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A&B Irrigation District v. State Respondent's Brief 8 Dckt. 40974

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In the Supreme Court of the State of Idaho

IN RE SRBA, CASE NO. 39576, SUBCASE 00-91017 (BASIN-WIDE ISSUE 17 – DOES IDAHO LAW REQUIRE A REMARK TO ‘REFILL’, UNDER PRIORITY, SPACE VACATED FOR FLOOD CONTROL).

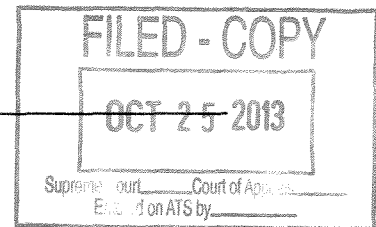
A & B IRRIGATION DIST., AMERICAN FALLS RESERVOIR DIST. #2, BURLEY IRRIGATION DIST., MILNER IRRIGATION DIST., MINIDOKA IRRIGATION DIST., NORTH SIDE CANAL Co., TWIN FALLS CANAL Co.,

Appellants

v.

STATE OF IDAHO, UNITED STATES OF AMERICA, BOISE PROJECT BOARD OF CONTROL, ABERDEEN-AMERICAN FALLS GROUND WATER DIST., ABERDEEN-SPRINGFIELD CANAL Co., BINGHAM GROUND WATER DIST., BONNEVILLE-JEFFERSON GROUND WATER DIST., JEFFERSON-CLARK GROUND WATER DIST., MADISON GROUND WATER DIST., MAGIC VALLEY GROUND WATER DIST., NORTH SNAKE GROUND WATER DIST., BLACK CANYON IRRIGATION DIST., NEW YORK IRRIGATION DIST., BIG WOOD CANAL Co., BALLENTYNE DITCH Co., BOISE VALLEY IRRIGATION DITCH Co., CANYON COUNTY WATER Co., EUREKA WATER Co., FARMERS’ CO-OPERATIVE DITCH Co., MIDDLETON IRRIGATION ASSN., INC., MIDDLETON MILL DITCH Co., NAMPA & MERIDIAN IRRIGATION DIST., NEW DRY CREEK DITCH Co., PIONEER DITCH Co., SETTLERS IRRIGATION DIST., SOUTH BOISE WATER Co., THURMAN MILL DITCH Co., IDAHO POWER Co., FREMONT-MADISON GROUND WATER DIST., IDAHO IRRIGATION DIST., UNITED CANAL Co., CITY OF POCATELLO, UNITED WATER IDAHO INC., PIONEER IRRIGATION DIST.,

Respondents



BOISE PROJECT BOARD OF CONTROL,

Appellant

v.

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Respondents

RESPONSE BRIEF OF UPPER VALLEY WATER USERS

Appeal from the District Court of the Fifth Judicial District of
The State of Idaho, in and for the County of Twin Falls,
Honorable Eric J. Wildman, District Judge, Presiding

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STATEMENT OF THE CASE

This case is an appeal from District Judge Eric J. Wildman's *Memorandum Decision* issued on Basin-Wide Issue 17 (R. 883-99). This brief is Fremont Madison Irrigation District, Blackfoot Irrigation District and Idaho Irrigation District's, (hereinafter the Upper Valley Water Users, or "UVWU") response to *Appellant's Opening Brief* ("*Project Brief*") filed by Appellant Boise Project Board of Control ("Boise Project"), and to the *Surface Water Coalition's Opening Brief* ("*Coalition Brief*") filed by A & B Irrigation District, et al. ("Surface Water Coalition"). We refer to the Boise Project and the Surface Water Coalition collectively as "Appellants."

I. Nature of the Case

The District Court designated "Basin-Wide Issue 17" as "Does Idaho law require a remark authorizing storage rights to "refill," under priority, space vacated for flood control?" and directed the parties to address "whether Idaho law authorizes the refill of a storage right, under priority, where water diverted under that right is released for flood control?" *Order Designating Basin-Wide Issue* (Sept. 21, 2012)("Order"), at 5, 9.

The District Court ruled that a storage right holder may only take, in priority, what is allowed under the right, stating:

The Court holds that under the prior appropriation doctrine as established under Idaho law, a senior storage right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once.

Memorandum Decision at 13 (R. 895).

Therefore, once an initial fill of a storage water right is reached, a storage right holder may refill an amount of water not attached to a priority date, so long as such refill occurs

incidental to that water right, based solely on the availability of excess water. If the refill is only incidental to the water right, it cannot be an enlargement of the right, and is appropriate. As such, non-priority refill should be memorialized in the element portion of the Partial Decrees to such rights in the Snake River Basin Adjudication

II. Course of Proceedings and Statement of Facts

The UVWU are comprised of representative storage water right holders, or approximately 34% of storage water right holders which divert from the Snake River and its tributaries above Blackfoot, Idaho, and above Milner Dam. UVWU agrees with the State of Idaho's assessment that Appellants' briefs ignore many of the proceedings relevant to this appeal, and hereby adopts and incorporates into this brief the State's Course of Proceedings and Statement of Facts.

ADDITIONAL ISSUES PRESENTED ON APPEAL

In addition to the five issues identified in briefs filed by Appellants, the UVWU identify the following issues:

1. How is an initial fill of a storage water right quantified?
2. If a storage right holder is allowed only one priority fill under its water right, may it nevertheless divert and store additional water if such refill does not impair other water rights?
3. Should the ability to refill, not under priority, be memorialized in the element portion of the Partial Decrees to such rights in the Snake River Basin Adjudication?

ARGUMENT

I. Standard of Review

The question of designating a basin-wide issue in the SRBA is committed to the discretion of the District Court, and is reviewed for abuse of discretion. AO1 § 16. This Court reviews questions of law *de novo*. *Idaho Dep't of Health and Welfare v. McCormick*, 153 Idaho 468, 470, 283 P.3d 785, 787 (2012).

II. The District Court's Decision to Limit Storage Water Rights to One Priority Fill is Correct.

The District Court's answer to this basin-wide issue—“[d]oes Idaho law require a remark authorizing storage rights to “refill,” under priority, space vacated for flood control?” was no. The District Court supported its decision stating that “under the prior appropriation doctrine as established under Idaho law, a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water right once.” *Memorandum Decision* at 13 (R. 895).

The District Court further held that “as soon as a storage right is filled it is no longer in priority.” *Memorandum Decision* at 10 (R. 892). The court's opinion explained its decision using necessarily basic principles of water law:

The assertion that a senior storage right holder can “fill,” or “satisfy,” his water right multiple times under priority before an affected junior water right is satisfied once is contrary to the prior appropriation doctrine as established under Idaho law.

Memorandum Decision at 9-10 (R. 891-92).

Anytime a water user diverts more water than is allowed under a water right, an enlargement has occurred. The Idaho Supreme Court has defined an enlargement in simple terms, such as: “Enlargement includes increasing the amount of water diverted or consumed to accomplish the beneficial use.” *Barron v. Idaho Dep’t Of Water Res.*, 135 Idaho 414, 4520, 18 P.3d 219, 225 (2001). While historical changes in a water right, such as a change in point of diversion or change in place of use, may be allowed as an accomplished transfer pursuant to I.C. § 42-1425, the Court has made it clear that an enlargement is not allowed under the accomplished transfer statute. *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012). Once an enlargement has taken place, water that would have been available for junior appropriators on the same system becomes unavailable, and a *per se* injury to those junior users exists. *Id.*

To determine if a water right has been unlawfully enlarged, one need only look to the quantity allowed to be diverted under the water right, and then the amount actually diverted. If the diverted amount exceeds the allowed amount, an enlargement has occurred. Storage water rights, like all water rights, must contain a quantified diversion amount per year. The Court has held that water rights must be defined “in terms of quantity of water per year” *A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 416, 958 P.2d 568, 573. The UVWU are unaware of any case law, statutory law, or constitutional law which allows storage rights to exist without the required element of quantity.

Therefore, the analysis of whether refill under priority to replace water released for flood control is consistent with Idaho Law must conclude that the diversion of any water exceeding the

decreed quantity is an enlargement and inconsistent with the law. If the decreed quantity of water is diverted for a storage right, any other diversion under the right must be considered an enlargement. The District Court properly stated that “it is the quantity element of a water right that defines the duration of priority administration during its authorized period of use.”

Memorandum Decision at 11 (R. 893).

On the other side, Appellants argue for a water right that in its very nature is of an uncertain amount, and one that is vague and fluctuating—depending on the water flows of any given year. Appellants are asking for the ability to fill under priority without a quantity limit. Such action is not supported by Idaho law, including the prior appropriation doctrine.

The Court has recognized the requirement that a water right be defined in terms of quantity of water per year is “essential to the establishment and granting of a water right.” *A&B Irr. Dist.*, 131 Idaho at 411, 958 P.2d at 573. The Court has further held that language which eliminates the quantity element “vitiates the existence of a legal water right.” *State v. ICL*, 131 Idaho 329, 333, 055 P.2d 1108, 1112 (1998).

It is clear that if senior storage reservoirs such as American Falls are allowed priority “refill,” there will be no real limit on the quantity they can divert for storage. There would be no “term of quantity” to define the right, because they would have the ability to continuously store water, well after their annual water storage limit had been reached. Any additional storage would be a full or partial “refill” of the decreed quantity. If the priority date for the refill were to be listed as the initial priority date for the water right itself, the reservoirs in question would have an unprecedented ability to curtail junior rights in order to allow “refill” regardless of whether it

was as a result of flood control refill or otherwise.

The rights of the various storage reservoirs, just as with natural flow rights, are based upon "first in time is first in right" or the doctrine of prior appropriation. Therefore, once a senior storage right is filled, the junior storage right is allowed to "turn on" or to begin to fill. If the Courts adopted Appellants' argument of "refill with priority", then even though the full quantity of the acre foot storage right was originally filled, and the junior storage right would otherwise begin to fill, it would not be allowed to do so until the very last acre foot of storage was refilled by the senior storage right. Clearly, this would significantly impact and injure the junior storage right holder in a manner which modifies the historical way in which the junior rights were developed and administered. Furthermore, because of the virtual impossibility of re-filling the flood controlled reservoir to the "last acre foot" due to the concurrent demands for releases from the senior natural flow water users at the same time as the re-fill is occurring, the junior storage rights would be further impacted and injured.

The result would be that the quantity of water diverted for a storage right would not be determined by the quantity of water defined by the storage water right, but would be determined by the quantity of water released for flood control. It is impossible to administer a water right that does not properly include the elements of a water right, especially the quantity element. If the decreed quantity is less than the quantity actually diverted, the Water Master will not have the ability to properly take account of amounts diverted in relation to the other users on the system. It would create uncertainty for junior users and destroy what stability and predictability there is in the system. If a junior water user doesn't know what the senior water user is going to divert,

he can't predict what water will be available to him for the year and as such will be unable to plan accordingly. Furthermore, it defeats the reason for having multiple storage systems on the river if the senior storage right is in priority well beyond its original storage right.

Just as junior water right holders are subject to the priority of their water rights, senior storage right holders are subject to the terms of their individual contracts with any applicable governmental agency such as the Bureau of Reclamation. Therefore, a contract requiring special terms such as flood control releases should be deemed to be "part of the deal" which came with the right to store in that particular reservoir. One holding such rights in a reservoir which requires significant flood control obligations, must abide with such restrictions just as a junior water right holder must abide with its junior priority date.

For these reasons, the District Court's is correct in its decision to limit storage water rights to one priority fill.

III. Initial Fill of a Storage Water Right is Complete When the Total Quantity That Has Been Accounted to Storage Equals the Decreed Quantity of the Storage Water Right

Appellants have taken issue with the District Court's decision to limit its ruling to the issue of the right to refill. The District Court declined to rule how an initial fill is measured, stating "the issue of when a storage water right is filled does not lend itself to a basin-wide proceeding." The District Court supported that decision because it determined that the "issue of fill may require factual inquiries, investigation and record development specific to a given reservoir." *Memorandum Decision* at 11. (R. 893).

The District Court did, however, determine the meaning of the root term, “fill” to mean “to satisfy or to meet.” *Memorandum Decision* at 9 (quoting *The American Heritage Dictionary of the English Language*) (R. 891). The District Court expanded on this stating that “the term ‘fill’ may be used to describe (1) a reservoir physically filling with water, or (2) the decreed volume of a storage water right being satisfied (i.e. when the total quantity that has been accounted to storage equals the decreed quantity.) *Id.*

The UVWU agree with the District Court’s assessment that the term “fill” may be used to describe the decreed volume of a storage water right being satisfied. When the total quantity of water entering a reservoir which has been accounted to storage equals the decreed quantity on the water right, the storage water right under priority is filled. Water “accounted to storage” can be simply stated as follows: natural flow arising above and entering a reservoir, if not presently required to fill a senior right below the reservoir, is considered stored to that reservoir's water right. In other words, there is no storage of water until the volume of water leaving the reservoir to meet senior downstream rights is less than the volume of water entering the reservoir. Such an assessment is simple, functional, and employs logic and common sense. If this Court determines a need to address the issue of fill, the District Court’s assessment of the term “fill”, used as an official, working definition does not require any further factual inquiries, investigation or record development.

IV. Once a Storage Right Holder has Filled Once Under Priority, It May Refill Outside of Priority if Such Refill Does Not Impair Other Water Rights.

The UVWU does not contend that a reservoir may only fill one time, but rather that a

reservoir may only fill a water right under priority one time. UVWU concurs with the United States analysis when it stated:

As is noted below, in prior briefing no party has disputed Reclamation's ability to refill its reservoirs; the issue has been whether refill may be done under the priority of Reclamation's storage water rights. By emphasizing that the issue before the Court is whether "refill" can occur in priority, the Court effectively affirmed that no remark is necessary for "refill" done using water that can be stored without injury to other water rights.

United States' Opening Brief on Basin-Wide Issue No. 17, at 1 n.1 (R. 382)

A reservoir may catch excess water and "refill" so long as such refill does not harm other water rights. In fact, UVWU submits that such a right of non-priority refill is inherent within a storage right and should be memorialized within the element portion of each storage decree. Such action is "necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." Idaho Code § 42-1411(2)(j) *see also id.* § 42-1412(6) ("The Decree shall contain or incorporate a statement of each element of a water right as stated in subsections (2) and (3) of section 42-1411, Idaho Code, as applicable."). It is also the position of the UVWU that because this issue has been before the District Court and is now appealed to this Supreme Court, that this Court, by a confirming order, can and should clarify the non-priority refill right of all storage water rights, thus alleviating the need to re-open each of the storage right partial decrees in the adjudication.

Non-priority refill would not constitute an enlargement. As defined above, an enlargement of a water right occurs when the quantity of water diverted for a water right exceeds the decreed quantity. Insofar as refill occurs without being attached to a priority date, (as the

UVWU contend that refill procedures have historically occurred) it is simply incidental to that water right, and relies solely on the availability of excess water. If the refill is only incidental to the water right, it cannot be an enlargement of that right.

Appellants' problem comes because they wanted to have their cake and eat it too. Appellants are trying to use flood control operations as a vehicle to enlarge their water rights, directly in contradiction with well established principles of the prior appropriation doctrine and Idaho law. As stated above, the end result of stored water being released for flood control, or any other purpose for that matter, is that junior water rights would be harmed or diminished if a reservoir is able to fill, under priority, more than once.

Interestingly, Appellants are now trying to argue their way out of a position they have already been in for many years. Historically, Appellants have refilled their reservoirs by catching incidental, non-priority water—water that does not harm other water right holders. Appellants have successfully used this method of refill without issue for years. Appellants' many efforts to achieve their desire to refill an unquantifiable amount of water under priority (to the detriment of other water right holders) have merely brought them to the same place they started—refilling outside of priority, so long as such refill is incidental to other water rights.

Finally, one only needs to address the logic of the current issue before this Court: the refill following releases for "flood control". Why else would there be a flood control release but for the fact that the reservoir is expecting to have significant water enter its system from substantial snowpack or rain events occurring above the releasing reservoir? Therefore, assuming the flood control releases are consistent with the amount of anticipated floods, the non-priority

fill right of the releasing reservoir should not be impacted and the reservoir will fill again without the need for a priority right. In such event, the system literally becomes a "catch as catch can" system allowing each reservoir the ability to refill or even re-release under additional flood control.

V. The Right of Non-Priority Refill Should be Memorialized in the Element Portion of the Partial Decrees in the Snake River Basin Adjudication and confirmed by the Supreme Court.

The UVWU support non-priority refill operations. The UVWU concur with all other parties in recognizing the importance of refill. While the UVWU believe that priority refill is inconsistent with Idaho law, as argued above, the UVWU wish to emphasize the importance of this Court explicitly recognizing the right to non-priority refill in its decision. Because the UVWU contend that non-priority refill is not an enlargement of the right itself, but rather an incidental ability to refill once all junior users have had their rights filled, it is necessary, for proper administration, for either a court order of confirmation or for a remark to that effect to be listed in the right.

CONCLUSION

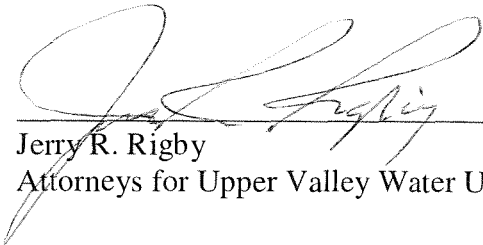
The District Court properly decided that Appellants cannot fill under priority more than once. A senior storage water right holder may not refill his storage water right under priority before junior appropriators' water rights are satisfied.

The District Court also properly assessed the term "fill", as stated above. To the extent that a working definition of the term fill is useful this case, the District Court's assessment of the term "fill", used as an official, working definition does not require any further factual inquiries,

investigation or record development.

Appellants have aggressively sought to bolster their own surface water rights, to the detriment of other water right holders, in conflict with well established Idaho water principles. They have done so when they already had an accepted and functional method to refill their reservoirs. In so doing, Appellants have demonstrated a real need for this Court to officially confirm a reservoir's right to non-priority refill.

RESPECTFULLY SUBMITTED this 23rd day of October, 2013.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of October, 2013, the foregoing was served as follows:

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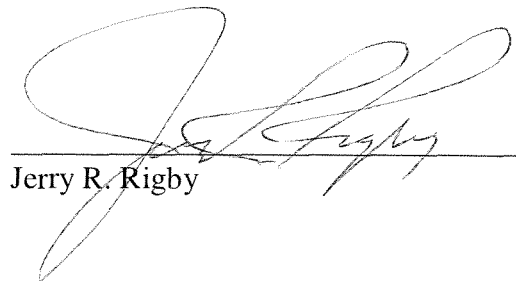
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