

**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) **Subcases 74-50A, 74-380A, 74-381A and**
) **74-10146**
Case No. 39576) **(Carlson)**
)
) **SPECIAL MASTER REPORT**
) **and ORDER SETTING DEADLINE**
) **FOR OBJECTIONS**

Findings of Fact

Background

The Director of the Idaho Department of Water Resources filed his *Director's Report, Reporting Area 23, IDWR Basin 74* on January 23, 2006. The Director recommended claim 74-10146, filed by Thomas and Evelyn Carlson, P.O. Box 206, Leadore, Idaho, 83464, be disallowed: "Right not claimed in prior adjudication."¹

The Carlsons filed an *Objection* on April 21, 2006, objecting to claim 74-10146 being recommended disallowed:

We recently purchased the property that water right 74-10146 supplied irrigation water for since the Colemans homesteaded the ranch. The water out of Adams Creek had a priority date of 11-06-1908. Shirley Coleman who we bought this ranch assured us all water rights were in order and that Mr Ray Rigby Sr from Rexburg ID. had handled them for her. I talked to Mr Rigby and feel he is an excellent water rights specialist and between all of use, we hope we can get this straightened out.

¹ IDWR identified 74-50A, 74-380A and 74-381A as the Carlsons' uncontested claims overlapping with 74-10146. Only claim 74-10146 is at issue here.

In the *Notice of Claim* attached to the Carlsons' *Objection*, they claimed .47 cfs from Adams Creek, tributary to sinks,² for year-'round domestic and stock uses and to irrigate 158 acres in Lemhi County from March 15 to November 15 with a priority date of November 6, 1908, based on beneficial use.

The Special Master entered an ***Order Requesting 706 Report and Alternative Recommendation*** on May 20, 2008, requesting an I.R.C.P. 706 Report concerning the underlying facts and data upon which it based its recommendation including an "alternative recommendation" in the event the Carlsons' claim is allowed.

IDWR filed its *Supplemental Director's Report Regarding Subcase No. 74-10146* on July 11, 2008. It found that water right 74-10146 was not claimed in the general stream adjudication known as the Lemhi Adjudication commenced in 1970. Therefore, "the legal doctrine of *res judicata*³ bars reconsideration of the nature and extent of all water rights previously adjudicated [citing I.C. §42-1420]."

Most importantly, IDWR found that even though the Carlsons' predecessor-in-interest (Coleman) was a party to the Lemhi Adjudication, "Adams Creek, the source claimed for water right no. 74-10146, was not a listed or decreed source in the Lemhi Adjudication."

IDWR concluded its *Supplemental Director's Report* by stating that, but for *res judicata*, it would recommend the claim for .4 cfs with a priority date of March 15, 1934, based on statements of witnesses to historic beneficial use of water on the Coleman Ranch.

The Carlsons lodged their *Pre-Trial Memorandum* on July 11, 2008. They argued their beneficial use claim is not precluded by the Lemhi Decree:

The Lemhi County District Court lacked subject matter jurisdiction to enter a final decree in the Lemhi Adjudication because the Snake River Basin Adjudication had commenced and all jurisdiction to adjudicate water rights within the Snake River Basin was vested in the Snake River

² The importance of this language will become apparent later in this ***Report***. There is evidence that Adams Creek is a "terminating stream" that ends 5-6 miles from the Lemhi River.

³ "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." *Black's Law Dictionary* 1174 (5th ed., West 1979).

Basin District Court. Because the Lemhi Court lacked subject matter jurisdiction, its “final decree” should be voided – at least as far as it is being used by IDWR to bar Claimant’s beneficial claim is concerned. As such, the final decree entered is not binding on Claimants or others in the Lemhi basin, and it cannot be used to preclude them from making beneficial use claims for water rights in the Snake River Basin Adjudication. Further, even if the Lemhi Decree were valid for all purposes, Idaho has historically supplemented its water right decrees and has not applied claim preclusion to supplement claims. Finally, the policy of the Snake River Basin Adjudication is to determine accurately the water rights within the Snake River Basin, and precluding Claimants from making a beneficial use claim based on historical beneficial use violates that policy.

Trial

Trial was held on July 24, 2008, at the SRBA Courthouse in Twin Falls, Idaho. Jerry R. Rigby appeared for the Carlsons, along with his clients, and Chris M. Bromley appeared for IDWR, along with senior water resource agent Nathaniel Arave. At trial, counsel for the Carlsons and IDWR agreed that IDWR would amend its draft recommendation of 74-10146 if the claim is allowed – the priority date would now be March 15, 1927, instead of March 15, 1934.

The Carlsons presented no witnesses, but offered the *Affidavit* of Ray W. Rigby to explain how claims not decreed in the 1910 Rexburg Decree were later adjudicated under Idaho’s summary supplemental adjudication statute, I.C. §42-1405 (now I.C. § 42-1424). Ray Rigby concluded that Idaho’s supplemental adjudication statute has not been used to the extent it was in the past, but there is no apparent reason why a claimant must wait for completion of the SRBA to file for a supplemental adjudication:

At the time of the so called Lemhi Adjudication said Supplemental Adjudication Statute was still in full force and effect and it was generally understood that in furtherance of the agreement with the power company [Idaho Power Company], every claim to a water right on the Snake River and its tributaries, both those of record, by other adjudications or not, would be made of record. And as many rights with priorities prior to 1910 have been granted in the area covered by the Rexburg Decree, so should those rights missed in the Lemhi Adjudication, if proof is made of their use, even before the date of the Lemhi Decree.

At trial, the Carlsons next made an argument they called “dispositive” – because the final order in the Lemhi Adjudication was not signed until *after* the November 19,

1987 **Commencement Order** in the SRBA, the Lemhi Adjudication is not final and the SRBA now has exclusive jurisdiction over the Carlsons' claim, citing *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993) and *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998). Hence, their beneficial use claim is not barred by *res judicata*.⁴ The Carlsons finally argued fairness because other similar late claims have been decreed in the SRBA, no one opposed their claim and there is no evidence their claim will impair other water rights.

IDWR conceded the Carlsons' water has been historically diverted and beneficially used as IDWR recommended in its *Supplemental Director's Report*. The Carlsons agreed with IDWR its *Report* would be submitted in lieu agent Arave's testimony, but certain issues arose during closing statements and agent Arave was called to testify. He said some high flow claims were acknowledged but not decreed in the Lemhi Adjudication. He said there is no evidence the Carlsons' claim was ever filed or even reported, probably because, unlike now, IDWR may have deemed it a high flow claim. In fact, Adams Creek, the source of the Carlsons' claim, was not listed in the Lemhi Adjudication. Agent Arave thought that might be because Adams Creek was considered non-tributary to the Lemhi River.

Conclusions of Law

Under I.R.C.P. 60(b)(6), a court may relieve a party from a final judgment for any reason justifying relief from the operation of the judgment, but any motion for relief must be made within a reasonable time.

⁴ The Lemhi Adjudication commenced with District Judge Arnold T. Beebe's August 13, 1970 **Order** and ended with Judge Beebe's December 30, 1982 **Partial Decree Pursuant to Rule 54(b), I.R.C.P.** See District Judge James C. Herndon's October 14, 1992 **Lemhi County Case, Minute Entry, Case No. 4948** – his rulings included:

1) The December 30, 1982, partial decree shall be considered a final decree in this matter.

.....

3) It was ordered . . . that this matter be consolidated with the Snake River Basin Adjudication with the jurisdiction, in Twin Falls, so the procedures can be followed that have been established by the sitting Judge there, Daniel C. Hurlbutt.

.....

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

On March 3, 1993, Judge Herndon entered an **Order to Stay Proceedings** ordering that "all further proceedings in this matter [Lemhi Adjudication] are stayed pending resolution of the U.S. claims to water rights in the Lemhi basin in the SRBA District Court."

The record supports the Carlsons' beneficial use claim in subcase 74-10146 and they have stated sufficient reason justifying relief from the operation of District Judge Arnold T. Beebe's December 30, 1982 *Partial Decree Pursuant to Rule 54(b), I.R.C.P.* in the Lemhi Adjudication. The Carlsons' *Objection* was timely filed and it would not be fair to deny their claim in the SRBA based on *res judicata* given the possibilities that in the Lemhi Adjudication 1) the claim was deemed to be a high flow claim and therefore excluded and 2) the claimed source was not considered tributary to the Lemhi River and therefore excluded.

For the above reasons, the Carlsons' claims should be decreed in the SRBA. But several issues raised in this matter warrant further comment. On the issue of whether the Lemhi Adjudication is final, SRBA Presiding Judge John M. Melanson may have answered the question in the affirmative. He asked whether it was necessary to consolidate the Lemhi Adjudication with the SRBA. In his May 25, 2004 *Order Re: In the Matter of the General Determination of the Right to the Use of Surface Waters and Tributaries from Whatever Source of the Lemhi Drainage Basin (Lemhi Adjudication)*, Judge Melanson held:

[T]his Court concluded that consolidation with the SRBA was not necessary based on the final decree issued on the Lemhi Adjudication, and that the final decree would have the same legal effect in the SRBA as other prior decrees addressed in the SRBA.⁵

On the issue of high flow claims, sometimes called high water or flood water, there is evidence that some high flow claims were not considered in the Lemhi Adjudication. First, for a definition:

“High water” or “Flood water” . . . describes a natural flow of “water over and above the amounts required to fulfill (1) existing quantified rights as shown in the decree of water rights and (2) any future rights that may be established pursuant to statutory procedures of the State of Idaho.

Judge Beebe's and the parties' February 11, 1982 *Stipulation Resolving General Objections*, “definitions.”

⁵ Whether one considers the final decree or judgment in the Lemhi Adjudication to be Judge Beebe's December 30, 1982 *Partial Decree Pursuant to Rule 54(b), I.R.C.P.*, Judge Herndon's October 14, 1992 *Lemhi County Case, Minute Entry, Case No. 4948* or Judge Herndon's March 3, 1993 *Order to Stay Proceedings*, the result is the same – a final decree has been entered and is entitled to the same legal effect in the SRBA as other prior decrees. Of course, if the final decree in the Lemhi Adjudication was entered in 1982, that would be nearly 5 years *before* the SRBA commenced; that would obviate the Carlsons' argument that the SRBA subsumed the Lemhi Adjudication before it became final.

Next a bit of background to understand the basis of high water or flood water claims:

The Lemhi River Basin presently has almost non-existent storage facilities in which to preserve water for use later in the irrigation season when the flow in surface water sources diminishes. Diversions of high waters or flood waters for irrigation purposes within the basin have been practiced in an effort to hold or store water underground within the basin, which later contributes to the flow of the streams and river, and has the effect of augmenting or supplementing this flow during the latter portion of the irrigation season. While the amount of such high water available varies from year to year, an effort has been made to divert all of such water, whenever and in whatever amounts it is available, and to apply it on the irrigated lands. The practice has been to distribute and use this water in an informal manner. There is some potential for development of water storage projects within the basin; however, general interest in such development will probably only occur as the economic feasibility thereof increases.

....

Water has been diverted and applied to a beneficial use as described in the following decree of water rights. In addition, the water users in the Lemhi River Basin have historically diverted the so called "high water or flood water" generally during the months of May or June.

February 11, 1982 *Stipulation Resolving General Objections*, "findings of fact."

With that background, there is evidence to support agent Arave's conclusion that some high flow claims were acknowledged but not decreed in the Lemhi Adjudication. In IDWR's May 14, 1976 *Answers to Interrogatories* filed in the Lemhi Adjudication, IDWR was asked: "Why the waterusers were dissuaded by department personnel from filing claims on their historical uses of this high or flood water and why many of the claims of those who did claim the use of high or flood waters were not recommended. Its answer:

In certain cases it was suggested that claims to high water not be submitted since some people on a stream would have submitted the claims and others not, causing an internal conflict. Further, the claims to "high water" submitted were more than questionable since the basis of priority, rate of diversion and season of use were of a manner to interfere with the quantified rights. Department personnel did take claims to the high or flood water from any individual who wanted to submit a claim to the same.

Answers to Interrogatories, at 6-7.

The Carlsons are entitled to a partial decree adjudicating a water right as described in Attachment B to IDWR's *Supplemental Director's Report Regarding Subcase No. 74-10146*, as amended at trial, and the attached ***Special Master Recommendation for Partial Decree for Water Right 74-10146***.

It would be in the best interests of all SRBA parties that docket sheet notice of proceedings concerning this claim, initially recommended by IDWR for disallowal, be given an adequate objection period.

Order

THEREFORE, IT IS ORDERED that objections to 1) the Carlsons' claim in subcase 74-10146, 2) IDWR's *Supplemental Director's Report Regarding Subcase No. 74-10146*, as amended at trial, and 3) this ***Special Master Report*** shall be filed with the SRBA Court no later than **Tuesday, October 28, 2008**.

DATED September 24, 2008.

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication