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. 36-02080, 36-15127 (36-**
Case No. 39576	)	**15127A and 36-15127B), 36-15192, 36-**
	)	**15193 (36-15193A and 36-15193B), 36-**
	)	**15194 (36-15194A and 36-15194B), 36-**
	)	**15195 (36-15195A and 36-15195B), 36-**
	)	**15196 (36-15196A and 36-15196B)**
	)	**(A & B Irrigation District)**
	)	
	)	**ORDER ON CHALLENGE**
_____	)	

Summary of Ruling:
1) Affirming Special Master's factual ruling that the source of subject water rights is ground water supplied from the 36-02080 right;
2) Affirming Special Master's legal ruling that the source of the subject rights is the same as that of the original right from which the water is originally diverted even though the water is recaptured and reused;
3) Affirming the Special Master's ruling that the use of recaptured water on non-appurtenant lands required compliance with statutory procedures after procedures became mandatory;
4) Affirming Special Master's ruling that the provisions of I.C. 42-1426 apply to the subject rights because of failure to comply with statutory procedures;
5) Affirming Special Master's application of I.C. 42-1426 by recommending subordination remark in partial decrees for subject rights;
6) Affirming Special Master's ruling that claimant cannot rely on provisions of I.C. § 42-1416; and
7)Affirming Special Master's denial of claimant's estoppel and waiver defense.

Appearances:

Jason D. Walker, Ling & Robinson, Rupert, Idaho, attorney for A & B Irrigation District.

Jeffery C. Fereday, Karl T. Klein, Givens Pursley, LLP, Boise, Idaho, attorneys for Estate of Mack Neibaur, Ralph E. Breding, Aberdeen-American Falls Ground Water District, Bingham Ground Water District and Magic Valley Ground Water District.

Larry Brown, David Negri, Lee Leininger, U.S. Dept of Justice, attorneys for U.S. Dept. of Interior, Bureau of Reclamation.

David Barber, Office of Attorney General, Boise, Idaho, attorney for State of Idaho.

I.

PROCEDURAL BACKGROUND AND FACTS

1. A & B Irrigation District ("A & B" unless otherwise indicated) is an irrigation district organized pursuant to Title 43 of the Idaho Code. A & B provides irrigation water service to approximately 81, 300 irrigated acres located within Jerome and Minidoka Counties. The irrigation project was developed by the Bureau of Reclamation (BOR) and is operated and maintained by A & B. The irrigation project was originally designed as a gravity fed surface irrigation system. At present, approximately 78% of the project acres are now sprinkler irrigated with ground water pumped from the Eastern Snake River Plain Aquifer. A & B is divided into an "A Unit" and a "B Unit." The A Unit is that portion of the district irrigated with surface water pumped from the Snake River.[1] The B Unit is that portion of the irrigation district irrigated with ground water. The ground water is pumped from the Eastern Snake Plain Aquifer ("ESPA") via various wells located throughout Unit B pursuant to water right 36-02080. Water right 36-02080 is a licensed right with a priority date of September 9, 1948, and authorizes the diversion of 1100 cfs for the irrigation of 62, 604.30 acres.

[1] The surface rights servicing the A Unit of A & B have not yet been reported by IDWR and are not at issue.

2. As a result of a combination of existing soil conditions and the geographic layout of the irrigation district, not all of the irrigation ground water is consumed by crops or immediately seeps back into the ground after being applied to the fields. Excess runoff or "waste water" collects at the end of fields or in "tail" ponds and does not drain into an existing natural surface watercourse if left to flow uninterrupted. Without the implementation of a drainage system for handling the waste water, these ponds would eventually cover extensive acreage and ultimately encroach on the irrigated lands of the water users within the district. Even under the current drainage system it is estimated that in excess of 150 acres of open water exist. Originally, the drainage problem was controlled through the use of agricultural drainage or "injection" wells, whereby waste water either drained or was pumped back into the ground. Eventually, A & B began pumping the waste water from the ponds to irrigate additional acreage not part of licensed right 36-02080. Now, because of concerns over aquifer contamination, the use of injection wells is being eliminated. Currently, only 34 of the original 78 injection wells are still in use, and the intent is to entirely eliminate the use of the remaining 34 injection wells in the near future thus requiring alternative drainage plans. According to A & B's expert there are three possible solutions for handling the waste water accumulation: 1) Apply to adjacent lands covered by the subject enlargement claims; 2) Reapply to the appurtenant lands being irrigated under the original right; or 3) Pump the water out of the drainage basin.

3. Prior to 1963, A & B enlarged the use of licensed right 36-02080 by irrigating additional acreage in excess of the number of acres authorized under the license. To irrigate the additional acreage A & B uses a combination of water directly pumped under the 36-02080 water right and the reuse of some of the waste water which also originates from the 36-02080 water right. These pre-1963 enlargements were later amended and claimed in the SRBA as beneficial use claims under amended claims 36-15127A, 36-15193A, 36-15194A, 36-15195A and 36-15196A (collectively as "A rights" or "A

claims").[2] Because these enlargements preceded the enactment of Idaho's mandatory permitting/licensing requirements, the claims were treated as beneficial use claims and recommended by IDWR for the expanded acreage as beneficial use claims with a priority date as of the date of the enlargement. All issues pertaining to the A rights have been resolved and are not before the Court on challenge.

4. In 1963, the Idaho legislature amended Idaho's appropriation statute for ground water, I.C. § 42-229, making the application, permit and license procedure for appropriating ground water mandatory for all subsequent ground water appropriations. *See* 1963 Idaho Sess. Laws, 623 (codified at I.C. § 42-229). The application, permit and license procedure was not made mandatory for surface water appropriations until 1971. *See* 1971 Idaho Sess. Laws, 843 (codified at I.C. §§ 42-103 and 42-201).

5. Over a time period between March 25, 1963, (the date I.C. § 42-229 was amended to make the permit procedure mandatory for appropriating ground water), and November 19, 1987, (the date of commencement of the Snake River Basin Adjudication), A & B further expanded the irrigated acreage under licensed right 36-02080 by an additional 2363.1 acres. The primary water source for irrigating this additional acreage is from the use of recaptured waste water originally pumped under licensed right 36-02080.[3] In the event the waste water is insufficient to irrigate the additional acreage, then additional ground water from water right 36-02080 is diverted and applied directly. The water rights for these post-1963 enlargements were claimed in the SRBA under amended water right claims 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B

[2] The claims were originally filed under claim numbers 36-15127, 36-15193, 36-15194, 36-15195 and 36-15196. Later in the course of SRBA proceedings the claims were amended and split into A claims and B claims to distinguish between the pre-1963 enlargements which could be treated as beneficial use claims and the post-1963 enlargements which required compliance with statutory procedures. (Note: The A and B designations only describe the split right and do not relate to the aforementioned A or B units within the district).

[3] Although one of the issues raised by A & B is that there is more than one source of waste water contributing to the B rights, A & B does not contend that the source of the waste and drain water is from commingled surface diversions from the A Unit and ground water diversions from the B Unit.

(collectively as "B rights" or "B claims"). **It is these five post-1963 "enlargement claims" or B rights that are the subject of the issues raised in this challenge.**

6. Initially, A & B began irrigating the additional acreage after 1963 without filing for a permit and license as required by statute. On November 23, 1984, the BOR sought authorization by filing a permit application to appropriate additional ground water to develop and expand Unit B of the irrigation project. The permit application sought to expand the number of irrigated acres in Unit B by 11,470 acres through the use of between 18 and 24 new wells and the expanded use of the then-existing 177 wells licensed under water right 36-02080. The expanded acreage also included the lands covered by the five subject enlargement claims (36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B). The application for the permit stated that the source for the water supply is "[g]round water—comprised of recharge from existing USBR which is tributary to Snake River." The application did not refer to the use of a surface water diversion source, nor did it distinguish between the acreage that was intended to be irrigated via the new wells and the acreage that was intended to be irrigated through the reuse of waste water pumped from the ponds.

7. On July 1, 1985, prior to the commencement of the SRBA, the BOR filed water right claim 36-04265 for a beneficial use ground water right in accordance with I.C. § 42-243.[4] The claim was also for the expansion of licensed right 36-02080 by an additional

[4] Prior to 1963 for ground water appropriations, and prior to 1971 for surface water appropriations, a permit was not required to establish a valid water right in Idaho. *See* I.C. §§ 42-201 and 42-229. A water right could still be appropriated under the "constitutional" or "beneficial use" method. *See Nelson v. Parker*, 19 Idaho 727, 115 P.488 (1911). As a result, Idaho did not have an inventory of water rights that had not previously been permitted or adjudicated. In 1967, in order to assist the Department of Reclamation (now IDWR) with compiling a tabulation of existing water rights, the Idaho Legislature enacted I.C. § 42-225a, subsequently amended and redesignated as I.C. § 42-243, which required any water user claiming a right to the use of water by diversion and application to beneficial use, to file a claim of right with IDWR on a predesignated claim form (domestic uses excluded). The statute set deadlines for filing such claims. The claims process was not a judicial confirmation as to the validity of the claim but rather a process whereby the claim could be registered and maintained on file. I.C. § 42-246. Water users failing to comply with the statutory requirements were deemed to have relinquished the right. Because of the mandatory permit requirements no beneficial use claims could be filed for ground water appropriations after 1963 or surface appropriations after 1971.

14,900 acre-feet per year to irrigate an additional 5,742.1 acres and claiming an April 20, 1971, priority date. This claim included a portion of the total acreage specified in the prior 1984 permit application including the 2363.1 acres now covered by the five subject enlargement claims (36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B). The reason for the differences between the claim and the permit application are not made clear from the record. The claim did not refer to a surface diversion or describe the source as the use of waste water. Additionally, the "remarks" section of the claim form stated that the priority date should be "as of the date of the expansion pursuant to House Bill 71, First Regular Session of the 48th Legislature [I.C. § 42-1416], if a basin wide adjudication occurs at a later date."

8. House Bill 71, later codified as I.C. § 42-1416, was enacted in 1985 in anticipation of the SRBA and has subsequently been repealed. Idaho Code § 42-1416 established certain rebuttable presumptions intended to apply in the adjudication. Idaho Code § 42-1416(2) provided:

> Expansion of use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.

In essence I.C. § 42-1416 was an attempt by the legislature to validate or provide "amnesty" for otherwise illegal expansions made to existing water rights in violation of the mandatory permit statutes.[5] *See Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996).

9. In 1987, the SRBA was commenced. A & B and BOR both filed the five original enlargement claims 36-15127, 36-15193, 36-15194, 36-15195, and 36-15196 in the SRBA based on water right claim 36-04265, which had previously been filed with IDWR

[5] Idaho Code § 42-1416 was one of two statutes enacted for the purpose of having unauthorized changes or enlargements to existing water rights recognized in the SRBA. Idaho Code § 42-1416 created a presumption in the SRBA regarding enlargements to existing water rights. Idaho Code § 42-1416A provided for unauthorized changes to existing rights.

pursuant to I.C. § 42-243.[6] Thereafter the BOR withdrew the November 23, 1984, permit application. According to BOR, the permit was withdrawn in reliance on the enactment of I.C. § 42-1416.

10. In 1992, IDWR reported the five original enlargement claims (36-15127, 36-15193, 36-15194, 36-15195 and 36-15196) in the *Director's Report Part I, for Reporting Area 3 (Basin 36)*. Based on the provisions of I.C. § 42-1416 the claims were all recommended as beneficial use claims with the following remark: "This right is an expansion of right no. 36-02080 pursuant to Idaho Code 42-1416(2)." The claims were recommended with the following priority dates representing the date the enlargements occurred: 36-15127 (April 1, 1984), 36-15193 (April 1965), 36-15194 (April 1968), 36-15195 (April 1978) and 36-15196 (April 1981). Although BOR and A & B both filed objections to the recommendations, neither filed objections with respect to the recommended priority dates.

11. In 1994, Judge Daniel C. Hurlbutt, Jr., then Presiding Judge of the SRBA, ruled that I.C. § 42-1416 was unconstitutionally vague and temporarily stayed further proceedings in the SRBA. As a result of his ruling, the Idaho Legislature repealed I.C. § 42-1416 in 1994 and simultaneously enacted I.C. § 42-1426.[7] Idaho Code § 42-1426, like I.C. § 42-1416 also provided a procedure for having enlargements made in violation of the mandatory permitting requirements confirmed in the SRBA. Idaho Code § 42-1426 also provided the opportunity for parties who previously filed claims based on I.C. § 42-1416 to file amended claims under I.C. § 42-1426. Judge Hurlbutt then issued an

---

[6] A & B and BOR essentially filed duplicate claims as one of the issues in these subcases has been the ownership of the water rights as between A & B and BOR. This issue has subsequently been resolved via a stipulation.

[7] Idaho Code § 42-1426 was one of three statutes enacted for the purpose of having unauthorized changes or enlargements to existing water rights recognized in the SRBA. Idaho Code § 42-1425 provided for unauthorized changes to existing rights or 'accomplished transfers." Idaho Code § 42-1427 provided for ambiguous decrees. Collectively these statutes are referred to as the "amnesty statutes."

Order setting forth scheduling deadlines for the filing of amended claims, director's reports and objection and response periods.

12. In 1996, in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996) (*Fremont Madison*), the Idaho Supreme Court ruled on the constitutionality of the new "amnesty statutes" including I.C. § 42-1426. The Supreme Court upheld the constitutionality of I.C. § 42-1426, and acknowledged that the Legislature cannot enact a statute that retroactively creates or confirms a water right for an unauthorized water diversion that is senior in priority to other existing water users on the same source. However, because I.C. § 42-1426 subordinated the new enlargement right to any potentially injured junior rights on the same source and provided for mitigation the constitutionality of the statute was upheld.

13. In 1997, IDWR filed an *Amended Director's Report* for the five original enlargement claims (36-15127, 36-15193, 36-15194, 36-15195 and 36-15196) pursuant to Judge Hurlbutt's ***Order***. Based on the provisions of I.C. § 42-1426(2) and the Supreme Court's analysis of the same in *Fremont-Madison*, the amended recommendations contained the following "subordination remark":

> This water right is subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to section 42-1426, Idaho Code, the earlier priority right is the superior right.

IDWR adopted the standardized subordination language to be included in enlargement claims brought pursuant to I.C. § 42-1426 in order to comply with the express language of the statute and the Supreme Court's ruling in *Fremont-Madison*. The April 12, 1994, date corresponds with the date of enactment of I.C. § 42-1426. A & B and BOR both filed *Objections* to the inclusion of the subordination language and also asserted for the first time that the priority dates for the subject enlargement rights should be the same as that of licensed right 36-02080 (September 9, 1948). The Magic Valley

Groundwater District, *et al*., ("Ground Water Users") filed a *Joint Response* supporting the inclusion of the subordination remark for each enlargement right.

15. On April 8, 1998, the BOR and A & B were granted leave to file *Amended Notices of Claim* in subcases 36-15127, 36-15193, 36-15194, 36-15195 and 36-15196 based on newly discovered evidence that some of the enlargements occurred prior to 1963.[8] On August 21, 1998, IDWR's recommendation for the amended claims split the water rights into "A" and "B" rights. The "A" rights consisted of the pre-1963 enlargements, which could be treated as beneficial use claims, and the "B" rights consisted of the post-1963 enlargements that are now before the Court. For the "B" rights IDWR recommended the same priority date as was previously recommended for the original "base" right from which the B right was split and also included the subordination remark now at issue.

16. A & B and BOR both filed *Objections* to IDWR's *Amended Recommendations* for the B rights. The Ground Water Users again filed *Responses* in support of the subordination remark.

17. On January 24, 2001, the Ground Water Users filed a *Motion for Partial Summary Judgment*. On March 26, 2001, the Special Master entered an ***Order Granting Respondents' Motion for Partial Summary Judgment.*** In the ***Order*** the Special Master held *inter alia* that the source of the water for the B rights is "ground water"; that the provisions of I.C. § 42-1426 apply to the B rights, that the priority dates should be the date the water was first put to beneficial use, subject to the subordination remark recommended by IDWR.

18. On July 29, 2002, the parties and IDWR filed a *Stipulation to Resolve Objections* and *Standard Forms 5* agreeing that the water rights should be decreed in the name of the

[8] Prior to enactment of the mandatory permit requirement for ground water, any enlargement could be treated as a beneficial use appropriation.

BOR with a remark regarding A & B's irrigation contract with the BOR. In the *Stipulation*, the parties reserved their rights to challenge and appeal the ***Special Master's Order Granting Respondents' Motion for Partial Summary Judgment.***

19. On October 18, 2002, the Special Master issued a *Special Master's Report and Recommendation* consistent with the ***Order Granting Respondents' Motion For Summary Judgment.*** On October 16, 2002, A & B filed a *Motion to Alter or Amend*. An *Order Denying Motion to Alter or Amend* was issued by the Special Master on November 2002. The *Notice of Challenge* was filed December 3, 2002. Oral argument on the challenge was heard March 18, 2003.

20. The United States, on behalf of the BOR, participated in the challenge. However, the BOR concurred with the Special Master's recommendation that the provisions of I.C. § 42-1426 as well as the subordination language applied to the B rights. BOR disagreed with the Special Master's characterization of the source solely as ground water. The BOR argues that the source should not just be ground water but should also include waste water, drain water and return flow.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on March 18, 2003. The parties did not request additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or March 19, 2003.

III.
ISSUES RAISED ON CHALLENGE

A &B raised the following issues on challenge:

1. Whether the Special Master erred in characterizing the source of the subject claims as "ground water" instead of "waste water" or "drain water?"

2. Whether the Special Master erred in subordinating the priority date for the subject claims pursuant to the provisions of the "Amnesty Statute," Idaho Code § 42-1426?

3. Whether the Special Master erred in determining that A & B's reliance on the former Amnesty Statute, Idaho Code § 42-1416, in withdrawing its permit application for the subject claims was misplaced where the statute was subsequently repealed and replaced with Idaho Code § 42-1426?

4. Whether the Respondents are barred under concepts of estoppel or waiver from now asserting the application of the subordination language where the Respondents did not timely object to the A & B's claims at the time the repealed Amnesty Statute, Idaho Code § 42-1416, was in effect?

5. Whether the Special Master erred with respect to subcases 36-15193B and 36-15194B in failing to recognize that these water rights were appropriated pursuant to the constitutional method of appropriation prior to the mandatory permit date for surface water?

6. Whether the Special Master erred in finding no genuine issues of material fact with respect to the subject claims, the application of the subordination language and the nature and source of the claims?

7. Whether the Special Master erred in finding that there is always an injury when an enlargement takes priority over a validly established water right?

8. Whether the Special Master erred in finding that the subject enlargement claims would cause potential injury to junior appropriators?

9. Whether the Special Master erred in finding that the only certain way to mitigate potential injury to junior appropriators was to subordinate the subject enlargement claims to all other water rights with priority dates earlier than April 12, 1994?

IV.

STANDARDS OF REVIEW

A. Review of a Special Master's Recommendation

The district court is required to adopt a special master's findings of fact unless clearly erroneous. I.R.C.P. 53(e); *Rodriguez v. Oakley Valley Store, Inc.*, 120 Idaho 370,

377 (1991), 816 P.2d 326, 333; *Higley v. Woodward*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct.App. 1993). Although the conclusions of law of a special master are expected to be persuasive, they are not binding upon the district court. This permits the district court to adopt the special master's conclusions of law only to the extent they correctly state the law. *Rodriguez* at 378, 816 P.2d at 334; *Higley* at 534, 861 P.2d at 104. Accordingly, the district court's standard of review of a special master's conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d. at 104.

In this case, the Special Master's recommendation was based on a ruling on his earlier ruling on motion for partial summary judgment. A question of compliance with rules of procedure and evidence is one of law. *State v. Hagerman Water Right Owners, Inc*., 130 Idaho 736, 740, 947 P.2d 409, 413 (1997)(citing *Harney v. Weatherby*, 116 Idaho 904, 906-07, 781 P.2d 241, 243-44 (Ct.App. 1989). Accordingly, this Court's standard of review of a special master's ruling on a motion for summary is the same standard that this Court would apply if this Court were ruling on the same motion.

B. Summary Judgment

Summary judgment is appropriate where the pleadings, depositions, admissions and affidavits on file show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c); *City of Idaho Falls v. Home Indemnity Co*., 126 Idaho 604, 606 (1995). The burden of proving the absence of a genuine issue of material fact rests with the moving party. *G and M Farms v. Funk Irrigation Co*., 119 Idaho 514, 517 (1991). The Court must also liberally construe facts and inferences contained in the existing record in favor of the party opposing the motion. *Bonz v. Sudweeks*, 119 Idaho 539, 541 (1991).

However, to withstand a motion for summary judgment, the opposing party's case must be anchored in something more solid than speculation. A mere scintilla of evidence is insufficient to create a genuine issue of material fact. *Edwards v. Conchemco, Inc*., 111 Idaho 851, 853 (Ct. App. 1986). The party opposing the motion may not merely rest on the allegations contained in the pleadings, rather evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party. I.R.C.P.

56(e); *Ambrose v. Buhl Joint School Dist. # 412*, 126 Idaho 581 584 (Ct. App. 1995). Supporting and opposing affidavits must be made on personal knowledge, must set forth facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. I.R.C.P. 56(e).

V.

DISCUSSION

A. The Special Master did not err in recommending that the source of the B rights is "ground water" both factually and as a matter of law.

A & B's first assignment of error goes to the Special Master's recommendation that the source of the water for the B rights is ground water. A & B raises three separate arguments with respect to this issue. First, A & B asserts that factually the Special Master failed to recognize all the sources of recaptured waste water which contribute to the supply for the B rights. A & B contends that the recaptured water which supplies the B rights comes from various sources other than just ground water recaptured from the 36-02080 right. Second, A & B argues that the source element for the B rights should be described as either "waste" or "drain" water instead of ground water. Third A & B argues that to the extent the waste water is pumped from surface pools it should be decreed as "surface" water instead of ground water. A & B's arguments rest on the premise that if the source is described as "waste" or "drain" water, then the enlargements would not be subject to the applications of I.C. § 42-1426, because no permit and license would have been required to recapture and reuse waste water after it was beneficially used. Alternatively, if the source is decreed as surface water, then only those enlargements occurring after the enactment of mandatory permitting requirements for surface water in 1971 would be subject to the application of I.C. § 42-1426 because no permit and license would have been required for pre-1971 enlargements relying on surface water. A & B contends that water rights 36-15193B and 3615194B were appropriated prior to 1971. The BOR argues that the source element should be ground water but should also include waste water, drain water, and return flow. Each of these arguments is addressed below.

1. The Special Master did not err in recommending that the source of the waste water supplying the B rights is ground water originating from licensed right 36-02080.

A & B asserts that the Special Master's recommendation regarding the source of the B rights was in error because of the failure to recognize all of the sources of the recaptured water that supply the B rights. This Court disagrees. The Special Master issued a recommendation based on the *Motion for Partial Summary Judgment*. This is solely a factual determination. This Court has reviewed the record from the summary judgment proceedings and concurs with the Special Master's ruling that the source of the subject waste water originates from ground water diverted pursuant to water right 36-02080. A & B's responses to request for admission number 3 and answer to interrogatory number 4 at page 6 of the *Responses and Answers to Respondents' First Set of Requests for Admission, Interrogatories, and Requests for Production of Documents to District* included as "Exhibit B" to the *Affidavit of John M. Marshall* filed on January 24, 2001, state as follows:

> REQUEST FOR ADMISSION NO. 3: Please admit that all the water you are claiming under the Enlargement Rights is water that was originally ground water diverted under water right 36-02080.
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 3: Admit. However, it is possible for drain water to flow upon the District's project from independent sources, which water is captured by the District in its drainage system and such water may in fact also be after it is commingled with the District's drain water.
>
> INTERROGATORY No. 4: If your response to request for admission No. 3 was anything but an unqualified Admission, please identify any other water right that is contributing to the water diverted under the Enlargement Rights.
>
> ANSWER TO INTERROGATORY No. 4: Not applicable.

This Court did not find anything in the record to controvert this admission. Although A & B makes the conclusory assertion in its briefing that it is possible that water from an independent source may also contribute to the waste water, A & B offers

no substantive facts in the form of affidavits or further explanation regarding an independent source of water in order to withstand summary judgment. Additionally, at oral argument on Challenge, the Court specifically asked counsel to identify what other waste water sources contribute to the B rights. Other than identifying possible precipitation runoff collected in the waste water pools, A & B could not identify any other source. It is apparent from the record that the source of the water that is reused to supply the B rights is water originally diverted under the 36-02080 ground water right. The record does not support or raise any genuine issue of material fact that this is a situation where recaptured water from A & B's surface diversion or from some other independent source commingles with the water diverted and recaptured under the 36-02080 right. Accordingly, this Court affirms the Special Master's recommendation regarding the source of the B rights.

2. The Special Master did not err as a matter of law in concluding that the source of B rights is still ground water even though the water is recaptured in surface pools and subsequently reused.

A & B next argues that the Special Master erred as a matter of law in concluding that the source of the B rights should be decreed as ground water instead of waste water, drain water, return flow or surface water. A & B argues that because the water is diverted from the ground and applied to beneficial use and then subsequently recaptured in surface pools where it is again pumped to supply the B rights, that the source of the B rights should be decreed as either "waste" or "drain" water but not ground water. Alternatively because the waste water is collected in surface pools, A & B argues that the source should be decreed as surface water. A & B makes this later argument in particular with respect to rights 36-15193B and 36-19194B. This Court disagrees with A & B's arguments. Even though the water is recaptured and pumped from a surface pool, the authorization for the use is still ultimately derived from the 36-02080 right and as such the water does not lose its identity as ground water until such time as A & B ultimately relinquishes control of the water and it is commingled with a different source. This

conclusion is consistent with the body of law pertaining to the reuse of recaptured waste water and the respective rights as between original and third party appropriators.

The general rule is well established that waste water and seepage (leakage from canals, etc.) resulting from the beneficial use of a water right may be recaptured and reused by the original appropriator of a water right so long as the recaptured waste water is put to a beneficial use.[9] *Reynolds Irr. Dist. v. Sproat*, 70 Idaho 217, 214 P.2d 880 (1950); *Sebern v. Moore*, 44 Idaho 410, 258 P.2d 176 (1927). Third parties may appropriate the waste water after it leaves the control of the original appropriator. However, the right of the third party appropriator is subject to the paramount right of the original appropriator to later recapture and reuse the waste water or to later reduce the quantity of waste water through the implementation of more efficient water use practices.[10] *See e.g. Colthrop v. Mtn. Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945). The situation is different if after the original appropriator relinquishes control of the waste water and the water returns to, and is commingled with, a natural stream or aquifer prior to being appropriated by a third party. The water is then considered "return flow" and is subject to appropriation by third parties as part of that tributary body of water. In such a situation, third party junior appropriators relying on the return flow have rights which in effect place limitations on the original appropriator's ability to alter the consumptive use of the original right. *See Crockett v. Jones*, 42 Idaho 652, 249 P. 483 (1926); *Beecher v. Cassia Creek Irr. Co*., 66 Idaho 1, 154 P.2d 507 (1944)(establishing junior user's right to existing conditions).[11]

---

[9] The concept of "waste water" is distinguishable from the concept of "waste." Waste implies that water is being diverted and not being put to a beneficial use. Committing waste is legally prohibited. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 735 947 P.2d 400, 408 (1997)(string citations omitted). Waste water is that water which is diverted for beneficial use but is not all ultimately consumed. Most uses of water involve some degree of inefficiency whereby more water is diverted for a particular purpose than is consumed. Water uses that result in waste water are legal provided the practice is reasonable under the particular circumstances.

[10] The limitation on the right of a third party appropriator is based on the policy that a third party should not be able to compel the original appropriator to continue to waste water. *Hidden Springs Trout Ranch v. Hagerman Water User's, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130, 1134 (1980).

[11] Admittedly, there is a conflict between the senior's ability to employ more efficient water use practices and a junior's right to existing conditions. The Court need not address the issue at this time.

In evaluating the scope of these respective rights, it is apparent that the right to recaptured waste water is entirely derivative of the original right and is not a right wholly independent from the original right until such time as control over the water is relinquished, and the right is commingled with another source. In other words, implicit in the reasoning that permits an original appropriator to reduce or reclaim waste water under the original water right (even to the detriment of third party users) is the recognition that the original appropriator is still controlling and beneficially using the water. The reuse is simply a use authorized under the original right. It then follows that the source of the waste water is the same as that of the original right giving rise to the waste.

In this case, A & B never relinquished control of the ground water diverted under the 36-02080 water right nor does the record support that the water is commingled with a surface source. Accordingly, A & B is still using water pursuant to the 36-02080 water right. The ultimate source of that right is ground water not surface water. Furthermore, even if the source were to be decreed as "waste" or "drain" water the source element would still need to include a description of the ultimate source (license 36-02080) that supplies the waste water. As such, for purposes of determining the applicability of Idaho's mandatory permit and license requirements as concerns the B rights, the rights would still be treated as ground water whether or not labeled as waste or drain water.

The BOR acknowledges that the source should be ground water but argues that the source should also include drain water, waste water and return flow. The BOR points out that it is well established that a water right can be perfected in waste water, seepage, etc.. While this Court acknowledges that a right can be perfected in waste water etc., for the reasons just stated A & B is still using the recaptured water from the original right. The source of that right is ground water.

The other problem with both A & B's and the BOR's argument is that the B rights were claimed as enlargements of the original right. As discussed below, I.C. § 42-1426 provides amnesty for enlargements of **existing rights** as opposed to any previously unauthorized independent use. Implicit in the express purpose of I.C. § 42-1426 is the acknowledgment that the enlargement and the original right share the same source. See I.C. § 42-1426(a). It is therefore inconsistent to make a claim for an enlargement in

reliance on I.C. § 42-1426 and then attempt to escape the limitations imposed by the statute by asserting that the enlargement is actually from a different source. To the extent the "enlargement" is really from a different source then its not an enlargement of an existing right and in which case I.C. § 42-1426 will not operate to excuse non-compliance with the mandatory permit requirements.

Accordingly, the Special Master did not err as a matter of law in concluding that the source for the B rights, including rights 36-15193B and 36-19194B, is ground water.

B. After 1963, the application of recaptured ground water to land that is not appurtenant to the original water right under which water arises, requires compliance with the mandatory statutory permit and license procedures. A & B is therefore required to rely on the provisions of I.C. § 42-1426 to claim the B rights in the SRBA.

A related issue raised by A & B concerns whether or not waste water can be used to irrigate lands other than those to which the original right is appurtenant. A & B argues that no permit and license is required to recapture and reuse water originally diverted under a valid water right because the recaptured water is essentially the property of the original appropriator. A & B argues that because no permit and license is required to use recaptured water, that the provisions of I.C. § 42-1426 do not apply to the B rights. A & B argues that the priority date for the B rights should therefore be the same as that of the 36-02080 source right. This Court disagrees. A & B is applying the recaptured water to lands outside of the scope of the licensed water right and therefore was required to seek authorization in order to irrigate those additional lands after the permit and license procedures became mandatory. This conclusion is consistent with both the common law and Idaho's permit and license statutory scheme.

1. Under the common law general rule the use of recaptured water is limited to appurtenant lands.

Prior to enactment of the mandatory permit and license requirements, the issue of whether recaptured water can be reused on lands other than those to which the original

water right is appurtenant was not really clear in Idaho.[12] *See e.g. Hall v. Blackmun*, 22 Idaho 556, 126 P. 1047 (1912)(addressed issue but decided on other basis). In other jurisdictions the common law general rule is that recaptured water can only be used on the lands to which the original water right is appurtenant without having to perfect additional rights. *See e.g. Salt River Valley Water Users' Assoc. v. Kovich,* 411 P.2d 201, 202 (Ariz. 1966)(doctrine of beneficial use precludes application of waters gained by conservation practices to lands other than those to which the water was originally appurtenant without applying for an additional right); *Fuss v. Franks*, 610 P.2d 17, 19 (Wyo. 1980)(waste waters can be used only upon land for which the water forming the waste was originally appropriated); Wells A. Hutchins, *Water Right Laws In Western States*, Vol. II, p. 568 (USDA 1974) (owner of land on which waste and seepage originate can apply to same land). Therefore, even under the common law general rule, the use of recaptured water is limited to appurtenant lands without perfecting an additional water right for use on adjacent lands.

2. Idaho's permit and license statutory scheme limits the reuse of recaptured water to appurtenant lands absent compliance with the permit and license requirements.

Idaho's statutory scheme on the permit and license method for perfecting and transferring a water right, and in particular after the process became mandatory, requires that recaptured water cannot be use on non-appurtenant lands without complying with the requisite statutory procedures. The subsequent enactment and purpose of the "amnesty statutes," as well as the Idaho Supreme Court's discussion of the same in *Fremont-Madison,* resolve any doubt. The license in this case authorizes the diversion of 1100 cfs and is limited to the irrigation of 62,604.30 acres. A & B expanded the acreage authorized under the license by an additional 2363.1 acres to irrigate the additional acreage covered by the B rights. After the permit and license procedure became

[12] Prior to enactment of the mandatory permit requirements this issue would not have been as likely to have arisen in Idaho because irrigating additional lands would not have necessarily been illegal because of the constitutional method of appropriation.

mandatory, the only way to transfer or enlarge the place of use for the license was through the statutory process.

Although the statutes pertaining to permit and license procedures have been amended since their inception, their effect has remained substantially the same. The effect of a license is that the water right becomes appurtenant to the land irrigated. I.C. § 42-220 (1996)("water right confirmed by provisions of this chapter . . . shall become appurtenant to . . . land for which right of use is granted"); I.C. § 42-101 (1996) ("water right shall become one of the appurtenances of, the land . . . to which . . . said water right is being applied."). Historically, the same was also true. *See* 1905 Idaho Sess. Laws, 174 (later codified as I.C.§ 42-220) (all rights to water confirmed under the provisions of this act . . . shall become appurtenant to and shall pass with conveyance of the land for which the right of use is granted."). The number of irrigated acres is also integral to the irrigation right because it places restrictions on the rate of diversion. I.C. § 42-220 (1996)(no license issued confirming right to use more than 1 cfs of water for each 50 acres unless the appropriator can demonstrate greater amount is needed). Historically, this was also the case. *See* 1905 Idaho Sess.Laws, 174 (no more than 1 cfs for each 50 acres of land irrigated). Today, in order to transfer or enlarge the place of use to which the water right is appurtenant, application and approval is required by IDWR. I.C. § 42-108 (1996); I.C. § 42-222(1996).[13] Historically, the same was also true, with the exception that an additional water right for the expanded place of use and acreage could previously be perfected under the constitutional method of appropriation. 1943 Idaho Sess. Laws, 102 (codified as I.C. § 42-216, now codified as I.C. § 42-222). However, once the permit and license procedures became mandatory in 1963 for groundwater diversions, and in 1971 for surface diversions, the constitutional method was no longer an option. Although the earlier statutes did not distinguish between changes resulting in enlargements to the existing water right and those that did not result in enlargements, the application and approval by the Department of Reclamation (now IDWR) was still nonetheless required.

[13] The Court acknowledges that there is an exception for irrigation districts with respect to transferring acreage within the boundaries of the district, however, the exception does not apply to increasing the number of irrigated acreage.

Therefore, after 1963, the fact that A & B used recaptured water without increasing the rate of diversion for the 36-02080 right did not excuse compliance with the mandatory statutory requirements because the place of use and irrigated acreage were changed and enlarged without seeking the appropriate authorization from IDWR. Further support for this conclusion is found as a result of the enactment of the amnesty statutes and the Supreme Court's discussion of the same in the *Fremont-Madison* opinion. The very purpose of the amnesty statutes was to validate rights that had been previously changed and/or enlarged in violation of the statutory requirements under circumstances similar to the enlargement involved in this case. In anticipation of the commencement of the SRBA, the Idaho Legislature acknowledged that many water right holders made unauthorized changes to their water rights after the permit and license procedure became mandatory. The legislature initially enacted I.C. § 42-1416 (1985) (repealed 1994) and I.C.§ 42-1416A (1989)(repealed 1994) in an attempt to validate rights in the SRBA that had been previously changed and/or enlarged in violation of the statutory procedures. Although I.C. § 42-1416 and I.C. § 42-1416A were repealed, they were replaced with I.C. § 42-1425, I.C. § 42-1426 and I.C. § 42-1427, which sought to achieve the same objective, albeit in a different manner. Simply put, but for the existence of the amnesty statutes any unauthorized changes to the water right, enlargement or transfer, would have been illegal and ran the risk of not being confirmed in the SRBA adjudication process.

The amnesty provisions distinguish between changes that did not result in an enlargement to the water right or "accomplished transfers" (I.C. § 42-1425) and changes resulting in enlargements (I.C. § 42-1426). As concerns enlargements, I.C. 42-1426 provides in relevant part:

> The legislature finds that prior to the commencement of the Snake River Basin Adjudication and subsequent to the mandatory permit system . . . persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature.

I.C. 42-1426 (Supp. 2002). Although the statute does not specifically define "enlargement," the plain meaning assumes that the water diverted at the same authorized

rate under the original water right will be spread on additional acres. In *Fremont-Madison*, the Supreme Court defined what constitutes an enlargement for purposes of applying the statute. "The term 'enlargement' has been used to refer to any increase in the beneficial use to which an existing water right has been applied, through water conservation and other means. *See* I.C. § 42-1426(1)(a). An enlargement may include such events as *an increase in the number of acres irrigated*, an increase in the rate of diversion or duration of diversion." *Id*. at 458, 129 Idaho at 1305 (1996)(emphasis added). For purposes of applying I.C. § 42-1426, this Court finds that the reuse of recaptured water falls squarely within the meaning of the language "water conservation and other means" when the water is applied to additional acreage not covered by the original appurtenant water right. The statute contemplates the situation where the beneficial use of the right will be increased by irrigating additional acres without increasing the rate of diversion. One way this can be accomplished is through water conservation techniques, another "means" is through the use of recaptured water.

A & B cites the case of *Jensen v. Boise-Kuna Irrigation Dist*., 75 Idaho 133, 269 P.2d 755 (1954), for the proposition that the courts have long recognized the ability of irrigation districts to contract to deliver waste water to owners of adjacent lands. A & B's reliance on *Jensen* is misplaced for several reasons. First, *Jensen* preceded the enactment of the mandatory permit and license procedure, hence any transfer of the waste water could have also been accomplished through beneficial use. Second, the owners of the adjacent lands where the waste water was being used had a permit to use the water on the adjacent lands. *See Jensen* at 137, 269 P.2d at 759. It wasn't a situation where the water was being used on the adjacent lands without authorization. Finally, A & B is not being denied a water right to irrigate the additional lands with recaptured waste water. Rather, the right is merely subject to the provisions of I.C. § 42-1426, which requires the subordination of the right to junior appropriators potentially injured from the enlargement.

The bottom line is that after 1963 when the permit and license requirements became mandatory for ground water, the only way to change and/or enlarge the place of use was through the statutory procedures. The Legislature acknowledged this mandate

by enacting the amnesty statutes to prevent unauthorized changes from potentially being lost as a result of the SRBA. This Court can find no exception for using recaptured water as a means of enlarging the irrigated acreage without complying with the licensing procedures. Because A & B expanded the irrigated acreage under the 36-02080 ground water right after 1963, the irrigating of the additional acreage was unauthorized and therefore the enlargement is subject to the provisions of I.C. § 42-1426 in order to be confirmed in the SRBA.

3. Recaptured water is not the same as "private water."

In a related attempt to circumvent the application of I.C. 42-1426, A & B also argues that recaptured water is akin to "private water" and is therefore essentially private property and not subject permit and license requirements, nor is it subject to appropriation by others. This Court disagrees that the subject rights ccan be characterized as "private water." Private water and the use of recaptured water are two distinct legal concepts and are treated differently. Generally, all water located in the State of Idaho is public water subject to appropriation. The exception to the rule is private water which is appurtenant to the land owned by the land owner. Private water is defined as "the waters of any lake not exceeding five (5) acres in surface area at high water mark, pond, pool, spring which is entirely located or situated wholly or entirely upon lands of a person . . . owning said land. I.C. § 42-212. In *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939), the Idaho Supreme Court defined private water:

> While the rule prevails that lakes of a surface area of less than five acres and pools and springs, located *wholly* upon and within lands of a person or corporation, are appurtenant to and a part of the lands and belong exclusively to the owners of the land, it is also well settled that the waters of natural springs, which form a natural stream or streams flowing off the premises on which they arise, are public water subject to acquirement by appropriation, diversion and application to beneficial use.

Id. at 352, 91 P.2d at 387.

Because private water is not subject to appropriation by the public in general, it is essentially treated as the property of the land owner and more akin to a riparian right. Conversely, water that is public water is subject to appropriation in accordance with state law. I.C. § 42-101. Under the prior appropriation doctrine, the property right of the

appropriator is a usufructuary right meaning the appropriator doesn't own the actual water but rather owns the right to divert and put the water to a beneficial use. A & B is reusing public water diverted under the 36-02080 right that has been recaptured. Waste water is subject to appropriation in accordance with the principles previously set forth which govern the recapture and reuse of waste water. The argument that use of recaptured water is the same as private water is entirely inconsistent with the concept of beneficial use and the principles which comprise the prior appropriation doctrine.

C. The Special Master did not err in applying I.C. § 42-1426 by recommending that the "subordination remark" should be included in the B rights.

Because A & B offered no "mitigation plan" as provided for in I.C. § 42-1426, the Special Master correctly recommended the inclusion of the subordination remark for the B rights. I.C. § 42-1426(2) provides in relevant part:

> The mandatory permit requirements . . . are waived, and a new water right may be decreed for the enlarged use of the original right based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before November 19, 1987; provided however, that the rate of diversion of the original right and the separate water right for the enlarged use, combined shall not exceed the rate of diversion authorized for the original right; **and further provided, that the enlargement in use did not injure water rights existing on the date of the enlargement of use**. **An enlargement may be decreed if conditions directly related to the injury can be imposed on the original right and the new water right that mitigate any injury existing on the date of enactment of this act. If injury to a water right cannot be mitigated, then the new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement.**

I.C. 42-1426 (emphasis added).

In *Fremont-Madison*, the Idaho Supreme Court held that the enlargement provision of I.C. § 42-1426(2) was constitutional only because of the mitigation provision. *Fremont-Madison* at 461, 926 P.2d at 1308. In finding the statute unconstitutional without the mitigation provision, the Court held:

> [S]ome injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called

> junior appropriator. The junior appropriator will not receive the water that he/she would have received but for the enlargement if there is not enough water to serve all water users. It is difficult, if not impossible, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority. However, there is at least the possibility that an appropriator seeking an enlargement of one water right might accept a dimunition of another water right held by the same appropriator to assure that the enlargement of the one water right will not reduce the total volume available to the junior appropriator.

Fremont-Madison at 461. Implicit in the Court's reasoning is that to the extent a previously unauthorized enlargement claim is retroactively given senior priority over an existing right on the same source, without mitigation (i.e a substitute source of water), the injury is essentially *per se* because the priority of the affected right on the system has been diminished. At the time an enlargement occurs the affect on other appropriators may not be physically apparent or apparent because there may be a sufficient enough water supply at the time to satisfy all rights on the system as well as the enlargement. However, the relative priority dates on a system only become significant when there is not enough water to supply all water rights on the system. Hence, the essence and value of a water right in a prior appropriation system is the priority date. To the extent a claimant is entitled to retroactively receive a valid water right with a priority date senior to other appropriators on the same source the juniors are *per se* injured irrespective of the extent of the water supply. The mitigation provision preserves the order of priorities on a system by preventing the available water supply to juniors from being diminished as a result of the new or enlarged right.

Following the Supreme Court ruling in *Fremont-Madison*, namely that the injury to junior appropriators occurs any time an enlargement claim is given priority over water rights existing as of the date of the enactment of I.C. § 42-1426, and where no mitigation plan is presented, IDWR began recommending enlargement claims with the following subordination language in the decree to protect other appropriators on the same source as the enlargement:

> This water right is subordinate to all other water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to section 42-1426, Idaho Code. As between water rights decreed as

enlargements pursuant to section 42-1426, Idaho Code, the earlier priority right is the superior right.

The inclusion of the subordination remark satisfies the constitutional concerns raised in *Fremont-Madison* by protecting the order of priorities of existing rights while at the same time permitting previously unauthorized enlargements to be decreed with the priority date as of the date of enlargement subject to being subordinated to any junior rights existing as of the date of the enactment of I.C. § 42-1426(2), if any. The standardized remark allows the provisions of I.C. § 42-1426(2) to be applied and implemented without identifying each and every affected water right..

A & B argues that under the facts of this case there is no injury to other water users. A & B raise two arguments in support. A & B argues that it is essentially on a closed system and therefore other water users are not affected. Alternatively, A& B argues that the recharge to the ESPA is enhanced by application of the waste water to adjacent lands as opposed to just allowing the water collect in pools. This Court disagrees in two respects. First A & B is not on a "closed system." The source for the rights is the ESPA. A & B clearly is not the only water user on the ESPA. A & B by its own argument regarding the respective rates of recharge acknowledges that the system is not closed. *See Affidavit of C.E. Brockway*. Second, for the reasons previously discussed, to the extent a subject enlargement claim is retroactively given a priority senior to an existing junior right without a mitigation plan the injury is *per se* as it is the priority date that is the essence of the right. The fact that the recharge to the ESPA may arguably be enhanced by application to adjacent lands as opposed to allowing the water to pool is irrelevant for defining priorities as in times of shortage the junior right would be curtailed prior to the subject enlargement claim. However, for purposes of administering the rights the rate of recharge may become relevant at a future date in determining whether or not a delivery call on a junior enlargement claim would be futile. If as argued by A & B, the rights of junior appropriators would not be affected as a result of decreeing the enlargement claims without the subordination remark, then it is peculiar that A & B is concerned about the subordination remark being included in the decrees, as any attempt to curtail the enlargement claims would ultimately be futile.

For the foregoing reasons, the Special Master's recommendation to include the subordination remark in the partial decrees for the B rights is **affirmed**.

D. The source for the B rights includes both recaptured water and supplemental water directly pumped pursuant to the 36-02080 right.

One observation made by this Court that was not a basis for the Special Master's recommendation is the fact that A & B is not exclusively using recaptured water to irrigate the acreage covered by the B rights. Water directly pumped under the 36-02080 licensed right is also used to supplement the recaptured water. Both A & B and the BOR acknowledged in briefing as well as at oral argument that the B rights are not exclusively irrigated with recaptured water and that supplemental water pumped directly under the 36-02080 right is also used.

Because water pumped directly from the 36-02080 right is also used to supplement the recaptured waste water and because A & B does not distinguish between the reused water and the directly pumped supplemental water, this Court has difficulty in following A & B's arguments that I.C. § 42-1426 does not apply to the B rights. At a minimum a "gray area" in the law is created if an enlargement is irrigated exclusively with recaptured water. However, the use of water pumped directly under the 36-02080 right falls squarely under the purview of I.C. § 42-1426. A & B has not addressed this issue.

E. A & B's reliance on I.C. § 42-1416 as a basis for withdrawing its 1984 permit was misplaced.

A & B next argues that if the subordination language is to be included in the partial decrees for the B rights, that the date of the subordination should be the date of enactment of I.C. § 42-1416 (March 1, 1985), not the date of enactment for I.C. § 42-1426 (April 12, 1994). A & B contends that the 1984 permit application for the enlargement claims was withdrawn solely in reliance on the enactment of I.C. § 42-1416. In support of this argument, A & B, cites a general rule pertaining to the circumstance

where a right accrues or vests under a statute that is subsequently repealed (I.C. § 42-1416), but is simultaneously replaced by a statute relating to the same subject matter.

> Where a statute is repealed by a new statute which relates to the same subject matter, and which re-enacts substantially the provisions of the earlier statute, and the repeal and re-enactment occur simultaneously, the provisions of the original stature which are re-enacted in the new statute are not interrupted in their operation by the so-called repeal; they are regarded as having been continuously in force from the date they were originally enacted.

Citing 73 Am. Jur. 2d Statutes § 391; *see also State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955).

This Court disagrees. First, any reliance A & B may have placed on I.C. § 42-1416 for withdrawing its permit application was misplaced. I.C. § 14-1416(2) only operated to create a **rebuttable presumption** in the forthcoming SRBA proceedings. The statute did not confer an absolute or vested right to previous unauthorized enlargements or otherwise excuse non-compliance with the mandatory permit and license requirements. In *State v. Hagerman Water Right Owners*, 130 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997), the Idaho Supreme Court addressed the effect of a rebuttable presumption in the context of a director's report. "Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighted with all other facts that may be relevant." Although I.C. § 42-1416(2) lacked standards for determining when injury occurred to other appropriators as held by Judge Hurlbutt, under the express terms of the statute the presumption only applied "in the absence of injury to other appropriators." The 1984 permit application was withdrawn even in advance of IDWR's recommendation for the enlargement claims. As such, A & B and BOR had no way of knowing the extent, to which it would be able to rest on the presumption in the forthcoming SRBA proceedings. Until such time as the rights were investigated and reported by IDWR, A & B would not even know whether or not injury would occur to other users on the same source let alone what "injury" meant under the statute. Moreover, because the source of the water is ground water, the relative effects of the enlargement on other appropriators would be even less apparent.

Later, in *Fremont-Madison*, in the context of the Supreme Court's analysis of I.C. § 42-1426, it also became apparent that I.C. § 42-1416(2) contained an inconsistency that would result in the presumption being automatically rebutted in any situation where an enlargement was presumed to have priority over an existing water right on the same source. As discussed above, without a mitigation provision, injury to other appropriators would occur any time an enlargement claim received priority over a water right on the same source. The presumption would automatically be rebutted. Therefore, to the extent any right arguably accrued under I.C. § 42-1416(2), under the facts of this case, the alleged right would have been automatically extinguished under the express terms of the statute because the ultimate source for the subject enlargement claims is ground water pumped from the ESPA of which A & B is not the only appropriator. At best it would have been ambiguous as to how the statute would be applied. Hence any reliance placed on I.C. § 42-1416 for withdrawing the 1984 permit application was misguided.

The SRBA adjudication statutes in effect at the time provided and still provide a protocol for the filing of a claim based on a permit application and for the issuance of a partial decree prior to the issuance of the pending license. I.C. § 42-1421 and 1986 Idaho Sess. Laws, 580. Apparently, A & B and BOR made a tactical decision not to pursue its claim based on the permit in lieu of attempting to seek an earlier priority date based on the presumptive affect of I.C. § 42-1416. Nothing would have precluded A & B and BOR from proceeding with the claims simultaneously under both bases.

Next, in this Court's opinion the general rule regarding the simultaneous repeal and enactment of the statute as relied on by A & B does not apply to the particular circumstances of this case. One significant distinguishing factor is that there was an interruption between the repeal of I.C. § 42-1416 and the enactment of I.C. § 42-1426. Namely, Judge Hurlbutt ruled that I.C. § 42-1416 was void for vagueness. *See* ***Memorandum Decision and Order on Basin-wide Issue No. 1***, ***Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A, as Written,*** SRBA Case No. 91-00001 (February 4, 1994). Next, although I.C. § 42-1416 and I.C. § 42-1426 were both attempts by the Legislature to excuse the mandatory permit and license requirements for prior enlargements, the respective statutes are substantially different. I.C. § 42-1416 only

created a rebuttable presumption while I.C. § 42-1426 attempts to confirm the enlargement if all the conditions are met. Thus it is a stretch to argue that the enactment of I.C.§ 42-1426 operated to "reenact" the repealed I.C. § 42-1416. In addition, the cases relied on by A & B speak in terms of protecting rights that have already accrued under a former version of the statute after the statute is repealed and replaced. For the reasons discussed earlier, no rights accrued under I.C. § 42-1416 and at best, any right which did arguably accrue under I.C. § 42-1416 was automatically extinguished by its own express terms.

Finally, the inclusion of the subordination remark in no way relates to the provisions of I.C. § 42-1416. The remark was specifically crafted in an attempt to reconcile the constitutionality of I.C. § 42-1426 with the Supreme Court's ruling in *Fremont-Madison.* The remark has no application to I.C. 42-1416.

E. A & B's estoppel and waiver argument is without merit.

A & B next asserts that the Ground Water Users should be barred from responding to the enlargement claims under concepts of waiver and estoppel because the Ground Water Users failed to originally object to the enlargement claims when the claims were initially recommended pursuant to I.C. § 42-1416. This argument is without merit for a number of reasons. This Court will only address a few of the most obvious. First, after I.C. § 42-1416 was repealed, Judge Hurlbutt entered an ***Order*** setting forth deadlines to file amended claims, director's reports, objections and responses. *See* ***Order Re: Amendment of Claims*** (July 7, 1997). The ***Order*** did not limit objections to those parties already parties to the subcases. As such, any party to the adjudication could have filed an objection without leave of court. Second, after leave to amend a claim is granted, the determination as to how to proceed is left to the discretion of the presiding judge or special master whichever the case may be. ***AO1*** 4.(k). Finally, the Ground Water Users did not file an objection to IDWR's recommendation. Rather they filed a response to IDWR's recommendation to allow them to participate in the proceedings. There have been numerous occasions where parties did not timely become involved in a subcase because they agreed with IDWR's recommendation and were later denied leave of court

to participate. The Court's position has been that if a party agrees with a particular recommendation in a case that may affect their right or establish legal precedence which may affect their right, that the appropriate procedure is to file a response. *See e.g. North Snake Ground Water District v. Gisler*, 136 Idaho 747, 750, 40 P.3d 105, 108 (2002). This process allows the party to participate in the proceeding in the event objections are filed or a case is resolved differently than IDWR's recommendation. The Ground Water Users acted appropriately by filing the response. However, even if the Ground Water Users did not file a response, this Court is not required to "rubber stamp" portions of a director's report to which there has been no objection nor is the Court required to adopt the terms agreements or stipulations resolving objections. *In Re SRBA Case 39576*, 128 Idaho 246, 258-59, 912 P.2d 614, 626-27 (1995). In its objections, A & B raised issues of broader reaching significance than just application to the the instant case which ultimately needed to be addressed by this Court irrespective of whether or not a response was filed.

V.
CONCLUSION

In summary, A & B is using a combination of recaptured ground water and ground water directly pumped under the 36-02080 right to irrigate the subject rights. The use of recaptured water is limited to application on lands to which the original water right is appurtenant. After 1963 for ground water and 1971 for surface water, the application of waste water to adjacent non-appurtenant lands required compliance with the statutory procedures for a right to irrigate those additional lands. Failure to comply resulted in an unauthorized use. Because the use of the recaptured water on additional land is considered an enlargement of the existing right, Idaho Code § 42-1426 operates to have the unauthorized enlargement validated in the SRBA, subject to the condition that the priority date for the unauthorized enlargement is subordinated to the priority dates of other water rights existing as of the date of enactment. The subject rights were claimed as enlargements of the 36-02080 right. To the extent it is argued that the waste water is

derived from a source different than 36-02080, then the claim is not an enlargement as of an existing right as contemplated by the statute. However, if I.C. § 42-1426 does not apply, the unauthorized use cannot be decreed as claimed. For these reasons, the decision of the special master is **Affirmed**.

VI.

ORDER

For the reasons set forth above, A & B's challenge **IS HEREBY DENIED**. Water rights 36-02080, 36-15127A, 36-15127B, 36-15193A , 36-15193B, 36-15194A, 36-15194B, 36-15195A, 36-15195B, 36-15196A, and 36-15196B will be decreed as recommended by Special Master Dolan in the *Special Master's Report and Recommendation* dated October 8, 2002. Water rights 36-15127, 36-15192, 36-15193, 36-15194, 36-15195 and 36-15196 will be disallowed.

IT IS SO ORDERED

Dated: April 25, 2003

_____

ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication