

**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 43-10356**
) **(William D. Jones and Son)**
Case No. 39576)
_____) **SPECIAL MASTER REPORT**

FINDINGS OF FACT¹

Claim

William D. Jones and William D. Jones and Son, P.O. Box 152, Almo, Idaho 83312, filed a *Notice of Claim to a Water Right* (43-10356) on June 6, 1989, claiming 2 cfs from South Almo Creek and laterals to irrigate 73 acres in Cassia County from March 15 to November 15 with a priority date of April 30, 1879, based on beneficial use.

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 43* on September 28, 2001. The Director recommended the claim to William D. Jones and Son ("Jones and Son") for .56 cfs from Almo Creek ("also known as South Almo Creek"), tributary to Raft River, to irrigate 28 acres from April 1 to October 31 with a priority date of April 1, 1935, based on beneficial use. Claim 43-10356 is the last water right on Almo Creek before it joins the Raft River.² It is also the most junior water right on Almo Creek.

Objections

Roscoe and Joyce Ward filed an *Objection* on January 31, 2002, alleging the water right should not exist. Nolan K. Branch, Clark W. Ward, Olene Warr (Warr Brothers) and Reid S.

¹ Many of the findings of fact are from the April 3, 2003 *Special Master Report and Recommendation Re: Interim Administration* and are repeated here for the convenience of the reader.

² "Almo Creek can be characterized as discontinuous, but connected, stream segments. Almo Creek flows on the surface in gaining reaches, and sinks below the surface in losing reaches, depending on irrigation practices and seasonal ground water table fluctuations. . . . Almo Creek naturally flows in a southeasterly direction but some man-made ditches have altered this natural course." *Supplemental Director's Report Regarding Subcase No. 43-10356*, May 20, 2003, at 3 and Figure 1 attached thereto.

Stewart filed the same *Objection* on February 4, 2002, and Rodney Hall filed his *Objection* on February 7, 2002. On July 15, 2002, the Special Master entered an *Order Dismissing Objection* dismissing Reid S. Stewart's *Objection* based on his motion. Jones and Son did not object to the Director's recommendation.

Joint Motion for Interim Administration

On December 5, 2002, objectors Roscoe Ward, Nolan K. Branch, Rodney Hall and Olene Warr filed a *Joint Motion for Interim Administrative Order* seeking interim administration of 43-10356 "as part of Water District 43B [Raft River Water District] and requiring the claimants [Jones and Son] to follow the laws of the State of Idaho and limiting the usage of this claim to that which has been recommended by the Department of Water Resources." On February 19, 2003, objectors Roscoe and Joyce Ward filed a *Certificate of Service* completing service of notice on all claimants of water from the Raft River and Almo Creek who might be adversely affected by the requested order of interim administration pursuant to I.C. § 42-1417, (2),(b).

IDWR Recommendation

On March 14, 2003, IDWR filed its *Recommendation for Interim Administration for Subcase No. 43-10356*. First, IDWR included 43-10356 within its general provision for "separate streams" and recommended 43-10356 as a separate water right from Raft River. That general provision reads:

The following water rights from the following sources of water in Basin 43 shall be administered separately from all other water rights in Basin 43 in accordance with the prior appropriation doctrine as established by Idaho law.³

Next, IDWR recommended that claim 43-10356 be administered pursuant to the current *Director's Report*. That meant that Jones and Son could divert .56 cfs at 2 points of diversion to irrigate their 28 acres. IDWR noted that Jones and Son recently changed their delivery system to include a concrete structure or dam across the natural channel of Almo Creek and that their pumping from the pool above that concrete structure or dam "may cause injury to senior Raft

³ At a later hearing, senior water resources agent Vikie Hancock said that IDWR based its recommendation for "separate stream" designation of 43-10356 solely on the 1928 "*Jobe Adams* decree." *Albion-Idaho Land Company v. Jobe Adams, et al.*, Decree No. 992 (D. Idaho 1928). Jones and Son based their claim on beneficial use (not any decree) with a priority date of 1879, but IDWR recommended a 1935 priority date. Jones and Son did not object to the recommended priority date.

River water rights and may improperly impound unnamed springs that are tributary to Raft River.”⁴

Therefore, the Department recommends that the claimant [Jones and Son] allow water to pass through the existing concrete structure The claimant may pump water further north of the concrete structure either directly from the ditch . . . or from a different holding pond, if such pond does not intercept springs that would be tributary to either Almo Creek or the Raft River.

Finally, as to the objectors’ request that claim 43-10356 be administered as part of the Raft River Water District 43B, IDWR noted the claim is currently considered to be within the Almo Creek Water District 43D: “The Department sees no reason that this should be changed at this time.”

Pre-Hearing Agreement

Just before the hearing on the objectors’ *Joint Motion for Interim Administrative Order*, Jones and Son filed their *Response to Reply to Memorandum in Opposition to Objectors’ Joint Motion for Interim Administration Order*. They wrote: “Claimant Jones has no objection to an *Order for Interim Administration* being entered in accordance with the recommendation of IDWR for interim administration.”

Hearing

A hearing before the Special Master on the objectors’ *Joint Motion* was held at the SRBA Courthouse in Twin Falls, Idaho. Jason D. Walker appeared for claimants Jones and Son (William and Annalee Jones and their son, Rod Jones); objectors Roscoe and Joyce Ward, Nolan K. Branch, Rodney Hall and Olene Warr appeared *pro se*; and Candice M. McHugh appeared for IDWR, along with Vikie Hancock, IDWR senior water resource agent (Southern Region Office).

The objectors’ main concerns with IDWR’s *Recommendation for Interim Administration for Subcase No. 43-10356* had to do with the recommended source and its “separate streams” designation. The objectors wanted to prevent Jones and Son from diverting spring water rising immediately upstream from their recently constructed concrete structure or dam in Almo Creek near the junction of Almo Creek and the Raft River. The objectors did not agree that 43-10356 should be administered separately from the Raft River. They maintained that the spring water is

⁴ At trial, there was evidence that the concrete structure was actually built as part of a four or five year United States Department of Agriculture, Natural Resource Conservation Service, Almo Creek watershed project for flood control, to raise the valley water table and to control erosion. Trial Transcript (*TTr*), at 210-215. The NRCS designed and partially funded the structure and Jones and Son contracted out the work. *TTr*, at 290-291.

tributary to the Raft River from which they divert downstream below the junction. For that reason, they want 43-10356 administered as part of the Raft River Water District 43B instead of the Almo Creek Water District 43D.⁵ Water right 43-10356 is junior to the objectors' water rights from the Raft River.

Interim Administration

1. Special Master Report and Recommendation

On April 3, 2003, the Special Master entered a *Special Master Report and Recommendation Re: Interim Administration and Order Deadline to File Motions to Alter or Amend*. The Special Master recommended that, pending a trial on the merits, claim 43-10356 be administered as recommended by IDWR. The Special Master also set a deadline for all claimants of water from the Raft River and Almo Creek who might be adversely affected by the requested order of interim administration to file motions to alter or amend no later than April 17, 2003. No one filed such a motion.

2. Order of Interim Administration

On May 14, 2003, former-Presiding Judge Roger S. Burdick entered his *Order of Interim Administration; I.C. § 42-1417* "that [water right claim 43-10356] shall be administered in accordance with the *Special Master's Report and Recommendation Re: Interim Administration* until such time as the *Partial Decree* is entered therefore [sic], or upon further order of this Court."

Supplemental Director's Report

On May 20, 2003, IDWR filed a *Supplemental Director's Report Regarding Subcase No. 43-10356*. In his *Supplemental Director's Report*, the Director recommended deletion of a claimed point of diversion in § 30 and a change in the one remaining point of diversion (T 15S, R 25E, § 32, ~~NESENW~~ NESWNE) – "the point of diversion from the altered channel of Almo

⁵ At trial, one aspect of the objectors' position was stated as follows:

SPECIAL MASTER DOLAN: The Jobe Adams decree decreed all existing water rights on the date of the decree.

MR. MICIAK [counsel for objectors]: Uh-huh.

SPECIAL MASTER DOLAN: I think we can all agree to that.

MR. MICIAK: Yeah.

SPECIAL MASTER DOLAN: So you're saying that any water appropriated after that date or water that's no longer in the natural channel [of Almo Creek] is not subject to the Jobe Adams decree and the separate streams recommendation from IDWR?

MR. MICIAK: That's absolutely right.

TTr, at 302-303.

Creek.”⁶ In addition, the Director recommended: “The source of this water right is correctly described as Almo Creek.”

The *Supplemental Director’s Report* noted:

Water right number 43-10356 was not decreed in the *Jobe Adams Decree* but is a beneficial use right with a 1935 priority date. This water right has never been administered because it is a beneficial use right. Consequently, this water right, although technically within the boundaries of the Almo Creek Water District, 43D has never been actively administered as part of any water district.

Supplemental Director’s Report, at 8.

In his *Supplemental Director’s Report*, the Director did not explicitly reiterate his earlier recommendation that water right 43-10356 be administered separately from Raft River water rights. Nevertheless, it was clearly understood that such was his intent. While noting that 43-10356 has never been actively administered as part of any water district (being a beneficial use claim), the Director wrote: “The Department included water right number 43-10356 on its general provision for separate streams and listed this water right as being separate.” *Supplemental Director’s Report*, at 8. That designation did not change since the original 2001 *Director’s Reports*.⁷

Trial

Trial was held over two days on May 29 and 30, 2003, at the Cassia County Courthouse in Burley, Idaho. Jason D. Walker appeared for claimants Jones and Son; Jason R. Miciak appeared for objectors Roscoe and Joyce Ward, Nolan K. Branch, Rodney Hall and Olene Warr; Clark W. Ward appeared *pro se*; and Candice M. McHugh appeared for IDWR, along with Vikie Hancock.

At trial, Clark W. Ward withdrew his objection when he confirmed that IDWR recommended deletion of the point of diversion in § 30 and a change of the one remaining point of diversion in § 32, from the west end of the Jones Ditch to the east end (variously called the “dirt dam” or “washout”).

⁶ At the hearing on the *Joint Motion for Interim Administrative Order*, William Jones agreed that the upper diversion point in § 30 is unusable without significant improvements.

⁷ At trial, Vikie Hancock was asked whether IDWR’s recommendation concerning separate streams administration had changed since the original *Director’s Reports*. Ms Hancock replied: “So I would, I would say that the department’s position then would be as it is in the supplemental director’s report, that this right was on Almo Creek and would be administered separately. There’s nothing that’s changed.” *TTr.*, at 82.

Post-Trial Matters

1. Briefing

At the conclusion of the trial, counsel for the parties agreed to submit closing arguments in writing. The objectors lodged their *Opening Post Trial Brief* on September 5, 2003. The claimants Jones and Son lodged their *Claimant's Post-Trial Memorandum and Findings of Fact and Conclusions of Law* on October 3, 2003. Finally, the objectors lodged their *Reply Brief* on October 24, 2003. The matter was deemed submitted for decision when the 370 page *Transcript* was lodged on December 17, 2003.

2. Site Inspection

Upon agreement of counsel, the general area of the diversion and use of water under claim 43-10356, near Almo, Idaho, was viewed by the Special Master on June 6, 2003, accompanied by counsel for the parties, Vikie Hancock and Doug Jones, IDWR water rights supervisor (Southern Region Office).

CONCLUSIONS OF LAW

***Prima Facie* Weight of IDWR Director's Recommendation**

Idaho Code § 42-1411, (4) states that, "Upon filing with the court, the director's report . . . shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law." That means the elements of water rights recommended in director's reports are presumed to be true unless disproved by some evidence to the contrary:

The Legislature's direction that the contents of the Director's report shall constitute prima facie evidence of some water right claims was a permissible exercise of the authority, recognized in I.R.E. 301, to create an evidentiary presumption. Unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the Director's report are established.

In Re SRBA Case No. 39576, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995).

Issues in Dispute

The objectors' disputes with the Director's *Supplemental Director's Report* were the same ones they voiced earlier when the Director first recommended 43-10356: the recommended source (Almo Creek) and IDWR's inclusion of 43-10356 in its general provision for separate streams. The objectors argued that the source is actually spring water tributary to the Raft River, not Almo Creek; hence, the water right should be administered as part of the Raft River Water

District 43B, not the Almo Creek Water District 43D. The objectors did not dispute any other elements recommended in the Director's *Supplemental Director's Report*. Jones and Son disputed none of the Director's amended recommendations, including deletion of the point of diversion in § 30 and a change in the legal description of the one remaining point of diversion in § 32.

1. Source⁸

The witness testimony and follow-up site inspection confirmed IDWR's description of Almo Creek as "discontinuous, but connected, stream segments," at least below the Sylvia Knight diversion (attached exhibit, Point B). All the surface flow of Almo Creek is diverted by Sylvia Knight upstream from the Jones and Son's recommended point of diversion (attached exhibit, Point F). Below the Knight diversion, it would be fair to say Almo Creek is intermittent, except during high water events. In fact, it requires an experienced water agent to identify which of the multiple channels in the nearly level pastures is the natural course of Almo Creek.

IDWR described the general area as meadowland where man-made ditches have altered the natural course of Almo Creek. During the site inspection, such alterations were evident throughout the area. In addition, stock-grazing has severely impacted all of the riparian areas. The most significant alteration, however, was a man-made six foot wide "straight ditch" that runs west to east from where it intersects the meandering channel of Almo Creek (attached exhibit, marked "Ditch"). Some witnesses called this the "Jones Ditch."

At the intersection point, the Jones Ditch, capable of carrying water up to three feet deep, captures the "underflow" of Almo Creek and conveys it easterly toward the Jones and Son's 28 irrigated acres. *Supplemental Director's Report*, at 7. IDWR reported that the Jones Ditch existed as early as 1956, and that "the natural channel of Almo Creek has been permanently altered many years ago to force creek water into the east-flowing ditch, and that any surface flow coming down the natural channel of Almo Creek had flowed through this man-made straight channel. . . ." Based on that information, IDWR concluded:

[I]t is apparent that the straight man-made ditch has become the natural channel of Almo Creek and should be so recognized by the Department. Therefore, the Department has confirmed that the source for the Claimant's [Jones and Son's] water right number 43-10356 is Almo Creek.

Supplemental Director's Report, at 7-8.

⁸ The exhibit attached hereto, prepared by IDWR, is similar to Figure 1 attached to the *Supplemental Director's Report*, and may help the reader understanding the following discussion.

IDWR originally recommended the point of diversion for water right 43-10356 where the west end of the Jones Ditch intersects the natural channel of Almo Creek. However, it later concluded that it may not be reasonable to install a measuring devise at that point. But it would be fairly simple to install a measuring devise at the east end of the Jones Ditch where IDWR now recommends the Jones and Son's point of diversion for 43-10356. That makes sense because, for administrative purposes, IDWR now considers the Jones Ditch to be the "natural" channel of Almo Creek.

IDWR noted that Jones and Son recently changed his water delivery system by installing a concrete structure or dam across the natural channel of Almo Creek downstream from the recommended point of diversion (attached exhibit, Point D, Pump Site). IDWR found that pumping from this structure may cause injury to senior water rights on the Raft River because it may improperly impound "unnamed springs" that are tributary to the Raft River. To prevent this potential injury, IDWR required Jones and Son to allow water to pass through the structure: "The claimant may pump water further north of the concrete structure either directly from the [straight] ditch . . . or from a different holding pond, if such pond does not intercept springs that would be tributary to either Almo Creek or the Raft River." *Supplemental Director's Report*, at 6, n.2.

Based on the record and in light of the *prima facie* weight accorded the Director's recommendations, the evidence is clear that the source of water right 43-10356 is Almo Creek, not spring water tributary to the Raft River.⁹ The objectors' interests in spring water identified by IDWR as tributary to Almo Creek and the Raft River will be adequately protected by the strictures imposed on Jones and Son as to where they may pump water to irrigate their 28 acres.

2. Separate Streams

Even though the source of water for water right 43-10356 is Almo Creek, tributary to the Raft River, there remains the issue of separate streams designation by IDWR. It will be recalled that IDWR based its recommendation for separate streams designation on the October 18, 1928 *Jobe Adams* decree entered in the United States District Court for the District of Idaho, Southern Division. *Albion-Idaho Land Company v. Jobe Adams, et al.*, Decree No. 992 (D. Idaho 1928).

⁹ By statute, the IDWR Director's role in a general adjudication, such as the SRBA, is that of "an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported . . . I.C. § 42-1401B, (1). In this subcase, neither party presented expert testimony to contradict IDWR's recommendation that the source is Almo Creek.

The critical questions to be answered are whether the *Jobe Adams* decree was an *in personam* (versus *in rem*) action and whether the objectors are bound by the terms of that decree.

A. *In Personam* Action

In the federal diversity of citizenship *Jobe Adams* private adjudication,¹⁰ lasting over 6 years, Judge Charles C. Cavanah decreed various water rights to the Raft River (and its tributaries), “an inter-state stream arising in the Raft River Mountains, having its primary sources in certain springs near Lind, Utah, and near Moulton, Idaho . . . and thence flowing in a northerly direction through Cassia County and emptying into the Snake River near Bonanza Bar.” *Jobe Adams*, at 5 (¶ XIV). The court joined multiple parties¹¹ and decreed “for use in the irrigation of the lands [purpose of use], the following and various amounts of water [quantity] hereinafter specifically mentioned and set out with the priorities [priority date] as hereinafter specified, and set out, for the irrigation of the particular tracts of land [place of use] hereinafter specified and set out. . . .” *Jobe Adams*, at 6 (¶ XX).

In the *Jobe Adams* decree, Judge Cavanah held:

[T]hat a certain creek known as Almo Creek, in its natural state, at times contributes some water to Raft River, but that said Almo Creek and its tributaries . . . by the terms of the decree of the state court,¹² has been set off as a separate water district, and is separately referred to in this decree, its priorities being specifically mentioned in that portion of the decree having to do with Almo Creek [emphasis added].

Jobe Adams, at 5 (¶ XV).

Later in the *Jobe Adams* decree, Judge Cavanah ordered:

Almo Creek

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That Almo Creek and its tributaries . . . do not contribute to the supply of the water users out of Raft River and its tributaries in the irrigation of the land, and that said Almo Creek hereby is set apart as a separate water district; and that the users of water from Raft River and its tributaries have no interest whatever in the use of the waters of Almo Creek and the distribution of the same that the use of the waters of Almo

¹⁰ “That this is an action between citizens of different states and that the amount involved exceeds the sum of \$3000.00, exclusive of interest and costs.” *Jobe Adams Decree*, at 4 (¶ XIII).

¹¹ Judging from the large number of named parties to the *Jobe Adams* case, the court probably joined all known water users diverting from the Raft River and its tributaries.

¹² By this language, it is unclear whether Judge Cavanah was referring to an earlier unknown state district court decree or perhaps to some action or recommendation of C.W. McClain who was appointed as “commissioner” in the *Jobe Adams* private adjudication to take testimony, transcribe the testimony, mark exhibits and transmit the record (“composed of certain stipulations, the oral testimony so taken and the exhibits offered”) to the Court for consideration. *Jobe Adams*, at 3.

Creek in accordance with the priorities hereinafter decreed, or otherwise shall not be considered as a violation of the injunctive provisions of this decree so far as the users of water from Raft River and its tributaries are concerned.

Jobe Adams, at 31.

