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APR 14 2005
Department of Water Resources

Attorneys for Basic American Foods, ConAgra/Lamb Weston, City of Pocatello, and J. R. Simplot Company (Water Resource Coalition)

BEFORE THE DIRECTOR
OF THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE REQUEST FOR ADMINISTRATION IN WATER DISTRICT 120 AND THE REQUEST FOR DELIVERY OF WATER TO SENIOR SURFACE WATER RIGHTS BY 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	**WATER RESOURCE COALITION'S AMICUS BRIEF: PURSUIT OF DELIVERY CALL AGAINST NONPARTIES TO PRIOR DECREES**

The Director of the Idaho Department of Water Resources (IDWR) has requested briefing by the parties on the following legal issue:

> 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.

The nature of a water right as a property right and the associated fundamental right of due process with respect to that property right is the common theme in the Idaho cases which have examined the effect of prior water right decrees on water users who were not parties to the prior decree proceedings.

In 1921, there were three existing prior decrees to the use of waters of Little Lost River when the Idaho Supreme Court had to determine whether a nonparty to those decrees had the right to maintain a quiet title action which could essentially reexamine the prior decrees. *Mays v. District Court*, 34 Idaho 200, 200 P. 115 (1921).

The Idaho Supreme Court allowed the quiet title action to proceed based on two lines of reasoning. First, a person's property right cannot be affected until he has had a hearing:

> 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*. The contention that one's rights can be affected by a decree to which he was a stranger is repugnant to a fundamental principle of our jurisprudence that no one will be judged until he has had a hearing. The operation of this principle cannot be defeated by the mere fact that it will put other parties to some added trouble or expense.

Mays at 207-08, 200 P. at 116 (internal citations omitted).

Second, a statutory proceeding for the decree of water rights can be binding as to strangers only if the statute provides for a strictly *in rem* proceeding where the rights of every existing claimant could be determined. A subsequent claimant who did not appear in the original case would be presumed to have had proper notice and be bound by the *in rem* proceedings. The three prior decrees for the Little Lost River were not *in rem* proceedings.

In 1934, the Idaho Supreme Court examined a similar due process issue in the Boise River drainage. *Scott v. Nampa-Meridian Irrigation District*, 55 Idaho 672, 45 P.2d 1062 (1934). The court concluded that a prior decree which determined the duty of water only for canal companies and persons who appropriated water directly from the Boise River did not bind the numerous users of water from those parties' systems that were not made parties to or represented in the prior decree. *Id.* at 680.

In 1977, the Idaho Supreme Court examined the due process issue with respect to water district deliveries in the Reynolds Creek drainage in northern Owyhee County. *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977). First, the court determined that it was not a violation of procedural due process to curtail water district deliveries to unadjudicated "constitutional use" water rights during times of shortage. Second, before the two water districts on Reynolds Creek could be consolidated into, or operated as, one water district, IDWR had to conduct a hearing where all interested persons could testify regarding facts relevant to the combined water district. IDWR was to decide whether there were sufficient uncontested rights to develop a workable plan for water distribution, and if not, IDWR was to proceed with a statutory general adjudication. A general adjudication did proceed following the IDWR hearing on remand. The dissenting opinion had discussed at length the due process issues supporting such a result. The most important fact was that "too many appropriators were not party to" the three prior decrees which had adjudicated water rights from Reynolds Creek. These appropriators were not bound by the terms of those decrees (citing *Carrington v. Crandall*, 65 Idaho 525, 533, 147 P.2d 109, 110 (1944), and *May v. District Court*, 34 Idaho 200, 207-08, 200 P. 115, 116 (1921)). *Id.* at 97-98.

Finally, in 1997, the Idaho Supreme Court determined that it would be an "untenable outcome" if the Director of IDWR, in its role in the SRBA were "obligated to accept prior decrees as being conclusive proof of the nature of a water right." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 737, 947 P.2d 409,__ (1997). The outcome was untenable because it would have "the effect of binding water right owners not parties in a prior adjudication to a prior decree issued in a private adjudication." *Id.,* citing *Mays v. District Court*, 34 Idaho 200, 207-208, 200 P. 115, 116 (1921).

Regardless of whether the prior proceeding was conducted pursuant to a statutory provision for private adjudication of water rights (*see* Idaho Code 42-1404) or was simply a judicial action which was not an *in rem* proceeding, the resulting decree of water rights cannot be binding on "parties who are strangers to it." *Mays* at 207-08, 200 P. at 116, as cited in *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho at 742, 947 P.2d at___. Unless the prior proceeding was an *in rem* determination of water rights, it cannot bind nonparties. The decree evidences a legal right to the use of water, but, absent an *in rem* proceeding, the decree neither obligates the Director to recommend a water right in the SRBA contrary to his findings nor does it bind more than the persons joined in the action and then only for the administration of the rights determined in that proceeding.

The legal issue framed by IDWR, and addressed by these cases, affects two important aspects of water right administration in Chapter 6, Title 42, Idaho Code water districts: (1) Limits on the obligation of the Director to administer water rights in accordance with existing decrees; and (2) The constitutional right of a water user not to be subject to a decree of water rights to which he was not a party.

The *Hagerman Water Right Owners* decision addresses both issues. First, it determined that the Director's recommendations to the SRBA court, which recommendations may be used for the distribution of water in water districts[1], could not be obligated to accept prior decrees as conclusive proof of the nature and extent of a water right. Second, it determined that placing such an obligation on the Director of IDWR was untenable because it would effectively bind water right owners to a prior decree, even when the prior decree was not the product of an *in rem* proceeding and the water right owners were not even parties to the proceeding. This is in accordance with the decisions in *Mays* and *Scott*, and the result in *Nettleton v. Higginson.*

[1] See I.C. 42-1417.

In determining whether it has the authority to impose the terms of the Surface Water Coalition's water rights [that were decreed in a proceeding(s) to which the ground water users were not a party] in a delivery call against ground water users, IDWR has due process guidance from the Idaho cases cited above. IDWR also has recourse to the ongoing SRBA proceeding to satisfy the due process requirements of Idaho case law, before proceeding with the delivery call.

CONCLUSION

Idaho law does not permit the members of the Surface Water Coalition 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. The ground water users may not have been a party because the proceeding was not an *in rem* proceeding and, although the ground water uses existed at the time of the proceeding, the ground water users were neither joined as a party nor represented. The ground water users may not have been a party because the prior decree was entered before the ground water uses began. In either of these situations, the ground water users cannot be bound by the prior decree when they were not a party. The ongoing SRBA is a comprehensive adjudication to which the ground water users are a party and in which the Surface Water Coalition's water rights will become at issue by or before the end of 2005. The delivery call can be pursued, and determined by IDWR, when the requisite due process standards have been met.

RESPECTFULLY SUBMITTED this 13th day of April 2005.

Beeman & Associates, P.C.

By Josephine P. Beeman

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April 2005, I caused to be served copies of the foregoing WATER RESOURCE COALITION'S AMICUS BRIEF: PURSUIT OF DELIVERY CALL AGAINST NONPARTIES TO PRIOR DECREES upon the following, by U. S. Mail, postage prepaid:

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