

**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 Nos. 63-33732 (consolidated subcase no. 63-
) 33737), 63-33733 (consolidated subcase no. 63-
Case No. 39576) 33738), and 63-33734
)
) **MEMORANDUM DECISION AND ORDER ON**
) **CHALLENGE AND ORDER OF**
) **RECOMMITMENT TO SPECIAL MASTER**

**I.
BACKGROUND**

1. On January 31, 2013, the United States Bureau of Reclamation (“United States”) filed *Motions to File Late Notice of Claim* in subcase numbers 63-33732, 63-33733, and 63-33734. The late claims seek storage water rights associated with Arrowrock Dam, Anderson Ranch Dam, and Lucky Peak Dam (collectively “federal reservoirs”) based on beneficial use.
2. On that same date, the Boise Project Board of Control¹ filed *Motions to File Late Notice of Claim* in subcase numbers 63-33737 and 63-33738. The late claims seek storage water rights associated with Arrowrock Dam and Anderson Ranch Dam based on beneficial use.
3. The five late claims were asserted in addition to water right numbers 63-303, 63-3613, 63-3614, and 63-3618 (hereinafter “reservoir water rights”). The reservoir water rights were previously decreed in the SRBA and authorize storage water rights associated with the federal reservoirs based on prior licenses.

¹ The term “Boise Project Board of Control” refers collectively to the Boise Project Board of Control, Boise-Kuna Irrigation District, Nampa-Meridian Irrigation District, Wilder Irrigation District, New York Irrigation District, and Big Bend Irrigation District.

4. On May 22, 2013, the Court entered *Orders* granting the *Motions to File Late Notice of Claim*. The late claims were then forwarded to the Idaho Department of Water Resources (“Department”) for investigation.

5. On December 31, 2013, the Director filed his *Director’s Report for Late Claims*, wherein he recommended that the late claims be decreed disallowed. *Objections* and *Responses* to the Director’s recommendations were filed by various parties. The subcases were subsequently referred to the Special Master for further proceedings.

6. On July 2, 2015, the Ditch Companies² filed a *Motion for Summary Judgment*, asserting that the water use claimed under the late claims is already memorialized under, and occurs pursuant to, the reservoir water rights. The Boise Project Board of Control joined in the Ditch Companies’ *Motion*.

7. On July 31, 2015, the State of Idaho filed a *Cross-Motion for Summary Judgment*, asserting that the late claims should be decreed disallowed as a matter of law. Suez Water Idaho, Inc. joined in the State’s *Cross-Motion*.

8. On October 9, 2015, the Special Master entered his *Special Master’s Recommendation*, recommending that the late claims be decreed disallowed. In so recommending, the Special Master determined that the Ditch Companies’ *Motion for Summary Judgment* be granted, and that the State’s *Cross-Motion for Summary Judgment* be dismissed.

9. *Motions to Alter or Amend* the *Special Master’s Recommendation* were filed by the State and Suez Water Idaho, Inc. The Special Master entered an *Order* denying those *Motions* on February 26, 2016.

10. Timely *Notices of Challenge* were filed by the State and Suez Water Idaho, Inc., challenging the *Special Master Recommendation* and his *Order Denying Motions to Alter or Amend*. A hearing on the *Notices of Challenge* was held before this Court on July 11, 2016. The parties did not request the opportunity to submit additional briefing and the Court does not require any. Therefore, this matter is deemed fully submitted for decision on the next business day, or July 12, 2016.

² The term “Ditch Companies” refers collectively to Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers’ Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Nampa & Meridian Irrigation Company, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

II. STANDARD OF REVIEW

A. Challenge.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(j); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *SRBA Springs & Fountains Memorandum Decision & Order on Challenge*, Subcase No. 67-13701 (July 28, 2006), p. 18. The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

B. Summary judgment.

This matter comes before the Court on challenge by way of summary judgment, and the Court is asked to review certain findings and conclusions of the Special Master made pursuant to an order on summary judgment. Summary judgment is properly granted when the pleadings, depositions, and admissions on file, together with the affidavits, if any, "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). Where the case will be tried without a jury, the district court, as the trier of fact, is entitled to draw the most probable inferences from the undisputed evidence properly before it and grant the summary judgment motion in spite of the potential of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrev. Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007). The burden of demonstrating the absence of a genuine issue of material fact, and that summary judgment is proper as a matter of law, is on the moving party. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005).

