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Department of Water Resources

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For the U.S. Department of the Interior, Bureau of Reclamation

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**RECLAMATION'S BRIEF IN RESPONSE TO DIRECTOR'S APRIL 6, 2005 REQUEST**

INTRODUCTION

The U. S. Department of the Interior, Bureau of Reclamation (Reclamation), by and through its attorney, Kathleen Marion Carr, Office of the Field Solicitor, hereby submits its brief in response to the Director's request of April 6, 2005. *See Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information; and Request for Briefs* (Apr. 6, 2005)(*Request for Briefs*). This request is in response to the January 14, 2005, water delivery call by the seven irrigation districts, reservoir district, and canal companies named in the caption and referred to as the Surface Water Coalition (Coalition), and the Director's Order of February 14, 2005, in this case and on related matters (*Order*). The Director posed the

question in his request for briefs of "whether Idaho law permits the Coalition members to pursue a delivery call to supply water rights that were decreed in a proceeding(s) to which the ground water users were not a party." He also asked that the parties review *Mays v. District Court*, *Scott v. Nampa Meridian Irrigation Dist.*, *Nettleton v. Higginson, and State v. Hagerman Water Right Owners, Inc. See Request for Briefs* at 4 (citations omitted).

In response to the Director's question, yes, the Coalition may pursue a delivery call against ground water users who were not a party to the decree. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d. 809 (1994), and *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), set the prevailing case precedent that the Director must adhere to in a water call situation. *Nettleton* clearly authorized the IDWR to use decrees as a basis for the distribution of water between a party to a decree and a nonparty. *Nettleton*, 98 Idaho at 94. *Musser* mandated that the IDWR administer water in response to a surface water right holder's call on interconnected groundwater use. *Musser*, 125 Idaho at 394-95. Neither case authorizes the IDWR to insulate a nonparty with junior water rights from a call nor to provide it a "super" priority over confirmed senior water rights.

Idaho law provides that decrees of a general and supplementary nature are binding on nonparties that received appropriate notice and the opportunity to be heard. I.C. §§ 42-1420 and 42-1424. With respect to Idaho case law *State v. Hagerman Water Right Owners, Inc.*, provides only that the Director is not prohibited from reexamining water right elements from a private adjudication in a general and supplemental adjudication like the SRBA. 130 Idaho 736, 947 P.2d 409 (1997). It does not address the Director's mandatory duties in a call request situation like *Nettleton* and *Musser*.[1]

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[1] All cases raised by the Director are addressed in more detail below.

FACTS

1. The priority to use waters of the Snake River and its tributaries with points of diversion at or upstream from Milner Dam has been determined by decrees of courts of competent jurisdiction including, but not limited to the following:

(a) *Twin Falls Canal Comp. v. Foster* entered in the District Court of the Fourth Judicial District of the State of Idaho on June 20, 1913 (***Foster Decree)***;

(b) *Burley Irrigation District v. Henry Eagle, Watermaster, Water Dist. No. 36, State of Idaho* entered in the District Court of the Fifth Judicial District for the State of Idaho on July 10, 1968 ***(Eagle Decree)*** and supplemented by *Aberdeen-Springfield Canal Company v. Eagle* entered in the District Court of the Seventh Judicial District for the State of Idaho on March 12, 1969*;*

(c) *Woodville Canal Company v. Clark and Edwards Canal* entered in the Federal District Court for the District of Idaho Eastern Division on June 25, 1929. (***Woodville Decree***).

2. Reclamation holds the following decreed and licensed water rights for irrigation and other purposes for American Falls Reservoir:

(a) Decreed right R-269/Permit No. 15134/**01-00284** for 8000.00 cubic feet per second (cfs) for period of use 1/1 to 12/31. *See* Reclamation license no. R-269 of March 30, 1921, *Woodville Decree* and *Eagle Decree*.

(b) Licensed right R-269/**01-02064** for 1,800,000 for period of use 1/1 to 12/31. *See* Reclamation license no. R-269 of Mar. 30, 1921 and *Woodville Decree*.

(c) Licensed right **01-02061** for 153.00 c.f.s for period of use 4/1 to 10/31. *See* Reclamation license no. 02061 of June 11, 1956.

(d) Licensed right 26216/**01-02060** for 240 c.f.s for period of use 4/1 to 10/31. *See* Reclamation license no. 26216 of 1955.

(e) Licensed right 4117/**01-02040** for 1700.00 c.f.s. for period of use 4/1 to 11/1. *See* Reclamation license no. 4117 of Mar. 31, 1921.

3. Reclamation holds the following licensed water right for irrigation and other purposes for Palisades Reservoir:

(a) Licensed right R-670/**01-02068** for 1,400,000 MAF for period of use of 1/1 to 12/31. *See* Reclamation license R-670 of July 28, 1939.

4. Reclamation holds senior decreed and licensed water rights for Minidoka Dam for irrigation and other purposes as follows:

(a) Decreed right **01-00211A** for 1,070.20 cfs for period of use from 4/1 to 11/1 and priority date Mar. 26, 1903. *See Foster Decree* Right #3.

(b) Decreed right **01-00214A** for 620.00 cfs for period of use from 4/1 to 11/1 and priority date Aug. 6, 1908. *See Foster Decree* Right #6.

(c) Decreed right **01-00217** for 2500.00 cfs for period of use 1/1 to 12/31 and priority date June 15, 1909. *See Foster Decree* Right #9.

(d) Decreed right **01-00219** for 2,500.00 cfs for period of use 1/1 to 12/31 and priority date Dec. 14, 1909. *See Foster Decree* Right #10.

(e) Decreed right **01-00218** for 200 cfs for period of use 1/1 to 12/31 and priority date July 2, 1912. *See Foster Decree Right #9.*

(f) License 4126/**01-02016** for 888 c.f.s. for period of use 4/1 to 11/1 June 16, 1911. *See* Reclamation license no. 4126 of June 16, 1911.

5. In addition, Reclamation holds licensed water rights for Island Park Dam for irrigation and other purposes:

(a) License R-590/**21-02156** for 114,000 acre feet for period of use 1/1 to 12/31. *See* Reclamation license no. R-590 of Mar. 14, 1936.

(b) License R-686/**21-02157** for 21,000 acre feet for period of use 1/1 to 12/31. *See* Reclamation license no. R-686 of June 12, 1940.

6. The 1969 *Eagle Decree* is particularly significant to this proceeding. In the *Eagle Decree* the plaintiffs brought the action pursuant to I.C. § 42-1405, now codified as I.C. § 42-1424, *Summary Supplemental Adjudication of Water Rights.*[2]

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[2] Idaho Code 42-1424 provides:

> (1) Where an adjudication of a water system has been commenced prior to July 1, 1986, or where an adjudication of a water system has been commenced pursuant to subsection (3) of section 42-1404 Idaho Code, resulting in a decree of any court of competent jurisdiction, and thereafter it appears that any claimant having the right to the use of any part of those waters was not included in the decree as a party, and the right was not determined thereby, or that a claimant subsequent to the decree has acquired any right to the use of those waters, the claimant may bring an action to have such right adjudicated in the manner specified in subsection (3) of this subsection.
> * * *
> (3) The following procedure shall be used for any supplemental adjudication:
> (a) A claimant may bring an action in the district court that originally heard the general adjudication to conduct a supplemental adjudication of the water rights of the claimant; and
> (b) The claimant shall, in his complaint, set forth his acceptance as binding upon him of all prior applicable decrees and the findings of facts and conclusions of law upon which they are based, shall request the commencement of a supplemental adjudication and shall set forth the claimed water right in a notice of claim form furnished by the director and attached to the complaint. Thereupon, the district court shall issue a summons and it shall be served upon the state of Idaho and the United States; and
> (c) After return of service of summons, the claimant shall cause to be published once a week for not less than three (3) weeks, a notice of the pendency and purpose of the action in such newspaper or newspapers as the judge of the district court may order, which notice shall contain the title of the court and the cause, the name and post-office address of the claimant, the date of priority of the water right claimed, the source of the water supply, the amount of water claimed, in general the nature of the water use, the approximate location of the point of diversion, and the place of use; and
> (d) Any person who may be injured and who objects to the water right claimed by the claimant, as described in the published notice, shall within forty-five (45) days of the date of the first publication of notice, file with the district court written notice of such objection stating the reasons for the objection. A copy of the objection shall be served upon the claimant upon all other parties of record in the action, the watermasters, and the director; and
> (e) The district court may request that the director determine the water rights in accordance with the procedures set forth in sections 42-1410 through 42-1413, Idaho Code; and
> [(3)(f)-(j) omitted regarding the Director's role in these proceedings]

7. In the *Eagle Decree,* the district court made "Findings of Fact," that, among other things, provided the following:

(a) Henry Eagle has at all times been the Watermaster of Water District No. 36 of the the State of Idaho; and Water District No. 36 was duly created under the laws of State of Idaho for "the purpose of distributing the waters within its boundaries, including all of the waters referred to and affected by this action."

(b) Proper and sufficient notice of the pendency and purpose of the suit was "published in newspapers having general circulation in the counties of Power, Cassia, Minidoka, Twin Falls, Jerome, Blaine, Gooding, Lincoln, and Elmore, Idaho, and that all provisions of Idaho Code Section 42-1405 [42-1424] relating to notice and publication of notice have been complied with."

(c) The parties comprise all presently known parties who are or will be affected by the entry of a decree;

(d) All of the water rights decreed to the lands shall be in addition to and supplemental to all other existing water rights appurtenant to their lands, and such additional water rights shall not in any way change, alter, vary, or diminish any and all other water rights possessed or owned by the parties hereto or appurtenant to their lands.

(e) The contracts as amended entered between the parties and Reclamation should be binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam.

(f) The amended Reclamation contracts "provide the basis of a common plan for the orderly administration of the waters of the Snake River above Milner Dam."

Eagle Decree, "Findings of Fact" ¶ ¶ I(b), III(a), IV, V, VIII, XIII(a) & (b) .

8. The District Court in the *Eagle Decree* "Conclusions of Law" established the following:

(a) The enumerated amounts and the priority dates listed for each party, and established the lands and location for the water diversions.

(b) The "[w]ater available at American Falls Reservoir for the March 30, 1921, priority under water license No. 15134, other than that to be

available to American Falls Reservoir District No. 2 as above provided, [is] to be available for storage in American Falls Reservoir."

(c) The contracts between the individuals and Reclamation "**constitute a scheme or plan for the administration of the Snake River and as such, are binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam.**"

Eagle Decree, "Conclusions of Law" pp.9-11 (emphasis added).

8. In the present case the Surface Water Coalition filed a letter and petition on January 14, 2005, for the administration and curtailment of junior ground water rights with Water District No. 120, the American Falls Ground Water Management Area, and areas of the Eastern Snake Plain Aquifer (ESPA) not within an organized water district or ground water management area. *See Order* at 1 (IDWR Apr. 14, 2005).

9. Idaho Ground Water Appropriators filed two petitions to intervene on February 3, 2005, that IDWR granted in its *Order* of April 14, 2005. *Id.* at 1.

10. In IDWR's *Order* of February 14, 2005, the Director made "Findings of Fact" that included the following:

(a) The ESPA is the "aquifer underlying an area of the Eastern Snake River Plain that is 170 miles long and 60 miles wide" that is "hydraulically connected to the Snake River and tributary water sources."

(b) "[H]istoric ground water depletions are causing reductions in the flows of the Snake River and its tributaries and reductions in the amount of water that could be otherwise diverted by the United States for the benefit of the surface water coalition."

See Order at ¶ ¶ 1 & 6, p.2; ¶ 67, p.15-16.

12. The Director determined in the "Conclusions of Law" that due to low snowpack in the Upper Snake River Basin, senior priority water rights will be injured. *See Order* at ¶ 36, p. 30.

13. The Director of IDWR also determined that it would consider the surface coalitions' water delivery call as one for "administration and curtailment of junior priority water rights." *See Order* at ¶ 4, p.33.

14. On April 6, 2005, IDWR granted Reclamation's *Petition to Intervene as a Party. See Request for Briefs.*

LEGAL BACKGROUND

A general or supplemental stream adjudication is a judicial proceeding that establishes a water right as a protectable property interest. The purpose of an adjudication is to (1) increase the certainty of the water rights by having a court clearly define its elements, (2) help users assess their individual risk of curtailment in times of shortages, (3) help the state manage its resource more effectively through a proper accounting of rights; and (4) to ensure that state laws and procedures provide a fair and impartial forum. *See generally* Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271-72 (1998-89); Krogh-Hampe, *The 1986 Idaho Water Rights Adjudication Statute*, 23 IDAHO L. REV. 1 (1986-87).

A key issue in any court administered water adjudication is how to join and bind all the claimants utilizing the water stream to provide certainty for those water users who wish to have their water rights determined. For this reason, any appropriation of water, whether from the main stream, or from surface or underground tributaries, is generally held to affect the entire stream, and the rights of all, including established users.[3] Courts in other states have found that

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[3] *Wall v. Superior Court of Yavapai Cty.*, 53 Ariz. 344, 89 P.2d 624 (1939); *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 207 P.2d 17, *followed in* 33 Cal.2d 956, 207 P.2d 46 (1949); *Mountain Meadow Ditch & Irrig., Co. v. Park Ditch & Reser. Co.*, 130 Colo. 537, 277 P.2d 527 (1954); *Pecos Valley Artesian Conservancy Dist. v. Peters*, 52 N.M. 148, 193 P.2d 418 (1948); *Jones v. Warm Springs Irrig. Dist.*, 162 Or. 186, 91 P.2d 542 (1939); *Richlands Irrig. Co. v. Westview Irrig. Co.*, 96 Utah 403, 80 P.2d 458 (1938).

an appropriator has an interest in the stream from the source to its point of diversion.[4] The Idaho Idaho Supreme Court affirmed this principle in *Musser* when it determined that the IDWR was required to distribute water in response to a call involving interconnected surface and groundwater supplies of the ESPA. *Musser* 125 Idaho at 395, 871 P.2d at 812.

Idaho's law provides that prior decrees of general or supplemental adjudicatory proceedings are binding upon parties, nonparties, and IDWR as "conclusive proof of the nature and extent of the water rights enumerated therein." I.C. § 42-1420. These rights remain conclusive and binding until the decreed water rights are reexamined either through the Snake River Basin Adjudication or by another court of competent jurisdiction. *See Nettleton, 98* Idaho at 94, 558 P.2d at 1055. Although there may be water proceedings wherein nonparties are not bound by prior decrees, particularly small private decrees; nonparties are nevertheless bound in a call situation if they received appropriate notice and opportunity to participate at the time the decree proceeding occurred as provided by I.C. § 42-1424, a supplemental or general adjudicatory proceeding. The rationale for binding groundwater users to earlier decrees is because these water users commenced their appropriation later than most of the decreed surface water rights, and thereby could only have acquired rights subject to those senior rights.

Even though Idaho case precedent has protected the application of the priority system for decreed, licensed and permitted rights in times of shortages, some cases suggest the courts have misgivings about applying a bright line rule that binds nonparties to decrees in a former general adjudication without formal service of process. *See, infra discussion, Mays v. District Court of*

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[4] *Meine v. Ferris*, 126 Mont. 210, 247 P.2d 195 (1952); *Vomburg v. Farmers Irrig. Dist.*, 132 Neb. 12, 270 N.W. 835 (1937); *Tudor v. Jaca*, 178 Or. 126, 164 P.2d 680 (1945) *reh'g denied* 178 Or. 126, 165 P.2d 770 (1946); *Cundy v. Weber*, 68 S.D. 214, 300 N.W. (1941); *Adams v. Portage Irrig., Reser. & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937); *Lawrence v. Southard*, 192 Wash. 287, 73, P.2d 722 (1937); *Mitchell Irrig. Dist. v. Whiting*, 59 Wyo. 52, 136 P.2d 502 (1943) *cert. denied*, 322 U.S. 727 (1944).

the Sixth Judicial Dist. of Idaho, 34 Idaho 200, 206, 200 P. 115, 116 (1921). Nonetheless, Idaho's legislature has enacted I.C. § 42-607 to ensure that water is distributed in priority to confirmed water rights during times of scarcity, and it has enacted I.C. § 42-4124 to provide publication notice and opportunity to participate to those unknown users who would be affected by administering decreed rights in priority in a call. If IDWR or the courts were to disregard these statutory provisions, it would permit nonparty junior water rights to defeat the certainty provided by formal general adjudications. It would also mean that in every water call, the decreed water user would have to re-establish their water rights all over again.

ARGUMENT

I. THE SURFACE WATER COALITION IS MAKING ITS CALL CONSISTENT WITH IDAHO'S PRIOR APPROPRIATION DOCTRINE

The Idaho Idaho Supreme Court confirmed in *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d. 568, 578 (1998) that "most, if not all, water in the Snake River system is interconnected." The Director reconfirmed this principle in his *Order* of February 14, 2005 when he determined that "ground water in the ESPA is hydraulically connected to the Snake River and tributary surface water sources." *Order* at ¶ 5, p. 2. The Director also established this fact in his *Order* that "ground water depletions are causing reductions in the flows of the Snake River and its tributaries and reductions in the amount of water" that Reclamation could otherwise store. *Order* at ¶ 67, p. 15-16.

Idaho's prior appropriation doctrine is well established and provides that, between senior and junior rights, "the first in time is first in right." I.C. § 42-106. As a result, junior water users are only entitled to divert water when the senior, or prior, rights are satisfied. *See Beecher v. Cassia Creek Irrig. Co., Inc.*, 66 Idaho 1, 154 P.2d 507 (1944). Idaho Code § 42-607 directs

IDWR to prefer water users with "adjudicated, decreed, permit[ed], or licensed right" in a water supply since there is confirmed evidence upon which the state may rely to distinguish between these types of documented water users. I.C. § 42-607.

In Idaho, prior decrees from a general or supplemental adjudication issued by a court of competent jurisdiction establish legally protectable property interests. *See Crow v. Carlson,* 107 Idaho 461, 465, 690 P.2d 916, 920 (1984). Decrees provide not only certainty to the water user about the extent of his property interest, but also provide the State with a means to efficiently administer its water rights to the source by priority. *Nelson v. State*, 131 Idaho 12, 13, 951 P.2d 943, 947 (1998) *citing Stethem v. Skinner*, 11 Idaho 374, 379, 82 P. 451, 452 (1905). The district court in the *Eagle Decree* confirmed the prior appropriation scheme in the case at hand, when it confirmed the water rights and contracts of the Coalition and ordered that together they "constitute a scheme or plan for the administration of the Snake River and as such, are binding upon all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam." *Eagle Decree* at 11.

As provided by the *Eagle Decree* and by Idaho law, the Coalition is entitled to invoke Idaho's prior appropriation doctrine to protect its senior rights, both decreed and licensed, in order for the Director to supervise the distribution of water in times of shortages. If IDWR does not carry out its duties to administer water rights by priority in a call, it will diminish the effective priority of the Coalition's water rights, which is an undeniable injury to the water right holders, *Jenkins v. State*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982), and the Coalition will be without a practical or adequate remedy since a decree is not self-enforcing. *Silkey v. Tiegs,* 51 Idaho 344, 5 P.2d 1049, 1055 (1931). Furthermore, Reclamation will not be able to fill its reservoirs and fulfill its contractual obligations to the Coalition as established in the *Eagle*

Decree when the court determined that together the contracts and rights constitute a scheme of operation of the waters of the Snake River and its tributaries above Milner Dam. *Eagle Decree* at 11.

II. THE DIRECTOR MUST ADMINISTER WATER RIGHTS IN PRIORITY, WHETHER WATER USERS ARE A PARTY OR A NONPARTY TO PRIOR DECREES.

The case *Nettleton v. Higginson,* is applicable to the case and facts at hand. The Idaho Idaho Supreme Court in *Nettleton* held that a nonparty may seek to have his water right adjudicated at any time against other decreed rights. But, the Idaho Supreme Court found, until a supplemental adjudication occurs, the nonparty is bound to have his water rights administered by priority in a water call. 98 Idaho 87, at 95, 558 P.2d 1048, at 1055 (1977).

In that case, Nettleton held unadjudicated constitututional rights, and sued to enjoin IDWR's distribution of water to Reynolds Creek when it had consolidated two water districts into one to distribute stream flows by priority under authority of I.C. § 42-607. Idaho statute § 42-607 provides that constitutional unadjudicated water rights will be treated junior in times of scarcity to those water users with adjudicated, decreed, permited or licensed rights. Nettleton argued that this statute (1) deprived him of a property right without due process of law; (2) denied him equal protection under federal law; and (3) authorized a taking of his property for a public use without just compensation. Significantly, Nettleton also argued that he could not be held to a decree to which he was not a party. 98 Idaho at 89-90, 558 P.2d at 1050-51.

The Idaho Supreme Court found that Nettleton was not denied due process of law since, at any time, he could commence a supplemental adjudication proceeding under I.C. § 42-1405 (now 42-1424) to either allow his constitutional rights to become protected like that of the other

water users or to enable him to challenge the priorities and amounts of other rights. 98 Idaho at 92 & 94, 558 P.2d at 1053 & 1055. The Court also found that Nettleton could not assert that he was not bound by prior decrees in a call given that he had an avenue to challenge prior decrees. Further, the court found that decrees are necessary as they provide IDWR a basis for the orderly distribution of water in time of scarcity until the decrees are later judicially reevaluated. 98 Idaho at 95, 558 P.2d at 1055.

In Nettleton, the Idaho Idaho Supreme Court also sided with the IDWR, and determined that an unadjudicated constitutional right was not a proven right by either judicial or administrative process and, as a consequence, it was not entitled to all the necessary protections given to water rights that were so determined. 98 Idaho at 90 & 92, 558 P.2d at 1051 & 1054. The Court acknowledged that in Idaho under its priority system, the "first in time is first in right," and quoted extensively from *DeRousee v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973), for the proposition that water users with adjudicated, licensed or permitted rights are entitled to have the state protect their established rights against those whose rights are not so established. 98 Idaho at 91, 558 P.2d at 1052.

State v. Hagerman Water Right Owners, Inc., 130 Idaho 736, 947 P.2d 409 (1997) (*HWRO*) is distinguishable from *Nettleton.* In *HWRO*, the Idaho Idaho Supreme Court ruled that prior "private decrees" only can be reexamined by a court in an adjudication. *HWRO* focused on private adjudications initiated under I.C. § 42-1401A, and the Court held such decrees were *not* binding on the IDWR or other parties as conclusive proof of the nature and extent of a water right in the Snake River Basin Adjudication (SRBA). *HWRO,* 130 Idaho at 741, 947 P.2d 414. *HWRO* provides, therefore, that only an adjudication authorizes the Director to reexamine decreed water rights.

Applied to the facts at hand, *Nettleton* and *HWRO*, provide that the ground water users are bound by the prior general adjudicatory decree when a water call is made. In the future, when the SRBA Court has jurisdiction over the senior water rights or if the ground water users commence a quiet title suit, the ground water users may challenge the prior decree rights as partially or fully invalid. Until that time, the IDWR must administer the water rights in priority.

The case *Musser v. Higginson* makes administering a call and supervising the distribution of water rights mandatory duties on IDWR. In *Musser v. Higginson,* 125 Idaho 392, 396, 871 P.2d 809, 813 (1994), the Idaho Idaho Supreme Court affirmed the trial court's determination that the Director must comply with I.C. § 42-602 (subsequently amended), and distribute water in accordance with the Constitution of the State of Idaho and Idaho prior appropriation doctrine as enacted by I.C. § 42-106.

In *Musser*, the trial court had issued a writ of mandate requiring the Director to deliver water to the Mussers' 1892 water right, which was supplied by springs, that were hydrologically connected with the Snake Plain Aquifer. The Idaho Supreme Court confirmed the issuance of a writ when no plain, speedy, and adequate remedy existed in the ordinary course of law. *See Musser,* 125 Idaho at 395, 871 P.2d at 812.

Since the Idaho Supreme Court issued the *Musser* decision, the legislature has amended I.C. § 42-602 to require the Director to have control over distribution of waters only "within a water district." Nevertheless, under this provision the Director still has a mandatory duty to deliver water in a call against known and unknown water users. Particularly where, as here: (1) the water rights are interconnected to a ground and surface supply vested prior to enactment of I.C. § 42-226; (2) the interconnection of the surface and ground water supply has been established; and (3) the water rights to be delivered originate in a water district. I.C. § 42-602; *Musser* 125 Idaho at 396, 871 P.2d 813.

III. UNDER IDAHO CODE §42-1424,[5] IDWR AND NON-PARTIES ARE BOUND BY COURT DECREED WATER RIGHTS

Prior to the legislature enacting the comprehensive adjudicatory scheme for the determination of water use in the SRBA, there were three primary methods to adjudicate water rights. A private adjudication under I.C. § 42-1404 determined the water rights of a small group of water right holders and, by statute, is not binding on non-parties.[6] A general adjudication under I.C. §§ 42-1405 to 42-1423 determined those rights to use water from a water system. A summary supplemental adjudication, I.C. § 42-1424 (previously I.C. § 42-1405), determined rights developed subsequent to the entry of a decree in a private or general adjudication. This latter provision is the one invoked by the parties to the *Eagle Decree* and is in issue here.

In the *Eagle Decree,* the District Court entered its "Findings of Fact" noting it had followed the notice provisions within I.C. § 42-1405 (recodified now at I.C. § 42-1424) to provide published notice to unknown parties in order for them to join the suit to contest the validity of the water rights. This statute provides as follows:

> (d) After return of service of summons, the claimant shall cause to be published once a week for not less than three (3) weeks, a notice of the pendency and purpose of the action in such newspaper or newspapers as the judge of the district court may order, which notice shall contain the title of the court and the cause, the name and post-office address of the claimant, the date of priority of the water right claimed, the source of the water supply, the amount of water claimed, in general the nature of the water use, the approximate location of the point of diversion, and the place of use[.]

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[5] When the *Eagle Decree* was entered the parties petitioned under I.C. §42-1405 that was later redesignated as I.C. § 42-1424. *See Compiler's Notes for both I.C §§ 42-1405 and 42-1424..*

[6] I.C. § 42-1404(6), *Private Actions for the Adjudication of Water Rights,* provides that "The decree shall be conclusive as to the rights determined in the proceeding only as to those persons party to the proceeding." There is no corresponding provision for general or supplemental adjudications commenced under Idaho statute 42-1405 or 42-1424.

> (d) Any person who may be injured and who objects to the water right claimed by the claimant, as described in the published notice, shall within forty-five (45) days of the date of the first publication of notice, file with the district court written notice of such objection stating the reasons for the objection. A copy of the objection shall be served upon the claimant upon all other parties of record in the action, the watermasters, and the director; and

I.C. § 42-1424(3)(c) &(d).

The District Court confirmed in its "Finding of Fact at ¶ IV that proper and sufficient notice of the pendency and purpose of the suit was "published in newspapers having general circulation in the counties of Power, Cassia, Minidoka, Twin Falls, Jerome, Blaine, Gooding, Lincoln and Elmore, Idaho, and that all provisions of Idaho Code Section 42-1405 [42-1424] relating to notice and publication of notice have been complied with." This notice also provided injured parties with an opportunity to participate by coming forward within 45 days to lodge their objections upon the court and the parties in compliance with the statutory notice procedures. *Eagle Decree* at p. 2.

Thus, the District Court, by its order, established that the publication notice was sufficient under I.C. § 42-1424 to "bind all persons claiming rights to the use of the waters of the Snake River and its tributaries above Milner Dam." Furthermore, the Court ordered that the Reclamation contracts and water rights thereto "constitute a scheme or plan for the administration of the Snake River." *Eagle Decree,* "Conclusions of Law" pp.9-11.

Since all the water users to the use of Snake River waters above Milner had notice of the general supplemental adjudication by its publication in local newspapers in <u>nine counties</u> once a week for three weeks, they cannot now argue that they did not have adequate notice or opportunity to participate in the proceedings. This is especially true since the court and the

parties followed the exact procedure set out by the legislature in I.C. § 42-1424 (formerly I.C. § 42-1405) to provide notice to unknown parties.

As discussed above, the Director has a mandatory obligation under Idaho's Constitution and statutes to deliver water in priority to all decreed, licensed and permitted rights. I.C. § 42-602; *Musser v. Higginson*, 125 Idaho 392, 871 P.2d. 809 (1994). If the decree is one of a general or supplemental water adjudication, and entered by a court of competent jurisdiction with appropriate notice and opportunity to participate, it is binding on the IDWR as conclusive proof as to the nature and extent of all water rights in the water system. I.C. § 42-1420. It is also binding on nonparties until such time as they either seek a supplemental adjudication of the rights or quiet title through a separate judicial proceeding. *See* I.C. § 42-602. *See Nettleton v. Higginson,supra discussion.*

I. DISCUSSION OF OTHER CASES RAISED BY DIRECTOR

Mays v. District Court

Mays v. District Court establishes that quiet title suits are a legislatively approved means to establish a water right against other decreed rights. 34 Idaho 200, 200 P. 115 (1921). The case does not address the ability of water right holders to pursue a call.

In *Mays,* an investment company filed a quiet title suit to the waters of the Little Lost River against a large number of defendants. 34 Idaho 200, at 204-205. The issue before the Court was whether the company was required to enforce its rights by filing for a supplemental decree and, thereby, accept as binding earlier decrees or could proceed to quiet title to its water rights under a separate quiet title statue. *Id.* The Idaho Supreme Court found that the legislature did not intend for supplemental adjudications to be the exclusive remedy for those water users situated like the company. 34 Idaho at 206, 200 P. at 116 . The Idaho Supreme Court noted that

the question was not before it to determine whether rights of every existing claimant could be adjudicated *in rem*[7] since there was no such statutory proceeding in the state as of that time (1921).

In *dicta* the Court stated,

> Except for that limited class of actions which are strictly *in rem*, a decree is not, and cannot be made, conclusive, as to parties who are strangers to it. The same principle applies to decrees rendered in proceedings to adjudicate rights to the use of water, they not being strictly *in rem*.

34 Idaho at 206, 200 P. at 116 (internal citations omitted). It is unlikely that this statement can be of any precedential value since the statement is merely dicta; is based on prior statutory language; and the Idaho legislature has since enacted a substantive statute to provide notice to unknown water users, I.C. § 42-1424. Also, it is noteworthy that the statute at issue, § 7036, was repealed in 1981. *See SRBA*, 130 Idaho at 741, n.3. The case does not provide direct insight into the ability of water right holders to pursue a call, but *Mays* is consistent with *Nettleton* on the principle that decrees are not "completely" binding on nonparties as they do not impose a *res judicata* effect. Thus, nonparties can subsequently attack prior decrees in a subsequent judicial proceeding to challenge the extent and validity of the prior rights. Until that time, however, the decrees are "binding enough" to be used by IDWR for the orderly distribution of water.

Scott v. Nampa Meridian Irrigation District

In *Scott v. Nampa Meridian Irrigation. District,* 55 Idaho 672, 45 P.2d 1062 (1934), the Farmers' Cooperative Ditch Company instituted the Boise River Priority Suit in 1902 against numerous appropriators of Boise River water, including Nampa Meridian's Irrigation District's (NMID) predecessor in interest, Central Canal and Land Company---also the same predecessor

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[7] *Black's Law Dictionary* defines "an 'action in rem' as proceeding that takes no cognizance of owner but determines rights to specific property against all the world, equally binding on everyone." (Fifth Ed., 1987)

in interest to the Scotts. In the late 1920s, while the suit to determine water duties for certain lands was still pending, NMID reduced pro rata the water rights it delivered to the Scotts and other water users on a district court's order allocating a "temporary duty of water from the Boise River." 55 Idaho 676-677, 45 P.2d 1063. The Scotts sued to enjoin their reduction in water supply and sought to have their water supply distributed in priority since their priority was equal to that of Nampa Meridian Irrigation District by virtue of the *Stewart Decree*. *Id.* Other water users joined the suit to have their water right distributed in priority against each other within the NMID.

The question before the Idaho Supreme Court was whether the Scotts' rights could be reduced under authority of a temporary court order given their prior right, as provided in the *Stewart Decree,* and as conveyed to them by their predecessor in interest the Central Canal & Land Company. 55 Idaho at 678, 45 P.2d at 1064. The Court found that the Scotts' rights vis-a-vis that of NMID had "temporarily been determined by the classification made by [NMID] under mandate of this court" in a succeeding suit to the *Stewart Decree* that determined the Scotts' right would be distributed by NMID under its first appropriation. 55 Idaho at 679, 45 P.2d at 1064. Moreover, the Court found that the Scotts,' and the other district water users,' rights should be distributed by priority as between each other because the "first in time of use, gives superiority of right." *Id.* In *dicta* the Court added that the Scotts, and other district water users, could not be affected by the pending suit to fix the water duty since they were not parties to the suit, even though, presumably, they were members of NMID and bound by its bylaws and its board's actions. 55 Idaho at 680, 45 P.2d at 1065.

The Idaho Supreme Court further clarified their holding in *Scott* in the *Nettleton* case by stating:

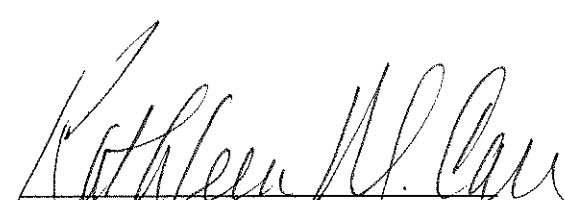
> The Court in *Scott* merely held that the consumers who were not parties to a prior action involving the canal company which supplied them with water were not bound by that decree in the sense of res judicata. They could therefore bring an action to determine their relative priorities to the water furnished by the canal company. 98 Idaho 87, 95, 558 P.2d 1048, 1055 (1977).

In other words, the Idaho Supreme Court's holding in *Scott* is consistent with other cases discussed herein, and is based on the principle that non-parties can be bound by the terms of a decree in a water call, but that to avoid the effects of such a decree they need to challenge it in appropriate court proceedings.

CONCLUSION

Based on the foregoing, Reclamation submits that Idaho's law provides that prior general adjudicatory decrees such as the *Eagle Decree*, *Foster Decree*, and the *Woodville Decree* are binding upon parties, nonparties, and the IDWR in a call until such time that the water rights within those prior decrees are reexamined by a court in either the Snake River Basin Adjudication or by another appropriate judicial proceeding. The Coalition members may, therefore, pursue a delivery call involving water rights that were decreed in proceedings that did not include the ground water users.

Dated this 13 day of April, 2005.



KATHLEEN MARION CARR

CERTIFICATE OF SERVICE

The undersigned certifies that on the 13 day of April 2005, a true and correct copy of **RECLAMATION'S BRIEF IN RESPONSE TO DIRECTOR'S APRIL 6, 2005 REQUEST** was served on the following person(s) as shown below:

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