

ground water and surface water rights has become a central issue. The phase of the SRBA addressed in the present motions concerns the particular relationship between the holders of decreed rights for aquaculture, fish propagation, in the Thousand Springs reach and the ground water users whose rights are junior in priority to those of the Spring Users.

I BACKGROUND

On April 10, 2000, the SRBA District Court issued partial decrees for Blue Lakes' water rights 36-07210 and 36-07427. Water right 36-07210 has Alpheus Creek as its source for a quantity of 45.00 cfs and a priority date of 11/17/1971. Water right 36-07427 has Alpheus Creek as its source for a quantity of 52.23 cfs and a priority date of 12/28/1973.

On April 10, 2000, the SRBA District Court entered partial decrees for Clear Springs rights 36-04013A, 36-04013B and 36-07148. Water right 36-04013A has Springs, aka Clear Springs, as its source for a quantity of 15 cfs and a priority date of 9/15/1955. Water right 36-04013B has Springs, aka Clear Springs, as its source for a quantity of 27.00 cfs and a priority date of 2/04/1964. Water right 36-07148 has Springs, aka Clear Springs, as its source for a quantity of 1.67 cfs for fish propagation and 0.04 cfs for domestic rest area and a priority date of 1/31/1971.

The Spring Users rights in issue are for fish propagation and are for the entire year. Each decreed right contains the following provision:

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. Section 42-1412(6) Idaho Code.

On May 19, 2005, the Director issued an order in response to the Blue Lakes delivery call. On July 8, 2005, the Director issued an order in response to the Clear Springs delivery call. The parties contest various aspects of those foundational orders and subsequent implementation orders.

There are multiple purposes defined for the SRBA. A threshold stage has been identifying and cataloguing existing rights, including source, purpose, location, quantification and priority. The sum of this process has been the memorialization of this information in partial decrees, which may include other provisions necessary for definition or administration of the water right. See Idaho Code section 1411. The partial decrees contain Rule 54 (b) certificates

pursuant to the Idaho Rules of Civil Procedure, rendering them appealable and rendering the determinations in the partial decrees final if not disturbed on appeal. The partial decrees for the Spring Users' water rights have not been appealed.

The process of memorializing water rights in partial decrees will ultimately lead to a final decree which will serve as the authority for the administration of water in times of shortage when not all rights can be fully honored. A primary purpose of the adjudication is to provide certainty in times of shortage so those with early priority dates will know what they will receive and those with later priority dates will know the likelihood of curtailment. *Legislative Council Committee on the Snake River Basin Adjudication Report to the 1995 Idaho Legislature*. The Idaho Supreme Court commented on the need for conjunctive management of surface and ground water rights in *A&B Irrigation v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1998), referencing the 1994 Interim Legislative Committee Report on the Snake River Basin Adjudication. The Committee Report noted that if issues of source and priority were not addressed in the SRBA a major objective of the adjudication would not be fulfilled. *Id.* This case reaches beyond the concerns of source and priority to the application of those rights defined in a partial decree when actual harm and benefit to particular parties is involved. Parties who have acted in good faith and invested heavily in their enterprises may either suffer greatly or be assured of economic opportunity depending upon the application of principles that are often easy to articulate but difficult to apply.

II

PRIORITY AND CONJUNCTIVE MANAGEMENT

As early as 1892 the Idaho Supreme Court rejected the concept of a “common right” whereby priority would be ignored and water apportioned among users as common property, balancing one need with another. *Kirk v. Bartholomew*, 3 Idaho 367, 29 Pac. 40 (1882). Instead, Idaho Code section 42-106 provides that “[a]s between appropriators, the first in time is first in right.” The question is how much of the adjudicated amount in the partial decree does a senior right holder receive and how much does a junior groundwater user surrender though curtailment in times of shortage? The direct relationship of curtailment that might be seen in surface water to surface water connections is attenuated when the seniors are surface water users and the juniors are ground water users. Regardless, conjunctive management between ground and surface water rights is mandated.

Following *A&B* the SRBA Court heard cross motions for summary judgment and determined that “[a]t present, all water sources within the Snake River basin, unless otherwise recommended by IDWR are presumed to have a common source.” Parties seeking to show otherwise were to have an opportunity to do so by a preponderance of the evidence at a future time.” In the aftermath of the SRBA Court’s decision denying the cross motions for summary judgment the parties reached an agreement on language for a “connected sources” general provision which was incorporated in the Court’s *Memorandum Decision and Order for Partial Decree, entered February 27, 2002*. The Partial Decree provided that unless “otherwise specified above, all other water rights within Basin 36 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.” No exceptions were specified.

On January 8, 2002, the SRBA Court granted the State of Idaho’s Motion for Order of Interim Administration and Motion for Order Expediting Hearing, finding that the water supply in basins 35, 36, 41, and 43 was not adequate at that time and was projected to be inadequate at times in the future to satisfy all water rights. The SRBA Court concluded that interim administration in accordance with the Director’s reports and partial decrees was “reasonably necessary to protect senior water rights in accordance with the prior appropriation doctrine as established by Idaho law.”

This proceeding centers on the Director’s Orders which determined that there must either be curtailment of designated junior ground water users or a mitigation plan to satisfy the senior rights of the Spring Users. The Director relied upon the partial decrees, the ESPAM model developed for determining the interconnection between surface and ground water uses, the IDWR’s Conjunctive Management Rules, and the Director’s interpretation of the State Constitution, state statutes and judicial decisions. Neither the Spring Users nor the Ground Water Users are fully satisfied with the Director’s determinations. The joint motion for summary judgment filed by the Spring Users and the motion for partial summary judgment filed by IGWA seek determinations on various elements of the May 19, 2005 foundational order and subsequent implementation orders. This opinion addresses both the Spring Users’ joint motion and IGWA’s partial motion.

III

STANDARD OF REVIEW

“Summary judgment is appropriate if ‘the pleadings on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’ *McCoy v. Lyons*, 120 Idaho 765,769, 820 P.2d 360, 364 (1991). If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied.” *American Falls Reservoir v. Dept. of Water*, 143 Idaho 862, 869, 154 P.3d 433, 470 (2007).

IV

RES JUDICATA

According to the Supreme Court, “*res judicata*” covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel).” *Ticor Title Co. v. Stanion, II*, 144 Idaho 119, 157 P.d 613, 617 (2007). The doctrine is intended to avoid the disrespect that would follow if the same matter were relitigated with inconsistent results and to protect the courts and the parties from repetitious litigation. *Id.* The elements that are required for issue preclusion are that the party who will be precluded on an issue had a full and fair opportunity to litigate the issue in the earlier case; the issue decided in the earlier case was identical to that asserted in the subsequent action; the issue was decided in the prior litigation; there was a final judgment on the merits in the prior case; and, the party who will be precluded from asserting the issue was a party or in privity with a party to the litigation. *Id.* 618. Issue preclusion extends to those matters “which might and should have been litigated in the first suit.” *Id.* 620.

The partial decrees that were entered in this case meet the standards of issue preclusion. They defined the Spring Users’ water rights. The SRBA Court entered I.R.C.P. 54(b) certificates on the partial decrees rendering them appealable. Those decisions have not been disturbed on appeal. They are final and conclusive as to the matters determined in them. To hold otherwise would tempt relitigation of matters already settled in a decades long process.

The fact that the partial decrees are final and conclusive as to the matters determined in them does not end the inquiry. In *American Falls Reservoir v. Dept. of Water*, 143 Idaho 862,876, 154 P3d 433, 447 (2007), the Supreme Court analyzed a challenge to the Conjunctive Management Rules, including CMR 42 which lists factors the Director may consider in determining whether water right holders are suffering material injury and using water efficiently

and without waste. “Such factors include the system, diversion and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion.” *Id.*

American Falls argued that the Director must deliver the full quantity of the decreed water right according to priority rather than re-evaluate and potentially negotiate water rights administration with the senior right holder as to the amount of water delivered. The Supreme Court responded:

Clearly...the Director may consider factors such as those listed above in water rights administration....If 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.*

Consideration by the Director of beneficial use is not a readjudication. Further the Director’s consideration of whether there is waste is not a readjudication. *Id.* 448. The Supreme Court noted that “a partial decree need not contain information on how each water right on a source physically interacts or effects other rights on the same source.” *Id.* Consequently, the question of whether a junior groundwater user’s pumping has an effect upon a senior surface water user’s decreed right is not a readjudication. Further, there may be consideration of the amount of water needed under a call.

The presumption under Idaho law is that the senior is entitled to his decreed water right, but there certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed. The Rules may not be applied in such a way as to force the senior to demonstrate an entitlement to the water in the first place; that is presumed by the filing of a petition containing information about the decreed right. The Rules do give the Director the tools by which to determine “how the various ground and surface water sources are interconnected, and how, when, and where and to what extent the division and use of water from one source impacts [others].” *A&B Irrigation Dist. 131 Idaho at 422, 958 P.2d at 579.* Once the initial determination is made that material injury is occurring or will occur, the junior then bears the burden of proving that the call would be futile or to challenge, in some constitutionally permissible way, the senior’s call. *Id.* 449.

Idaho Code section 42-1420 addresses the binding effect of a decree: “The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water right in the adjudicated water system...” From this language and the determinations of the Supreme Court it is clear that the Director cannot go behind the partial decrees on those matters decided in the decrees. But it is also clear that in responding to a call the Director may consider information bearing on whether the water can or will be put to a beneficial use, whether there will be waste,

whether the call is futile, the amount of curtailment necessary or whether there is any other reason recognized within State law that would preclude responding to the call as made.

V

THE SPRING USERS' WATER RIGHTS ARE SURFACE WATER RIGHTS AND THE MEANS OF DIVERSION REASONABLE

There is a question of whether the Spring Users are subject to the special rules for ground water administration, e.g., the “reasonable pumping level” requirement in Idaho Code section 42-226. IGWA acknowledges in briefing that the Spring Users’ rights were adjudicated as surface water rights, but according to IGWA the Spring Users are obligated to “chase” their water supply to a reasonable pumping level prior to the curtailment of junior ground water appropriators. This is a position that has historical support in the opinions of respected experts in the administration of water rights. Ronald Carlson, a long time water administrator has testified, “The state’s position was, if you were a fish producer and needed more water, you have the right to collect it, or if necessary, drill a well.” *Carlson direct testimony* at 16, 22. It appears this view was shared by former IDWR Director Kenneth Dunn and is reflected in the 1976 Idaho State Water Plan and the 1982 and 1986 Water Plans. CJM Rule 42.h references the construction of wells or the use of existing wells from an area having a common ground water supply. The position that the Spring Users must pursue other means of diversion cannot be rejected lightly. *Article XV, section 7 of the Idaho Constitution* authorizes the creation of the State Water Resource Agency

... which shall have the power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

The spring waters in this case are ground water and were adjudicated as such in the partial decrees that were entered. *Idaho Code* section 42-230(a) defines ground water: “Ground water” is all water under the surface of the ground whatever may be the geological structure in which it is standing or moving.” The Spring Users diversions are of water that has emerged from the ground, not by pumping or other artificial means. The partial decrees identify Alpheus Creek and Springs as the sources of the Spring Users’ water. The points of diversion are locations after the water has left the ground. Treating the decreed water rights as ground water rights would be

contrary to statute and would constitute a collateral attack on the partial decrees. However, the classification does not answer the question of whether the Spring Users have an obligation to pursue other methods of diversion. The legal and factual record in this case establishes the answer to be, no.

IGWA has asserted deficient means of diversion by the Spring Users. However, there is no evidence that the diversion works are out of date or function inefficiently as they exist, following correction of a defect observed by the Director. IGWA's position in this regard is premised on the claim that the Spring Users should be required to pursue additional water by drilling, as noted, a belief expressed by persons of considerable authority. However, the partial decrees that were entered did not condition the rights to water upon pursuing it in a different manner, and there is no basis in the record to add this condition to the partial decrees. There is conjecture that the Spring Users could drill, but there are no facts establishing that they could fulfill their water rights in this manner without interfering with other rights. There is no genuine issue of material fact to dispute the Director's finding that the Spring Users' means of diversion are reasonable.

Whether the Spring Users have the right to "chase" water, as opposed to an obligation to do so, is not an issue presented in these proceedings. It may become one if the Spring Users cannot obtain the full amount of the adjudicated rights through curtailment.

VI

THE DIRECTOR MAY USE HISTORICAL INFORMATION TO DETERMINE CURTAILMENT

The Director's use of historical information to determine the extent of curtailment, if any, of junior groundwater users to supply water to the Spring Users is not a readjudication of the partial decrees. The Director is called upon to make a determination of whether the water will be put to a beneficial use or whether there will be a waste of the water. Inferences may be drawn from historical data as to water use and need. If the Spring Users have filled the raceways with water and produced healthy and marketable fish in the past without the use of the fully adjudicated water rights, it is information the Director may consider as to need, beneficial use and waste of water provided by curtailment. This does not impair the use of the maximum amounts decreed when available without curtailment, assuming it can be put to a beneficial use. Preclusion of the use of historical data could lead to an anomalous result. In times of drought and

stress on the entire Eastern Snake River Plain a senior user might make a call and secure more water than the senior user has used in times of plenty.

Whether the Director has properly utilized the historical information he has considered is a question of fact that will be resolved at hearing.

VII

THE DIRECTOR'S SEASONAL VARIATION LIMITATION

The Spring Users object to the provisions in their respective orders recognizing seasonal variations in the springs discharge rates and limiting the calls to seasonal conditions that existed at the times the appropriations were initiated. This is a slippery situation, because in this instance it appears that the historical information has been used to modify the partial decrees. Aquaculture differs from the propagation of plants in fields in that it apparently is a pursuit that is or can be operated 365 days of the year. The partial decrees recognize that and do not stipulate any differences season to season in the decreed rights of the Spring Users, unlike the specification of irrigation seasons for field crops. This is not a condition that falls under the umbrella of the general provision in the partial decrees. To the extent that the Director's Orders import a seasonal condition they are in error. It is a fine line because seasonal conditions may limit or expand the availability of water throughout the Eastern Snake Rive Plain. There may be times when there is not enough water to meet the needs of water users whether junior or senior and the Director can consider the conditions, but attaching a seasonal limitation as such is contrary to the adjudicated water rights. The same principles are applicable to the Spring Users calls and any defenses to those calls regardless of the time of the year. If it was not the Director's intent to engraft a seasonal condition on the adjudicated rights, that language must be clarified.

VIII

THE PRIORITIES OF THE SPRING USERS' WATER RIGHTS APPLY TO ALL CONNECTED WATER SOURCES

IGWA maintains that incidental recharge, seepage, or "waste water," as that term is used by IGWA, is not subject to conjunctive management to satisfy senior rights. The rules of conjunctive management incorporated in Idaho Code section 42-226 and CJM Rule 50 dictate otherwise. Water in the aquifer is subject to conjunctive management regardless of its source, so long as hydraulically connected. See CJM Rule 40.01.

It is not directly on point, but the logic of *Shaub v. District Court of the Fifth Judicial District*, 96 Idaho 924, 926, 539 P.2d 277, 279 (1975), is applicable:

It is well settled in Idaho that an adjudication of water rights to a main stream also adjudicates rights to all tributary streams and other sources of supply to the main stream.

This reasoning dates back to *Malad Valley Irrigation Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). See also *Martiny v. Wells*, 91 Idaho 215, 218, 419 P.2d 470, 473 (1966). Facts about the source may be informative as to whether shortages are the result of weather or pumping, but once water enters the aquifer and river channels of the Eastern Snake River Plain from whatever source it is subject to administration by priority. That is the essence of conjunctive management.

IX

THE 10% UNCERTAINTY

The Spring Users Challenge the Director's refusal to subject certain junior ground water right in Water District 130 to administration unless those rights had a depletive effect on the Buhl Gage to Thousand Springs reach of 10% or more of their total diversions. This decision is tied to the 10% uncertainty attributed to the ground water model. The legal underpinnings of this decision are not clear. This is an issue that requires further explanation. Consequently, the issue is reserved for hearing for hearing when a representative of IDWR can explain more thoroughly the legal and factual theories for the decision.

X

THE PHASED IN CURTAILMENT

The Spring Users challenge the phased in curtailment of ground water users over five years as being untimely, inadequate and contrary to law. Spreading the impact of curtailment over the five year period was done to "lessen the economic impact of immediate and complete curtailment." *Clear Springs Order*, p. 34, paragraph 32; *Blue Lakes Order*, p. 27, paragraph 31. On its face the Director's decision seems to run contrary to statutory and case law once material injury to a senior water user is established. E.g., Idaho Code section 42-607, watermaster's duty to "shut or fasten" junior diversions when necessary to supply senior rights. AFRD#2 ("Clearly, a timely response is required when a delivery call is made and water is necessary to respond to that call."). Against this thinking is language in AFRD#2 that the Director may consider, among

other factors, fully economic development. 154 P.3d, 447. The Rules for Conjunctive Management anticipate phased in curtailment under some circumstances.

There are both legal and factual elements in this issue. The factual question is whether immediate curtailment would accomplish satisfaction of the Spring Users' call or whether the call would be futile, at least in part. The legal question is the degree to which economic impact may be considered. That is, can there be a weighing of financial gain and loss if the gain to those making the call is limited and the loss to those curtailed is catastrophic? It is a matter of importance to allow full development of a record in this regard to inform any reviewing court and perhaps the Legislature and Executive. Summary judgment on this issue is inappropriate.

XI

THE SWAN FALLS AGREEMENT

IGWA maintains that the Swan Falls Agreement precludes a delivery call by the Spring Users. In sum the position is that the protection to the Spring Users is in the maintenance of the minimum flows due Idaho Power. This ties to the argument that if the Spring Users need more water they must "chase" that water and develop a different method of securing the water than from simply capturing what comes out of the springs. Again, there is a historical basis for this belief that precedes the Swan Falls Agreement. *1976 Idaho State Water Plan – Part Two* at 118; *1982 Idaho State Water Plan* at 44. The argument reaches beyond the Swan Falls Agreement but has another focus if the Agreement is determined to create a flow that provides a protection to the Spring Users for some water but also limits them if less than their adjudicated rights are met. This understanding was set forth in the 1986 Idaho State Water Plan which commented that "minimum flows for the Murphy Gauging Station should provide an adequate supply of water for aquaculture...." Policy 5G at 38. See *Affidavit of Kenneth A. Dunn*, paragraph 6 at 3-4.

Regardless of historical belief and understandings of many concerned interests, the Spring Users were not parties to the Swan Falls Agreement, and nothing in this record indicates that they agreed to the understanding. The Agreement does not explicitly address the issue. Further, of significance, the partial decrees entered in this case do not reflect any conditions or limitations attributable to the Swan Falls Agreement. On the present record the claim that the Swan Falls Agreement precludes the Spring Users from making a call is rejected, and the Spring Users are entitled to partial summary judgment.

If a decision is reached in an action in District Court concerning this issue contrary to this ruling, this decision will be revisited.

XII

THE FAILURE TO CONVENE A LOCAL GROUND WATER BOARD

IGWA maintains that in the event the Spring Users are granted a right to curtail ground water development, a local ground water board must be convened prior to any such curtailment, relying on I.C. sec. 42-237b:

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affect by one or more user[s] of ground water rights of later priority...such person, as claimant, may make a written statement under oath of such claim to the director of the department of water resources.

Upon receipt of such statement, if the director or the department of water resources deems the statement sufficient and meets the above requirements, the director of the department of water resources shall issue a notice setting the matter for hearing before a local ground water board....

Idaho Code section 42-237d next provides:

Whenever a written statement of claim as provided in section 42-237b hereof is filed with the director of the department of water resources, if the statement of the claimant is deemed sufficient by the director of the department of water resources and meets the requirements of section 2-237b, the said director of the department of water resources shall forthwith proceed to form a local ground water board for the purpose of hearing such claim.

Idaho Code section 42-237c provides:

If the board finds that the use of any junior right or rights so affect the use of the senior rights, [then] it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine.

The Spring Users respond that the provision in 42-237b that a claimant “may make a written statement under oath of such claim to the director of the department of water sources” is optional and is only applicable if the process is initiated by a senior in the first place. This is not persuasive. A senior is never obligated to make a claim. The question is whether, when the senior has a grievance, this is the process that must be followed.

The question is whether the provisions concerning the use of a local ground water board have been superseded by the creation of water districts and the definition of the Director’s and

watermaster's rights and responsibilities. Idaho Code section 42-237a (g)(2) provides in part the "[t]he administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of Title 42, Idaho Code, as the same have been or may hereafter be amended." Idaho Code section 42-602 defines the powers of the

Director:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water with water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

The Spring Water Users and the Ground Water Users are all in a water district. The provisions for the mandatory use of a local ground water board have been superseded so far as resolution of this dispute is concerned. The procedure for use of a local ground water board had obvious due process components built into it, and it may be the Director could utilize that process. Regardless, the Director is not required to do so. Whether due process was met in the procedures that were actually utilized appears to be a remaining question.

XIII

THE PARTIAL DECREES DO NOT CREATE A GUARANTEED MINIMUM WATER SUPPLY

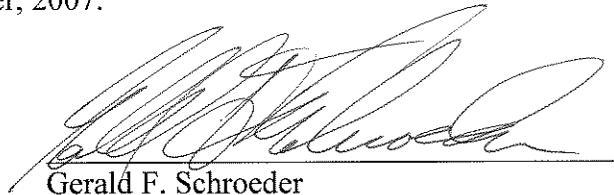
The partial decrees define the amount of water that a water user is entitled to when available and can be applied to a beneficial use. It is a maximum amount, not a guaranteed amount. It is subject to variables, including weather and the rights of prior appropriators. These general principles do not tell much about a result in this case. To justify curtailment there must be a relationship between the use by the junior water right holder of water and a shortage by the senior water right holder of water that could be put to a beneficial use. There are potential defenses to the Spring Users calls that must be addressed at hearing.

CONCLUSION

This opinion outlines the conclusions that can be reached on the issues presented by the Spring Users' Joint Motion for Summary Judgment and the Ground Water Users' Motion for

Partial Summary Judgment. Each motion is granted in part and each is denied in part as set forth in the subsections of this opinion.

DATED this 14 day of November, 2007.

A handwritten signature in black ink, appearing to read 'Gerald F. Schroeder', written over a horizontal line.

Gerald F. Schroeder
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2007, the above and foregoing, was served by the method indicated below, and addressed to the following:

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