III.

ANALYSIS

A. The Special Master exceeded the jurisdiction of the Snake River Basin Adjudication by ruling on the Director's accounting methodology.

i. Brief factual overview.

These subcases originated as a result of late claims filed for water that has historically been stored in the federal reservoirs and released for use by spaceholders in years requiring flood control measures after those measures have been completed for the season. By way of brief explanation, the United States and spaceholders hold reservoir water rights associated with the federal reservoirs. As with all storage rights, the quantity element for these rights was decreed with a volumetric quantity. Partial decrees were issued for the reservoir water rights in the Snake River Basin Adjudication ("SRBA"). Among other administrative duties, the federal reservoirs are operated by the United States to prevent flooding. In years when the estimated water content of the Boise River Basin exceeds the capacity of the reservoir system water otherwise available for storage under the decreed reservoir water rights is passed through the reservoir system and/or water that has previously been stored in the reservoirs is released in order to maintain sufficient space in the reservoirs to accommodate runoff estimated to occur later in the season. After all flood control releases have ceased for the season the reservoirs are then filled to the extent possible with the remaining available runoff. If the estimates were correct the reservoirs fill to capacity. Historically, this water has been distributed to the spaceholders for use.

In conjunction with his duty to distribute water, the Director adopted an accounting methodology for carrying out his administrative duty with respect to the federal reservoirs. In accounting for the water that is distributed to the reservoirs, the accounting methodology takes into account that quantity of water passed through the reservoirs by the United States when the reservoir water rights are in priority and that water that has been previously stored but released by the United States to meet its flood control obligations. The result is that respective quantities for the reservoir water rights can be considered satisfied or partially satisfied irrespective of how much water is physically in the reservoirs after flood control measures have ceased for the season. This result has been referred to in these proceedings as "paper fill." The water that has been historically stored and later distributed to the spaceholders after flood control releases have

ceased has been referred to as “refill.” In his methodology, the Director referred to this water as “unaccounted for storage.” It is this “refill” or “unaccounted for storage” water that is the subject of the beneficial use late claims. However, as discussed below the spaceholders argue that the water identified by the Director as unaccounted for storage is water that is included in their previously decreed reservoir water rights. This brief explanation is provided for sufficient context necessary to address the issue in this case. The historic administration of the reservoir water rights is detailed and quite complex. A comprehensive overview is provided in the *Memorandum Decision and Order* entered in Ada County Case No. CV-WA-2015-21376 contemporaneously herewith.

ii. The issue decided by the Special Master impermissibly dealt with the propriety of the Director’s accounting methodology for the previously decreed reservoir water rights.

Although coming to this Court in a different proceeding, the issue now before the Court on challenge is in most respects the same issue this Court previously declined to hear in conjunction with the Basin-Wide Issue 17 proceedings. *Memorandum Decision*, SRBA Subcase No. 00-91017, pp.11-12 (March 20, 2013) (hereinafter, “Basin-Wide Issue 17”). In Basin-Wide Issue 17 this Court declined to hear the issue of when the reservoir water rights were satisfied or “filled” under the Director’s particular accounting methodology. *Id.* This Court reasoned that the partial decrees issued for the reservoir water rights were silent as to how the rights were to be administered. The Court held that the issue was therefore purely one of administration and should be determined by the Director on a fully developed record in an administrative proceeding. In reaching this ruling, the Court was not treating the spaceholders differently from any other decreed water right holder in the SRBA. The Idaho Supreme Court has instructed that once a water right has been decreed, the Director has a clear legal duty to administer the water right according to the decree. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994). However, the details of the performance of that duty are left to the Director’s discretion. *Id.* In simplistic terms what this means is that once a right has been decreed and the decree holder takes issue with the way in which the Director is administering the right (i.e. exercising his discretion), then the decree holder must take up the issue first with the Director, not the Court who issued the decree. The Idaho Supreme Court was clear on this point when it affirmed this

Court's ruling in Basin-Wide Issue 17. *In Re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 394, 336 P.2d 792, 801 (2014) (holding which accounting method to employ is within the Director's discretion and IDAPA provides the procedures for challenging the chosen accounting method).

While issues pertaining to the administration of specific water rights can be entertained in the SRBA, such issues need to be raised at the time the affected rights are being adjudicated. *See e.g., Rangen Inc. v. IDWR*, 159 Idaho 798, 806, 367 P.3d 193, 201 (2016). Any resulting special administrative provisions need to be either reflected in the partial decree itself or through a general provision.³ There are numerous examples in the SRBA where water rights have historically been administered in a manner that promotes the most efficient use of water given the peculiarities of a particular system. This is true even though the administrative scheme may not pass muster if the rights were to be administered strictly in accordance with the prior appropriation doctrine. Such administrative schemes have typically been adopted through the consent of all affected water users and such users wish to have the administrative scheme memorialized in conjunction with their respective water rights. The SRBA is replete with such examples. Separate streams administration in various administrative basins and the administrative general provisions in the Big Lost in Basin 34 provide a couple of examples. However, what sets these types of examples apart from the instant case is that issues regarding a special administrative scheme were raised at the time the rights were being adjudicated and prior to the rights being decreed. To the extent an administrative provision successfully makes its way into a decree (or a general provision) then the Director must give effect to that provision in carrying out his administrative duties.

In the instant case, issues regarding any particular method of administration were never raised at the time the reservoir water rights were adjudicated. As a consequence the partial decrees issued for those rights are silent as to any particular type of administrative scheme or methodology. Indeed, allowing a water right holder to come back into the SRBA after the right has been decreed and then argue that it should be administered according to some particular methodology not otherwise provided for in the partial decree would constitute an impermissible

³ The spaceholders entered into contracts with the United States, which among other things, specify how the reservoirs are to be administered for flood control. The contracts also address the obligations of the United States in the event of shortfalls resulting from flood control measures. However, the State of Idaho and other water right holders on the system are not signatories to these contracts. The terms of these contracts pertaining to administration were not incorporated into the partial decrees issued for the reservoir rights.

collateral attack on the partial decree. *Rangen*, 159 Idaho at 806, 367 P.3d at 201. Moreover, it would ignore the finality of the partial decree as well as the final unified decree in which the partial decree was incorporated. *Id.* Accordingly, absent such an administrative provision, as is the case with any other decreed right in the SRBA, the Director must administer the rights according to the partial decrees in accordance with Idaho law. Absent an administrative provision in a partial decree or a general provision, the SRBA Court does not instruct the Director how to carry out his administrative duties in distributing water. If a decree holder asserts that the Director is not administering his or her right either according to the decree or consistent with Idaho law, he or she must first take it up with the Director.

In Basin-Wide Issue 17 this Court opined that despite the spaceholders' failure to timely raise issues pertaining to administration, a potential solution within the jurisdiction of the SRBA would be for the spaceholders to seek leave to file late claims to that water which physically "refilled" the reservoirs after flood control measures had ceased and the original rights were determined to be satisfied by the Director according to his accounting methodology.⁴ Thereafter the United States and various other water users filed beneficial use late claims for the "refill." The filing of the late claims was unopposed and the Court found "good cause" for granting leave to allow the claims to proceed. However, it needs to be emphasized that leave was granted for the filing of beneficial use late claims that were separate and distinct from the previously decreed reservoir water rights. Namely, the claims were limited to water diverted and stored after the original rights were determined to be satisfied by the Director however that determination was made. Again, given that the partial decrees were silent on administration, the SRBA Court lacked any jurisdiction to decide the soundness of the Director's accounting methodology used to determine when the original rights were deemed satisfied. I.C. § 42-1401D. The claimants also apparently appreciated this distinction as well when they filed the late claims. This is evidenced by reviewing the basis for the respective late claims. The reservoir water rights were claimed and decreed based on prior licenses. The late claims, on the other hand, were claimed based on beneficial use. Clearly, the beneficial use claims were intended as being distinct from the

⁴ The other alternative addressed by the Court was to move to set aside and reopen the reservoir water right claims. This option was not pursued by the United States or the spaceholders. The process for reopening a partial decree provides notice to parties to the adjudication that a water right claim relied on be finalized through a partial decree is again at issue and subject to change. The process affords interested parties a mechanism for participating in the proceedings.

previously decreed reservoir water rights as a result of how those rights were administered taking into account flood control measures.

The Director then issued a Director's Report recommending that the late claims be disallowed. He recommended that the water he identifies in his methodology as "unaccounted for storage" be memorialized in a general provision, and that it be made available for use by the spaceholders consistent with historic practice, albeit not pursuant to a water right. In effect, the "unaccounted for storage" was recommended by the Director as similar in concept to so-called "excess water." The origin and nature of excess water is discussed at length in the *Memorandum Decision and Order* entered in Ada County Case No. CV-WA-2015-21376 contemporaneously herewith. *See also Memorandum Decision and Order on Challenge*, Subcase Nos. 74-15051, *et. al.*, (Jan 3, 2012) (addressing "high flow" claims in Lemhi Basin).

Objections were filed to the Director's recommendation and the subcases were referred to the Special Master. In the proceedings before the Special Master, the spaceholders asserted that the beneficial use late claims need not be pursued because the historical use of water identified as "unaccounted for storage" was already covered by the reservoir water rights. The State and Suez asserted that the late claims should be disallowed because the "refill" water is "unaccounted for storage" and not attributable to any water right and therefore would not support beneficial use claims. In an attempt to fully address the objections, the Special Master entertained what he considered to be the threshold issue of whether the water argued to be unaccounted for storage was indeed covered by the reservoir water rights. In reaching his decision, the Special Master considered evidence on the propriety of the Director's accounting methodology used for distributing water to the federal reservoirs. The Special Master ultimately concluded the Director erred in his accounting methodology, ruling on summary judgment that the previously decreed reservoir rights included the water identified as unaccounted for storage, and that is the subject of the late claims.

In light of the previous discussion, it is apparent that the Special Master strayed from the narrow focus of conducting proceedings on the beneficial use late claims by delving into the propriety of the Director's accounting methodology. The narrow issue before the SRBA Court dealt with the beneficial use late claims not the scope or administration of the previously decreed reservoir water right claims. The SRBA Court lacks jurisdiction to rule on the propriety of the Department's accounting methodology as it pertains to those decreed reservoir rights. I.C. § 42-

1401D. The partial decrees issued for the reservoir water rights unambiguously define the elements of those rights and are silent as to any particular method of administration. As such, the methodology implemented by the Director for administering the reservoir water rights is an issue that needs to be raised administratively before the Director in accordance with the IDAPA. The Idaho Supreme Court is clear on this issue. *In Re SRBA, Case No. 39576, Subcase 00-91017*, 157 Idaho 385, 394, 336 P.2d 792, 801 (2014) (holding which accounting method to employ is within the Director’s discretion and the Idaho Administrative Procedures Act provides the procedures for challenging the chosen accounting method). This is the same protocol that applies to every other decreed right in the SRBA. To hold otherwise would be to ignore the finality of a partial decree. If a water right holder complains that the Department is not administering his or her right according to the partial decree, the matter needs to originate with the Department not the SRBA Court. In that same vein, the late claims cannot be used as a mechanism for either collaterally attacking the previously issued partial decrees or as an end run around IDAPA. IDAPA imposes a different standard of review and constrains the actions available to a district court on review. I.C. § 67-5279. In this case, the Special Master effectively overruled the Director’s methodology without applying the standard of review that applies to a judicial review proceeding. *Id.*

- iii. Despite the issues raised by the parties, the Special Master should have required the parties to elect to either proceed with the late claims based on the methodology in place or request to stay the proceedings to allow contests to the accounting methodology to proceed administratively.**

This Court acknowledges that the Special Master needed to hear evidence on the Director’s accounting methodology for general context for the purpose of determining whether the “unaccounted for storage” was indeed unappropriated “excess water” or whether the circumstances could support beneficial use water rights. However, the limited issue before the Special Master is pretty straightforward. Based on the Director’s accounting methodology, the quantity of water that is available for storage but is nonetheless passed through for flood control while the senior storage right is in priority, or water that is initially stored but later released for flood control, is counted against the reservoir water rights despite not ultimately being used for irrigation. The propriety of this accounting and distribution method is beyond the jurisdiction of

the SRBA Court now that the reservoir rights have been decreed. I.C. § 42-1401D. No party disputes that after flood control releases have ceased for the season, the reservoirs have historically been physically filled to the extent of available water. No party further disputes that this water has been historically allocated among the spaceholders and has been distributed to the spaceholders for irrigation. That said, the issue before the Special Master is limited to whether this historical use of water identified as unaccounted for storage supports the establishment of beneficial use claims. This Court granted the spaceholders' leave to file late claims to assert claims to this water, not for purposes of reopening previously decreed reservoir water rights or to challenge the Director's administration of those decreed reservoir water rights. Accordingly, the Special Master could have thoroughly conducted proceedings on the late claims without ruling on the scope of the previously decreed reservoir water rights or the propriety of the Director's accounting methodology.

Based on the nature of the issues raised by the parties, the Special Master had two options. He could have proceeded with the late claims based on the accounting methodology in place and moved forward on the late claims. Alternatively, if the spaceholders wished to pursue their position that the Director's accounting methodology was in error, the Special Master could have entertained staying the proceedings to allow the spaceholder to raise the issue in the appropriate forum.⁵ Depending on the outcome of that proceeding, the spaceholders could then make the determination whether it was necessary to proceed with their late claims. In any event, the SRBA Court, including the Special Master, lacked jurisdiction to rule on the propriety of the Director's methodology for administering the previously decreed reservoir water rights.

B. Remaining issues raised on challenge.

The Court acknowledges that other issues were raised by the parties. However, having determined that the Special Master exceeded the jurisdiction of the SRBA by ruling on the Director's accounting methodology, the Court need not reach these remaining issues.

⁵ The Director apparently acknowledged the jurisdictional distinction. Following the Idaho Supreme Court's decision in Basin-Wide Issue 17 the Director on his accord initiated a contested case regarding his accounting methodology for the reservoir water rights. However, the proceedings before the Special Master were not stayed.

IV.

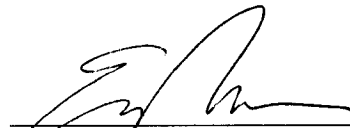
CONCLUSION AND ORDER OF RECOMMITMENT

In conclusion, in Basin-Wide 17 this Court declined to hear the issue of when the decreed reservoir water rights were considered to be satisfied under the Director's accounting methodology. The Idaho Supreme Court affirmed that ruling. The late claims neither open a door for the SRBA Court to address the administration of the decreed reservoir water rights, nor do they provide a procedural mechanism for an end run around this Court's prior ruling. Therefore, the Court rejects in whole the findings of fact and conclusions of law set forth in the *Special Master's Recommendation*. I.R.C.P. 53(j).

It is ORDERED that the matter is recommitted to the Special Master for further proceedings consistent with this decision.

IT IS SO ORDERED.

DATED: September 1, 2016



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON CHALLENGE AND ORDER OF RECOMMITMENT TO SPECIAL MASTER was mailed on September 01, 2016, with sufficient first-class postage to the following:

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