Finally, Judge Cavanah ordered:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the parties hereto, both plaintiff and defendants, cross-complainants and interveners, together with their heirs, successors, assigns, agents, servants and employees, are hereby severally particularly restrained and enjoined from using, attempting to use, diverting or attempting to divert, any of the waters of said Raft River or its tributaries as hereinbefore defined and set out in any manner except as hereinbefore provided and set out and in strict accordance with the terms of this decree.

Jobe Adams, at 32.

By any fair reading, the lawsuit resulting in the *Jobe Adams* decree was an *in personam* action; i.e., the court acquired jurisdiction or power over the named parties, in contrast to jurisdiction over certain property (the water of the Raft River and its tributaries). That being the case, the named parties and their successors-in-interest are bound by the decree. There is nothing in the record to indicate the *Jobe Adams* decree was ever appealed.

B. Binding Effect of *Jobe Adams* Decree

In 1994, the Interim Legislative Committee on the Snake River Basin Adjudication voiced its concerns about various decrees around the state which, as a matter of law, virtually ignore the hydrologic connection between water sources:

If water resources in the Snake River Basin are to be managed for maximum beneficial use within the constraints of the Constitution, laws of the State and new directives of the legislature, the priority of those rights must be established. There are presently a number of decrees affecting surface and ground water tributary to the Snake River plain. These decrees were created and operate in a vacuum. They do not acknowledge the existence of other tributaries they may affect or rights listed in the decrees are or may be subordinate to other rights not listed. These decrees are not effective vehicles for management of the entire system.

1994 Interim Legislative Committee statement, at 1 (¶ II), quoting from a 1983 Snake River Technical Advisory Committee report, *Needed Water Resources Programs in the Snake River Basin*.

The *Jobe Adams* decree is an example of a court, for whatever reason, ignoring the hydrologic connection between water sources. Judge Cavanah may have done so recognizing the decree of another court, but the legal result is that, since at least 1928 (almost 76 years), Almo

Creek has been considered a separate stream from the Raft River for administrative purposes, despite their clear hydrologic connection.

The Idaho Supreme Court has held that a prior decree entered in a private adjudication is binding only upon the parties (and their privies) to that decree. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997). The Court quoted I.C. § 42-1401A which defines a private adjudication as binding “only those persons joined in the action and for the administration of such rights.” I.C. § 42-1401A, (8). The Court then cited its much earlier decision that a decree in proceedings to adjudicate rights to the use of water are not strictly *in rem*; therefore, the decree is not conclusive as to parties who are strangers to it. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

Of course, in the *Hagerman* case, the Idaho Supreme Court was concerned with whether IDWR was bound by a prior decree entered in a private adjudication and held it was not bound because it was not a party. But a necessary implication from that case is that all parties (and their privies or successors-in-interest) included in the *Jobe Adams* decree are bound by the decree.¹³ That being the state of the law, IDWR has properly administered Almo Creek water separately from the Raft River since at least 1928, when the *Jobe Adams* decree was entered.

In the present subcase, the objectors’ predecessors-in-interest were named parties in the *Jobe Adams* decree and thus they are bound by that court’s determination that Almo Creek water must be administered separately from the Raft River; i.e., Jones and Son’s water source must be administered as part of the Almo Creek Water District 43D, not the Raft River Water District 43B.

Administration of Water Right 43-10356

Water Right 43-10356 should be administered by IDWR as part of Almo Creek Water District 43D as recommended by IDWR and as described in its separate streams general provision.

¹³ In the law, such an implication is termed a “negative pregnant.” Of course, this does not preclude parties to the SRBA with affected rights who were not parties to the *Jobe Adams* decree from attacking and potentially setting aside the separate streams provision in that decree, at least as to their rights. However, parties to the SRBA and their predecessors-in-interest who were parties to the *Jobe Adams* decree are estopped from collaterally attacking the decree.

Jones and Son's Water Right

Jones and Son are entitled to a partial decree adjudicating a water right under claim 43-10356 as described in the attached *Special Master Recommendation for Partial Decree for Water Right 43-10356*.

DATED March 2, 2004

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication