

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 ) Subcase No. 75-10117  
Case No. 39576 ) (Lemhi Gold Trust LLC)  
)  
) MEMORANDUM DECISION AND ORDER ON  
) CHALLENGE  
)  
) FINAL ORDER DISALLOWING WATER  
) RIGHT CLAIM  
)  
\_\_\_\_\_ )

I.

FACTS AND PROCEDURAL BACKGROUND

1. This matter concerns the constitutionality of Idaho Code § 42-223(11) as applied to the above-captioned water right claim. The claim was originally filed in the Snake River Basin Adjudication (“SRBA”) on April 17, 1990, by Joseph and Hallie Proksch. It sought the right to divert 0.5 cfs from Ditch Creek for year-round mining purposes under a June 1, 1895, priority. The basis of the claim is beneficial use.

2. On January 11, 2007, the Director filed his *Director’s Report for Irrigation & Other Users, Basin 75*. That *Director’s Report* included a recommendation that the above-captioned water right claim be decreed disallowed. No objections to the recommendation were filed by any party, and on November 13, 2009, this Court entered a *Final Order* disallowing the claim.

3. On September 28, 2012, Lemhi Gold Trust LLC (“Lemhi Gold”), a successor-in-interest to Proksch, filed a *Motion to Set Aside* the *Final Order* disallowing the claim. The *Motion* was filed pursuant to Idaho Rule of Civil Procedure 60(b)(5) and/or (6). The grounds for the *Motion* was that the Idaho Legislature’s enactment of Idaho Code § 42-223(11) on March 25,

2008, resulted in a change of law affecting the viability of this claim.<sup>1</sup> Idaho Code § 42-223(11) altered statutory forfeiture law as it relates to water rights for mining, mineral processing or milling.

4. No party appeared in opposition to Lemhi Gold's *Motion to Set Aside*. On January 30, 2013, this Court entered an *Order* setting aside the *Final Order* disallowing the claim. The matter was then referred to the Special Master for further proceedings.

5. On November 27, 2013, the Director filed an *Amended Director's Report*, which included a new recommendation for the claim. In considering and accounting for the new law set forth by the Legislature in Idaho Code § 42-223(11), the Director no longer recommended that the claim be decreed disallowed. Rather, the Director recommended that the claim be decreed to Lemhi Gold for the diversion of 0.5 cfs from Ditch Creek for year-round mining purposes under a November 19, 1909, priority date. The recommendation included the remark that "[t]his right is recommended pursuant to Section 42-223(11), Idaho Code."<sup>2</sup>

6. *Objections* to the *Amended Director's Report* were subsequently filed by Mitzi Felton, Robert Felton ("Felton"), Richard Rabe ("Rabe"), and Ann Heltsley. Those parties objected on the grounds that the water right should not exist. An *Objection* to the *Amended Director's Report* was also filed by Lemhi Gold. Lemhi Gold objected to the quantity element of the recommendation, asserting that the authorized quantity should be decreed as 3.8 cfs.

7. On April 23, 2014, Felton filed a *Motion for Summary Judgment*. Among other things, Felton raised issues pertaining to the constitutionality of Idaho Code § 42-223(11) on the grounds that the application of that statute works to injure other established rights on the source. Rabe joined, filing a *Memorandum* in support of Felton's *Motion for Summary Judgment* on the same grounds. Lemhi Gold opposed the *Motion*.

8. On June 12, 2014, the Special Master issued his *Order on Motion for Summary Judgment and Motion to Strike and Special Master Report and Recommendation* ("*Special*

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<sup>1</sup> Idaho Code § 42-223(11) was enacted after the Director filed his recommendation that this claim be disallowed, but before this Court entered its *Final Order* disallowing the claim.

<sup>2</sup> Following the filing of an amended *Notice of Claim* by Lemhi Gold, the Director filed a *Second Amended Director's Report* in this matter. In all aspects material to this challenge, the recommendation contained in the *Second Amended Director's Report* mirrored the Director's November 27, 2013, recommendation, except for the addition of the following remark under the "Other Provisions" element: "The point of diversion and place of use are within Mineral Survey Nos. 784A, 784B and 1120." That remark is not at issue in this challenge proceeding.

*Master Report*” or “*SMR*”). In his *Special Master Report*, the Special Master engaged in analysis concerning the constitutionality of Idaho Code § 42-223(11) as applied to the facts of this case. *SMR*, pp.11-13. The Special Master ultimately found that while the claim meets the statutory criteria of Idaho Code § 42-223(11), that statute may be applied constitutionally “only if Lemhi Gold’s water right is subordinated to all water rights on the system with priority dates earlier than the date the statute became effective, March 25, 2008.” *SMR*, p.12. Therefore, the Special Master recommended the claim be decreed as recommended, with the addition of a remark subordinating the right to all water rights on Ditch Creek with priority dates earlier than March 25, 2008.

9. On July 28, 2014, Lemhi Gold filed a *Motion to Alter or Amend* the *Special Master Report*.

10. On August 8, 2014, Lemhi Gold filed a *Motion for Voluntary Disqualification and Reassignment*, wherein it requested for reasons stated therein that the Special Master voluntarily disqualify himself from presiding over the *Motion to Alter or Amend*. On that same date, the Special Master entered an *Order* granting the *Motion for Voluntary Disqualification*. On August 12, 2014, this Court entered an *Order* rescinding its order of reference and treating Lemhi Gold’s *Motion to Alter or Amend* as a *Notice of Challenge* under *SRBA Administrative Order 1, Rules of Procedure*, § 13.c. Briefing in support of the *Notice of Challenge* was filed by Lemhi Gold. Briefing in opposition to the *Notice of Challenge* was filed by Felton and Rabe.

11. Oral argument on challenge was held before this Court on November 3, 2014. The parties did not request the opportunity to submit additional briefing nor does the Court require any. Therefore, this matter is deemed fully submitted for decision on the next business day or November 4, 2014.

## II.

### STANDARD OF REVIEW

#### A. Challenge.

A district court is required to adopt a special master’s findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court “inquires whether the findings of fact are supported by substantial and

competent evidence.” *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18. The special master’s conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master’s conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court’s standard of review of the special master’s conclusions of law is one of free review. *Id.*

**B. Summary judgment.**

This matter comes before the Court on Challenge by way of summary judgment, and the Court is asked to review certain findings and conclusions of the Special Master made pursuant to an order on summary judgment. Summary judgment is properly granted when “the pleadings, depositions, and admissions 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.” I.R.C.P. 56(c). Where the case will be tried without a jury, the district court, as the trier of fact, is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant the summary judgment motion in spite of the potential of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrev. Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005).

**III.**

**CONSTITUTIONAL ANALYSIS OF IDAHO CODE § 42-223(11)**

Lemhi Gold challenges the Special Master’s constitutional analysis of Idaho Code § 42-223(11), and his resulting recommendation that its claim must be subordinated in order to apply the statute in a constitutional manner. Lemhi Gold asserts that the Special Master’s “declaration of unconstitutionality of I.C. § 42-223 is erroneous,” and that his “determination that the statute

is unconstitutional unless Lemhi Gold's right is subordinated was in error and must be corrected." *Motion to Alter or Amend*, p.8. It asserts that "[w]here the Special Master determined that Lemhi Gold's water right qualified for exemption from the operation of forfeiture pursuant to I.C. § 42-223(11), his inquiry should have stopped there." *Id.* Further, that the Special Master's recommendation of subordination is contrary to the language and intent of the statute and "renders the entire purpose of I.C. § 42-223, to exempt certain rights from the operation of forfeiture pursuant to I.C. § 42-222, useless." *Id.*

The constitutionality of statutes enacted by the legislature is a question of law. *Freemont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457, 926 P.2d 1301, 1304 (1996). There is a presumption under Idaho law in favor of the constitutionality of a challenged statute. *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 540, 96 P.3d 637, 641 (2004). The party challenging the statute "bears the burden of establishing that the statute is unconstitutional." *Id.* The Idaho Supreme Court has further instructed that "[t]he judicial power to declare legislative action invalid upon constitutional ground is to be exercised only in clear cases." *Id.* For the reasons set forth herein, the Court finds that the Special Master correctly determined that Idaho Code § 42-223(11) is unconstitutional as applied to the facts of this case.

**A. The Special Master correctly determined that Idaho Code § 42-223(11) is unconstitutional as applied to the above-captioned claim.**

Idaho water law has long recognized statutory forfeiture.<sup>3</sup> At present, Idaho Code § 42-222(2) provides that a water right "shall be lost and forfeited" for five years' nonuse. Various exceptions and defenses to statutory forfeiture are provided for in Idaho Code § 42-223. The most recent statutory exception came about in 2008, when the Idaho Legislature enacted Idaho Code § 42-223(11). That legislation provides a means for exempting water rights for mining, mineral processing or milling from statutory forfeiture if certain conditions are met. It provides in full as follows:

No portion of any water right with a beneficial use related to mining, mineral processing or milling shall be lost or forfeited for nonuse, so long as the nonuse

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<sup>3</sup> Idaho law has contained a statute recognizing and providing for statutory forfeiture since 1903. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 836, 70 P.3d 669, 674 (2003).

results from a closure, suspension or reduced production of the mine, processing facility or mill due in whole or in part to mineral prices, if the mining property has a valuable mineral, as defined in section 47-1205, Idaho Code, and the water right owner has maintained the property and mineral rights for potential future mineral production.

I.C. § 42-223(11).

There is no dispute that the above-captioned claim would have been subject to statutory forfeiture but for the Legislature's enactment of Idaho Code § 42-223(11). Indeed, Lemhi Gold relied upon that basic premise to support and justify its *Motion to Set Aside* this Court's *Final Order* disallowing the claim.<sup>4</sup> In his *Special Master Report*, the Special Master found that prior to the filing of the claim no water had been used under this right for well over five years, and for perhaps as many as sixty years. *SMR*, p.11. No party challenges the Special Master's finding in this respect in this proceeding. In fact, the Special Master found that there is no evidence of a specific date when water was last beneficially used for mining purposes under this right, but recognized that evidence in the record establishes the mine associated with this water right was a viable and working mine in its early years (i.e., 1892-1909). *SMR*, pp.10-11.

In light of the undisputed nonuse, the Special Master analyzed the claim under Idaho Code § 42-223(11), and found that it meets the statutory criteria set forth therein. The claim is for a mining purpose of use. The Special Master found that the mine associated with the claim contains gold, that the nonuse resulted from a cessation in mining production due to gold prices, and that the mine has been maintained for potential future production:

The uncontested evidence supports Lemhi Gold's claim that the Bull of the Woods mine was a viable working mine during its early years, but production stopped when the price of gold failed to warrant further production at the remote site far removed from ore processing facilities. Over the years, assorted mining companies spent millions of dollars confirming the property contains valuable minerals worth extracting as the price of gold rose. Their continuing efforts show the current water right owner and its predecessors in interest "maintained the property and mineral rights for potential future mineral production."

*SMR*, p.11. No party challenges the Special Master's findings in this respect.

Notwithstanding his finding that the claim satisfies Idaho Code § 42-223(11), the Special

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<sup>4</sup> It must be noted that Lemhi Gold did not object to the Director's original recommendation that this claim be disallowed. That recommendation was made prior to the enactment of Idaho Code § 42-223(11). It was only after Idaho Code § 42-223(11) was enacted that Lemhi Gold came before this Court to assert the viability of the claim, relying solely upon the substance of that statute and the resulting change in law.

Master struggled with the constitutionality of the statute when applied to the facts of this case. Of primary concern was the effect the statute's application would have on junior water rights established by Rabe on Ditch Creek during the period of nonuse. After reviewing the Idaho Constitution, as well as pertinent case law from the SRBA and Idaho Supreme Court, the Special Master determined that the statute could not be applied in a constitutional manner to the facts of this case without the inclusion of an additional subordination condition. *SMR*, pp.11-13. He held that "[t]he inescapable conclusion is that, in these circumstances, the statute is constitutional only if Lemhi Gold's water right is subordinated to all water rights on the system with priority dates earlier than the date the statute became effected, March 25, 2008." *SMR*, p.12. The Special Master therefore recommended that Lemhi Gold is entitled to a partial decree adjudicating its claim as recommended by IDWR, with the addition of the following subordination remark: "This water right is subordinated to all water rights on Ditch Creek with priority dates earlier than March 25, 2008." *SMR*, p.13. It is the Special Master's constitutional analysis and his resulting recommendation that Lemhi Gold challenges before this Court.

**i. The application of Idaho Code § 42-223(11) to the above-captioned claim unconstitutionally injures Rabe's water rights in violation of Article XV, § 3 of the Idaho Constitution.**

Article XV, § 3 of the Idaho Constitution provides explicit protections to established water rights. It provides that "[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . ." Further, that "[p]riority of appropriations shall give the better right as between those using the water." The Idaho Supreme addressed the protections afforded by Article XV, § 3 against alleged legislative infringement in *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) ("*Fremont-Madison*"). The Court's constitutional analysis in that case is instructive here and must be reviewed.

In *Fremont-Madison*, the Idaho Supreme Court addressed the constitutionality of Idaho Code §§ 42-1425 and 42-1426. Idaho Code § 42-1425 allows water users in the SRBA to claim historic accomplished changes in certain elements of their water rights that would have otherwise violated Idaho's transfer statutes. Idaho Code § 42-1426 allows water users in the SRBA to claim historically enlarged water rights that would have otherwise violated Idaho's mandatory

permit and licensing statutes. When the constitutionality of those statutes was challenged as violating Article XV, §3 of the Idaho Constitution, the Idaho Supreme Court analyzed whether the application of either statute would result in injury to the priority of any other validly established junior water rights.

With respect to Idaho Code § 42-1425, the Court found that the statute as written expressly protects against such injury. *Fremont-Madison*, 129 Idaho at 458, 926 P.2d at 1305. The statute by its express terms only allows accomplished changes to be claimed in the SRBA “provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.” I.C. § 42-1425(2). The Court found that this express limitation protects “other water users from injury to their rights resulting from a recognition of the transfers that are memorialized in the adjudication.” *Fremont-Madison*, 129 Idaho at 458, 926 P.2d at 1305. The Court upheld the statute as constitutional, holding: “Proceeding under section 42-1425 a water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures water rights existing on the date of the change.” *Id.*

With respect to Idaho Code § 42-1426, the Court expressed concern that injury to established water rights may result from the recognition of historic enlargements:

[S]ome injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called junior appropriator. The junior appropriator will not receive the water that he/she would have received but for the enlargement if there is not enough water to serve all water users. It is difficult, if not impossible, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority.

*Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. The Court proceeded to find that its concerns were adequately addressed and relieved by the express terms of the statute. Like the accomplished transfer statute, the plain language of Idaho Code § 42-1426 only allows enlargements to be claimed in the SRBA “provided, that the enlargement in use did not injure water rights existing on the date of the enlargement.” I.C. § 42-1426(2). Further, that “[i]f injury to a water right later in time cannot be mitigated, then a new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement.” *Id.* Of paramount significance to this case, the Idaho Supreme Court held:



Section 42-1426 of the Idaho Code *would violate Article XV, § 3 of the Idaho Constitution if it allowed a party with a claim for an enlargement to unconditionally receive a priority date as of the date of enlargement regardless of injury to junior appropriators.* However, that is not the case. The clear and unambiguous language of the statute provides that only those enlargements which do not increase the rate of diversion, do not injure other water rights existing on the date of enlargement, and which fully mitigate any potential injury to junior water rights existing as of the date of enactment of the amnesty statutes are permitted. I.C. § 42-1426(2). *Section 42-1426 of the Idaho Code is constitutional as written because it provides that an enlargement cannot be allowed that would injure a junior appropriator.*

*Fremont-Madison*, 129 Idaho at 460, 926 P.2d at 1307 (emphasis added).

Unlike the statutes analyzed in *Fremont-Madison*, Idaho Code § 42-223(11) contains no express protections to prevent injury to other validly established water rights. In this case, the Court finds that the express terms of the statute, as applied to the above-captioned claim, would injure Rabe's water rights by diminishing their priority in violation of Article XV, Section 3 of the Idaho Constitution. The record in this case establishes that during the nonuse period associated with the above-captioned claim, and well after the five year statutory forfeiture had run, Rabe established two intervening water rights on Ditch Creek – water right numbers 75-7349 and 75-7443. Water right number 75-7349 authorizes Rabe to divert 1.97 cfs of water from Ditch creek under an April 11, 1983, priority for irrigation and power purposes. Water right number 75-7443 authorizes Rabe to divert 2.10 cfs from Ditch Creek under an October 31, 1986, priority for year-round power purposes. Both of Rabe's water rights were licensed on September 30, 1996. The Special Master found that "Ditch Creek is fully appropriated, if not over appropriated."<sup>5</sup> *SMR*, pp.11-12. As explained further in the succeeding section of this decision, at the time Rabe established and perfected his two water rights, and up until the time the Idaho Legislature enacted Idaho Code § 42-223(11), the above-captioned water right claim was subject to statutory forfeiture under Idaho Code § 42-222(2). Water use under that right could not lawfully be resumed by Lemhi Gold to the detriment of Rabe under the facts presented here. Therefore, since Idaho Code § 42-223(11) allows a party whose water right was previously subject to statutory forfeiture to resume use under that right to the injury of junior appropriators, the Court finds that the statute violates Article XV, § 3 of the Idaho Constitution.

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<sup>5</sup> No party challenges this holding before the Court in this proceeding.

ii. **The application of Idaho Code § 42-223(11) to the above-captioned claim retroactively injures Rabe's water rights in violation of Article XI, § 12 of the Idaho Constitution.**

Article XI, Section 12 of the Idaho Constitution provides that “[t]he legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.” Idaho Code § 73-101 provides that “[n]o part of these compiled law is retroactive, unless expressly so declared.” As such, “a well-settled and fundamental rule of statutory construction is to construe statutes to have a prospective rather than retroactive effect.” *Guzman v. Piercy*, 155 Idaho 928, 937, 318 P.3d 918, 927 (2014). “A statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute.” *Id.* at 938, 318 P.3d at 928. However, the statute need not use the word “retroactive” to be found to be retroactive. *Id.* “It is sufficient if the enacting words are such that the intention to make the law retroactive is clear.” *Peavy v. McCombs*, 26 Idaho 143, 151, 140 P. 965, 968 (1914); *Guzman*, 155 Idaho at 938, 318 P.3d at 928. The Idaho Supreme Court has instructed that “if the language clearly refers to the past as well as the future, then the intent to make the law retroactive is expressly declared . . . .” *Id.*

By its terms, Idaho Code § 42-223(11) was enacted for the benefit of the association of individuals, corporations and other interests comprising Idaho’s mining industry.<sup>6</sup> When Idaho Code § 42-223(11) was enacted, the Legislature contemporaneously approved and adopted the following emergency clause containing this instruction governing its application:

*An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and shall apply to all existing water rights, but shall not be applied to revive any water right that has been finally determined to be forfeited prior to the date of passage and approval of this act.*

2008 Idaho Sess. Laws 239, §2 (emphasis added). The emergency clause first states that the statute shall have effect “on and after its passage.” That language is prospective, and in effect provides that the act will apply to all water rights for mining, mineral processing or milling

<sup>6</sup> According to the Statement of Purpose, Idaho Code §42-223(11) was tailored to address the situation where “mining operations have not continued to put their water rights to beneficial use because mining activities have been reduced or discontinued due to low mineral prices.” 2008 Idaho Sess. Laws 239, Statement of Purpose RS17656C2.

acquired after its passage. The emergency clause does not stop there, however. In addition to applying on and after its passage, the emergency clause continues “and shall apply to all existing water rights” not finally determined to be forfeited. This language clearly refers to the past, and is retroactive as applied to the facts of this case.

In this case, the Court finds that the above-captioned water right was not finally determined to be forfeited at the time Idaho Code § 42-223(11) was enacted on March 25, 2008. At that time, no court had entered any order or decree finally adjudicating the right to be forfeited. Nor had any third-party, including Rabe, instituted administrative or judicial proceedings and proven by clear and convincing evidence that Lemhi Gold or its predecessors had forfeited the right. *See e.g., Sagewillow, Inc. v. Idaho Department of Water Resources*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003) (holding, “Forfeiture of water rights must be proven by clear and convincing evidence,” and directing further that the party asserting that a water right has been forfeited has burden of proving the forfeiture”). To the contrary, at the time Idaho Code § 42-223(11) was enacted, the above-captioned beneficial use water right had been claimed and was pending unresolved in the SRBA. Although the Director had issued a recommendation prior to the statute’s enactment that the claim be disallowed, this Court had not entered a final order disallowing the claim.<sup>7</sup> Since the water right had never been proven to be forfeited, or finally determined to be forfeited, as of the date of enactment of Idaho Code § 42-223(11), that statute, by and through the express terms contained in the emergency clause, applies here.

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<sup>7</sup> After enactment, this Court did enter a *Final Order* disallowing the claim based on the Director’s recommendation. Lemhi Gold then moved the Court to set aside that *Final Order* under Idaho Rules of Civil Procedure 60(b)(5) & (6). Its motion was based largely on grounds that the recommendation on which the *Final Order* was entered did not take into account the change in law contained in Idaho Code § 42-223(11). Additionally, Lemhi Gold argued that since its beneficial use water right had not been “finally determined to be forfeited” as of the enactment date, Idaho Code § 42-223(11), by its express terms, applied. As stated above, no party to the SRBA opposed Lemhi Gold’s *Motion to Set Aside*. Since the *Motion* unopposed, and since this Court found good cause to set aside the *Final Order* under Rule 60(b) due to the change in law, this Court entered an *Order* setting aside the *Final Order* disallowing the claim. No party opposed Lemhi Gold’s *Motion to Set Aside* at the time it was filed. Likewise, on challenge, no party challenges the decision to set aside the *Final Order* disallowing the above-captioned claim. Any such challenge at this stage in the proceeding would be rejected as untimely for the following reason. This Court’s *Order* setting aside the *Final Order* was entered pursuant to an unopposed *Report and Recommendation* issued by the Special Master on December 11, 2012. Under *SRBA Administrative Order 1*, § 13, any party in the adjudication that disagreed with that *Report and Recommendation* was required to “file a *Motion to Alter or Amend* within 21 days from the date the *Special Master’s Recommendation* appears on the Docket Sheet.” No party to the adjudication, including the parties to this subcase, filed a *Motion to Alter or Amend*. As a result the parties to this subcase waived the right to challenge that decision under *AOI*, § 13, which provides: “Failure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend* the *Special Master’s Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge. The waiver shall also apply to further proceedings in the subcase if remanded back to the Special Master.”

The Court finds that the application of Idaho Code § 42-223(11) to the above-captioned claim works to retroactively diminish Rabe's vested and established water rights on Ditch Creek. The Idaho Supreme Court has directed that a law is retroactive "when it operates upon transactions which have been completed *or upon rights which have been acquired* or upon obligations which have existed prior to its passage." *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 172, 457 P.2d 408, 411 (1969) (emphasis added). Such is the case here. Between the time nonuse subjected the above-captioned water right to statutory forfeiture, and the time Idaho Code § 42-223(11) was enacted, Rabe lawfully acquired vested water rights on Ditch Creek. Under Idaho law, those water rights are real property rights. I.C. § 55-101; *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 797, 252 P.3d 71, 78 (2011). "When one has legally acquired a water right, he has a property right therein that cannot be taken from him for public or private use except by due process of law and upon just compensation being paid therefor." *Clear Springs Foods, Inc.*, 150 Idaho at 797, 252 P.3d at 78.

At the time Rabe established his water rights, the law as it then existed protected Rabe's vested rights against diminishment resulting from an attempt by Lemhi Gold to resume use under its senior right. The law of forfeiture as it existed at that time is succinctly summarized by the Idaho Supreme Court in *Sagewillow, Inc. v. Idaho Department of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003). In *Sagewillow*, the Idaho Supreme Court recognized that statutory forfeiture is not self-executing or automatic. It acknowledged that the mere fact that a water user does not use water under a water right for the five-year statutory period does not automatically result in the loss of the ability to continue diverting water under that right. *Sagewillow*, 138 Idaho at 842, 70 P.3d 680. The Court instructed that "[u]nder the resumption-of-use doctrine, statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party." *Id.* However, the Court made clear that a resumption of use of the original right cannot occur if a third party has intervened and appropriated the forfeited water, as such resumption would result in undeniable injury to the the intervening appropriator. *Id.* When Rabe developed and perfected his water rights, he was entitled to rely upon the law as it then existed.

As applied to the facts of this case, Idaho Code § 42-223(11) works retroactively to fundamentally change the law of forfeiture at the expense of Rabe and for benefit of Lemhi Gold. Prior to the enactment of Idaho Code § 42-223(11), Lemhi Gold would not have been able

to resume use of the above-captioned water right under the analysis provided by the Idaho Supreme Court in *Sagewillow*. As a matter of law, upon issuance, Rabe's water rights were superior to Lemhi Gold's dormant right. The consequence of the passage of Idaho Code § 42-223(11) is that Lemhi Gold now has the better right to the use of water in Ditch Creek as against, and to the detriment of, Rabe. Under the new statute, Lemhi Gold's water right is exempt from forfeiture. If Lemhi Gold were now to resume use under its water right it would do so under its senior priority, despite its extended nonuse. Rabe's rights would then be pushed down the tabulation of priorities on Ditch Creek, thereby diminishing the rights. Given the above, the Court finds that Idaho Code § 42-223(11), as applied to the facts of this case, operates retroactively to affect substantive and vested rights (i.e., Rabe's water rights), and to diminish those vested rights. As such, the Court finds that Idaho Code § 42-223(11) retroactively injures Rabe's water rights in violation of Article XI, § 12 of the Idaho Constitution.

**B. This Court declines to adopt the Special Master's recommendation that the above-captioned claim be subordinated to all water rights on the system with priority dates earlier than March 25, 2008.**

The Special Master found Idaho Code § 42-223(11) unconstitutional in his *Special Master Report*. However, he determined that he could apply the statute in a constitutional manner if he recommended that Lemhi Gold's water right be subordinated to all water rights on the system with priority dates earlier than the date the statute became effective, March 25, 2008. While such a subordination remark may resolve any injury to Rabe and other intervening water users on the source, this Court declines to adopt the Special Master's recommendation in this respect.

The Idaho Supreme Court has instructed that a "[c]ourt cannot engraft a condition that does not exist in the legislation." *Fremont-Madison*, 129 Idaho at 460, 926 P.2d at 1307. Further, that "[i]t is not the province of the Court to read desirable protections into a statute that simply are not there as a matter of legislative prerogative." *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 524, 20 P.3d 702, 708 (2001). If this Court were to adopt that Special Master's subordination recommendation, it would in effect read a condition and/or protection into the plain language Idaho Code § 42-223(11) that is simply not there.

Furthermore, a review of the legislative history associated with Idaho Code § 42-223(11) reveals that the Legislature did not intend for any such protective condition. Prior to the Legislature's enactment of Idaho Code § 42-223(11), the Idaho House of Representatives Minority Leader addressed a letter to Attorney General Lawrence Wasden. The letter presented the Attorney General with various legal questions regarding proposed Senate Bill No. 1348. Among other things, the letter inquired concerning the ability of the Legislature to revive existing senior water rights and injury to junior water users.

On March 5, 2008, the Attorney General responded by providing a legal guideline regarding the Senate Bill ("*AG Legal Guideline*"). The Attorney General advised that "the constitutionality of SB 1348 would hinge upon whether the State has constitutional authority to revive a senior water right to the detriment of a junior water user." *AG Legal Guideline*, p.5. The Attorney General then analyzed and explained the Idaho Supreme Court's treatment of the enlargement statute (I.C. § 42-1426) in *Fremont-Madison*. In light of the Court's constitutional analysis of that statute in *Fremont-Madison*, the Attorney General advised as follows:

If the legislature wants to avoid the constitutional issues raised in *Fremont-Madison*, the solution would be to adopt language similar to that used in section 42-1426, Idaho Code. The legislature could provide for the resumption of forfeited senior water rights where the resumption does not injure other water rights existing on the date of the resumption. Providing that the priority date may be advanced to a date one day later than the priority date for any junior water right injured should resolve any constitutional issues.

*AG Legal Guideline*, p.6.

A copy of the *AG Legal Guideline* was attached by the House Resources & Conservation Committee to its March 11, 2008, minutes concerning Senate Bill 1348. *See Minutes of H. Res. & Conservation Comm.*, 2008 Leg., 59th Sess. 3 (Idaho Mar. 11, 2008). A review of those minutes reveals that the *AG Legal Guideline* was addressed and discussed. *Id.* Notwithstanding, and for reasons not set forth, the Legislature did not heed the advice of the Attorney General. It passed and enacted Idaho Code § 42-223(11) without any protective provisions (subordination or otherwise) addressing junior water rights. The Legislature's action in this respect indicates its intent to refrain from applying the type of protective condition recommended by the Special Master. Therefore, this Court declines to adopt the Special Master's recommendation that Lemhi Gold's water right be subordinated to all water rights on the system with priority dates earlier than the date the statute became effective, March 25, 2008.

**IV.**  
**REMAINING ISSUES**

In addition to the constitutional issue addressed above, Lemhi Gold raises several other issues on challenge. However, given the Court's holding that Idaho Code § 42-223(11) is unconstitutional as applied to the above-captioned claim, it is unnecessary for this Court to reach those additional issues.

**V.**  
**CONCLUSION**

Pursuant to Idaho Rule of Civil Procedure 53(e)(2) and *SRBA Administrative Order 1*, Section 13.f., this Court has reviewed the Findings of Fact contained in the *Special Master Report*, finds that they are supported by the evidence, and wholly adopts them as its own. With respect to the Conclusions of Law contained in the *Special Master Report*, this Court adopts them in part and rejects them in part. For the reasons set forth in this decision, this Court adopts the Special Master's conclusion of law that Idaho Code § 42-223(11) is unconstitutional as applied to the above-captioned water right claim. The Court rejects the Special Master's recommendation, for reasons set forth herein, that the above-captioned claim be decreed as recommended by the Director with the addition of the following subordination remark: "This water right is subordinated to all water rights on Ditch Creek with priority dates earlier than March 25, 2008."

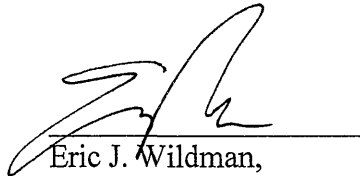
Since applying Idaho Code § 42-223(11) to revive the above-captioned claim would unconstitutionally injure intervening water rights, that statute cannot be applied to save the above-captioned water right from the operation of forfeiture. Nor can that statute relieve the above-captioned claim from the original recommendation in this case that it be decreed disallowed. The Court finds that the clear and convincing evidence in this matter establishes that the above-captioned water right has been forfeited due to nonuse, and that use cannot be resumed under the resumption of use doctrine due to intervening water rights on the source. Because the Court is prohibited from crafting a subordination remark to remedy the injury, the above-captioned claim must be decreed disallowed.

**VI.**  
**ORDER**

BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The ruling of the Special Master is affirmed in part and reversed and modified in part as set forth in this decision.
2. The above water right claim is hereby **disallowed with prejudice** and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

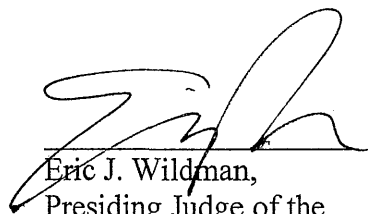
DATED: November 12, 2014

  
Eric J. Wildman,  
Presiding Judge of the  
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: November 12, 2014

  
Eric J. Wildman,  
Presiding Judge of the  
Snake River Basin Adjudication



CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE / FINAL ORDER DISALLOWING WATER RIGHT CLAIM was mailed on November 12, 2014, with sufficient first-class postage to the following:

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