

FEDERAL AND TRIBAL RESERVED SETTLEMENTS, INCLUDING ALL CONSENT DECREES AND ALL ATTACHMENTS THERETO, ALL PARTIAL DECREES ISSUED BY THIS COURT AS PART OF THE RESPECTIVE SETTLEMENTS, AND ALL FEDERAL, STATE AND/OR TRIBAL LEGISLATION NECESSARY TO ENACT AND APPROVE THE WATER RIGHT SETTLEMENTS, CONSISTING OF ___ PAGES.

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a. <i>Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin, dated August 2, 1995.</i>	—
<i>Order Amending Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin To Correct Clerical Error, I.R.C.P. 60(a), dated August 24, 2005.</i>	—
<i>The 1990 Fort Hall Indian Water Rights Agreement by and between the Shoshone Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Idaho Water Users, dated July 5, 1990.</i>	—
<i>Public Law 101-602, 104 Stat. 3059 (November 16, 1990).</i>	—
<i>Chapter 228, 1991 Idaho Sess. L. 547.</i>	—
<i>Shoshone Bannock Resolution (NEED CITE)</i>	
b. <i>Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin within Idaho, dated December 12, 2006.</i>	—
c. <i>Consent Decree Approving Entry of Partial Final Decrees Determining the Rights of the United States as Trustee for the Benefit of the Nez Perce Tribe and the Nez Perce Tribe to the Use of Water in the Snake River Basin within Idaho and Partial Final Decrees Determining Minimum Stream Flow Water Rights Held by the Idaho Water Resources Board, dated January 30, 2007.</i>	—
<i>Snake River Water Rights Act of 2004, Pub. L. 108-447, Division J, Title X, (December 8, 2004).</i>	—
<i>Chapter 148, 2005 Idaho Sess. L. 461.</i>	—
<i>Chapter 149, 2005 Idaho Sess. L. 462-465.</i>	—
<i>Chapter 150, 2005 Idaho Sess. L. 465-466.</i>	—
<i>Nez Perce Tribal Resolution No. 05-210 (March 29, 2005).</i>	—
d. <i>Water Rights Agreement Between the State of Idaho and the United States for the Craters of the Moon National Monument (May 13, 1992); Orders of Partial Decree entered Dec. 1, 1998 (Subcase Nos. 34-12383, 34-12384, 34-12385,</i>	

34-12386, 34-12387, 34-12388, and 34-12389). _____

e. *Water Rights Agreement Between the State of Idaho and the United States for the United States Department of Energy* (July 20, 1990); *Order of Partial Decree entered nunc pro tunc* June 20, 2003 (Subcase No. 34-10901). _____

f. *Order Approving Stipulation and Entry of Basin 79 Partial Decrees* (Subcase No. 79-13597, Hells Canyon National Recreation Area Act Claims, Nov. 16, 2004). _____

Order Approving Entry of Basin 78 Partial Decrees, dated May 2, 2005 (Consolidated Subcase No. 79-13597 Hells Canyon National Recreation Area Act Claims (Encompassing Subcases 79-14054 through 79-14079 and Subcases 78-12200 through 78-12205). _____

g. *Amended Order Approving Stipulation and Entry of Partial Decrees* (Consolidated Subcase No. 75-13316 (Wild & Scenic Rivers Act Claims, Nov. 17, 2004). _____

h. *Yellowstone Park Agreement* (need to add if approved). _____

ATTACHMENT 5

LIST OF WATER RIGHT NUMBERS FOR FILED WATER RIGHT CLAIMS DECREED AS DISALLOWED, consisting of ____ pages.

The disallowed water right numbers listed in Attachment 5 fall into two categories: (1) water right numbers where the actual claimed use of water was adjudicated to be disallowed; and (2) water right numbers where the water right was split subsequent to the filing of the director's report, with the claimed use of water being decreed under the water right numbers for the "children" rights, and the number for the "parent" right having been decreed disallowed for purposes of closing the subcase number in the court's register of action. Please consult the Idaho Department of Water Resources for further inquiry regarding any of the disallowed water right numbers listed in Attachment 5.

ATTACHMENT 6

LIST OF WATER RIGHT
NUMBERS FOR UNCLAIMED
WATER RIGHTS DECREED
AS DISALLOWED, consisting
of __ pages.

ATTACHMENT 7

~~JANUARY 17, 1989,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER ESTABLISHING
PROCEDURES FOR
ADJUDICATION OF
DOMESTIC AND STOCK
WATER USES~~ June 28, 2012,
*Order Governing Procedures in
the SRBA for Adjudication of
Deferred De Minimis Domestic
and Stock Water Claims,*
consisting of ~~10~~ 6 pages.

ATTACHMENT 8

INSTRUCTIONS ON
SEARCHING THE FINAL
UNIFIED DECREE, consisting
of ___ pages.

ATTACHMENT 9

*Order on State of Idaho's Motion for
Partial Summary Judgment on Issue
No. 2. Subcase No. 00-91013 (Basin-
Wide Issue 13) (July 12, 2011)*

ATTACHMENT 10

*Register of Actions, Twin Falls Case
No. 39576 (i.e., SRBA Main Case)*

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE IN THE MATTER OF THE FINAL UNIFIED DECREE was mailed on June 28, 2012, with sufficient first-class postage to the following:

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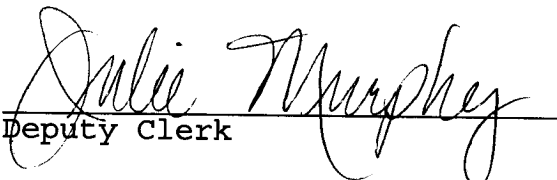
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