IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

	)	**Subcases 36-15127A, 36-15127B,**
In Re SRBA	)	**36-15192, 36-15193A, 36-15193B,**
	)	**36-15194A, 36-15194B, 36-15195A,**
	)	**36-15195B, 36-15196A and 36-15196B**
Case No 39576	)	
	)	**ORDER GRANTING RESPONDENTS'**
	)	**MOTION FOR PARTIAL SUMMARY**
	)	**JUDGMENT**[1]

BACKGROUND

Amended Enlargement Claims

On April 11, 1990, and June 24, 1991, A&B Irrigation District ("A&B") filed claims 36-15127, 36-15193, 36-15194, 36-15195 and 36-15196 for groundwater to irrigate lands in Unit B of the A&B Irrigation District based on beneficial use. The claims, originally filed under I.C. § 42-1416, represented expanded irrigated acreage under license 36-02080.[2] The claimed priority dates were 1965, 1968, 1978, 1981 and 1984.

On April 9, 1998, A&B and the United States of America, Bureau of Reclamation ("United States"), were granted leave to file amended notices of claims in subcases 36-15127, 36-15193, 36-15194, 36-15195 and 36-15196. Evidently because the United States is the license holder of the original right, IDWR recommended all claims to the United States[3] and then split each claim into parts "A" and "B" depending on the basis.

The "A" claims are constitutional appropriations and are not at issue in the present *Motion for Partial Summary Judgment*. Although the "B" claims were initially filed as

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[1] The *Respondents' Motion for Partial Summary Judgment* was filed in subcases 36-15127A, 36-15127B, 36-15192, 36-15193A, 36-15193B, 36-15194A, 36-15194B, 36-15195A, 36-15195B, 36-15196A and 36-15196B. However, summary judgment was only sought in the "B" claims, i.e. 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B.

[2] The United States, Bureau of Reclamation is the license holder of 36-02080. Both it and A&B are claimants and objectors in 36-02080.

[3] Each claim was recommended to the United States with the following remark under "name & address":

> The beneficial use of the water represented hereby is for the landowners within the A&B Irrigation District pursuant to contract No. 14-06-100-2386, dated February 9, 1962 (as may be supplemented or amended) between the United States of America through the U.S. Bureau of Reclamation and the A&B Irrigation District for irrigation and other permitted purposes as authorized by the Act of September 30, 1950, Ch. 1114, 64 Stat. 1083, of the North Side Pumping Division, of the Minidoka Irrigation Project.

expansions under I.C. § 41-1416, the United States later agreed they are enlargements subject to I.C. § 42-1426. On the other hand, A&B argued the "B" claims are not subject to I.C. § 42-1426. It now seeks the original 1948 priority date under 36-02080. For each "B" claim, the United States said the source is "groundwater, waste, seepage, return flow." A&B said the source is "return flow." The following summarizes their claims:

	Quantity	Total acres	Claimed priority date
36-15127B			
A&B	34 cfs	2,051.5 acres	9/9/1948
US	33.69 cfs	2,051.5 acres	4/1/1984
36-15193B			
A&B	.32 cfs	18.9 acres	9/9/1948
US	.31 cfs	18.9 acres	4/1/1965
36-15194B			
A&B	2.53 cfs	152.4 acres	9/9/1948
US	2.5 cfs	152.4 acres	4/1/1968
36-15195B			
A&B	2.25 cfs	135.6 acres	9/9/1948
US	2.23 cfs	135.6 acres	4/1/1978
36-15196B			
A&B	.08 cfs	4.7 acres	9/9/1948
US	.08 cfs	4.7 acres	4/1/1981
Totals			
A&B	39.18 cfs	2,363.1 acres	
US	38.81 cfs	2,363.1 acres	

IDWR Director's Reports

On August 21, 1998, IDWR filed *Director's Reports* for the amended "B" claims. IDWR recommended all claims to the United States with groundwater as the source for irrigation within a 66,305.3 acre place of use[4] described in 36-02080. A subordination remark[5] was included with each recommended priority date:

	Quantity	Total acres	Rec. priority date
36-15127B	34.03 cfs	2,051.5 acres	4/1/1984
36-15193B	.31 cfs	18.9 acres	4/1/1965
36-15194B	2.53 cfs	152.4 acres	4/1/1968

[4] Both A&B and the United States maintain the place of use should be 680.6 acres larger or 66,985.9 acres, probably because of acreage added by beneficial use claims not at issue here.

[5] The subordination remark recommended by IDWR states:

> This water right is subordinate to all 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.

36-15195B	2.25 cfs	135.6 acres	4/1/1978
36-15196B	.08 cfs	4.7 acres	4/1/1981
Total	39.2 cfs	2,363.1 acres	

A&B Objection

A&B filed identical *Objections* in each subcase on October 13, 1998:

> **Source** Should be: Drainwater (return flow) of project that is recaptured. These lands are irrigated with drainwater recaptured and diverted within project boundaries.
> **Quantity** Should be: Annual diversion volume should be 267,943.6 AF and total combined diversion rate should be 1100 CFS plus drainwater recaptured. Annual diversion is all recaptured drainwater **in addition** to 1100 cfs of groundwater diversions. Diversion volume per year is based upon total of 66,985.9 acres. Quantity is not a part of the 1100 cfs groundwater right.
> **Priority date** Should be: 9/9/48. No subordination provision. Should be the priority date of the water right that creates the drainwater. As this is not an enlargement claim, there should be no subordination provision. If any part of the right is considered an enlargement claim, a mitigation plan exists to avoid any subordination.

United States Objection

The United States filed its *Objection* on October 14, 1998:

> **Source** Should be: groundwater, waste, seepage, and return flow. The waste, seepage, and return flow is used and reused within the Bureau of Reclamation's Minidoka Project.
> **Priority date** Should be: Use of this right is subject to the terms of Idaho Code § 42-1426. The Director's subordination language is derived from too narrow a reading of I.C. § 42-1426. The Director's comments fail to recognize that the right may either be subordinated, as suggested by the Director, or may be tied to a mitigation plan which protects valid, pre-1994, junior water rights. The mitigation option was recognized by the Idaho Supreme Court in Fremont-Madison v. Ground Water Approp., 926 P.2d 1301 (Idaho 1996)[6], and should be expressly preserved as an option in the decree for this right. [footnote added]

Responses

On October 31, 1997, and again on October 30, 1998, the Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District,

[6] The Idaho Supreme Court decision on the constitutionality of Idaho's "amnesty statutes" (I.C. §§ 42-1425, 42-1426 and 42-1427) was *Fremont-Madison* v. *Ground Water Approp.*, 129 Idaho 454, 926 P.2d 1301 (1996).

Tim Deeg, Mack Neibaur[7] and Ralph E. Breeding ("Respondents") filed *Responses* to the A&B and United States *Objections*.

Respondents' Motion for Partial Summary Judgment

On January 24, 2001, Respondents filed their *Respondents' Motion for Partial Summary Judgment*. In their conclusion, Respondents summarized their arguments:

> In 1996 the Idaho Supreme Court affirmed the constitutionality of Idaho Code § 42-1426 on the basis that this statute, which allows for the retroactive creation of water rights established in violation of mandatory permit requirements, provided adequate protection to the priorities of existing water rights. In response to that decision, the Department began including a standard subordination clause on all of its recommendations for water rights. In 1998, this Court affirmed that the inclusion of the standard subordination clause was necessary in light of the constitutional requirements discussed in *Fremont-Madison* . . . .[8] Absent a subordination clause that protects the priorities of existing water rights, the District's enlargements would be unconstitutional and cannot be recognized. The District's objections to the source and priority date recommendations of its Enlargement Claims therefore are utterly without basis and should be summarily dismissed. [footnote added]

A&B Brief in Opposition

On February 12, 2001, A&B lodged its *Brief in Opposition to Respondents' Motion for Summary Judgment*. A&B's arguments in support of its claims for runoff, seepage, drain and waste water ("waste water") to irrigate additional acreage within the district with a 1948 priority date go something like this:

! Water drains from district land and is collected on the surface in ponds and drainage works. From there it is pumped back onto district land. A&B has a right to recapture and utilize water previously appropriated by A&B.

! Waste water belongs to A&B and in the absence of abandonment or forfeiture, may be reclaimed by A&B so long as it is willing and able to put it to a beneficial use.

! Waste water captured and put to beneficial use by A&B need not be applied only to the land to which the original water right (36-02080) is appurtenant. The water may be applied to

[7] Mack Neibaur died on September 7, 2000, and is no longer a Respondent.

[8] On September 11, 1998, Special Master Terrence A. Dolan entered an ***Order on Motions for Summary Judgment*** in subcases 36-10033, *et al.*, holding that *Fremont-Madison* required that IDWR recommend all enlargements be subordinated to all water rights with a priority date earlier than April 12, 1994, to fully mitigate potential injury to junior water rights existing as of the date of enactment of the amnesty statutes.

land within the district to which the original water right was not appurtenant and even to land outside the district.

! Expanded irrigation using waste water is not an enlargement claim under I.C. § 42-1426, but an appropriation and lawful use of water to avoid waste.

! The application of waste water to irrigate project lands: 1) is the most effective way to dispose of waste water, 2) increases the yield of the land, 3) promotes efficiency of the district, 4) is the most efficient method of reducing water losses within the district and 5) provides the greatest recharge to the Eastern Snake Plain Aquifer ("ESPA"). The alternatives of containment and out-of-basin pumping of the waste water would result in extensive evaporation of the water and large reductions in recharge of the ESPA.

! Proper utilization of waste water on additional irrigated land can reduce pumping from the aquifer and minimize the net depletion of the aquifer compared to other alternatives.

! Waste water captured by A&B in its drain ditches is an independent water source because the water is no longer flowing in its natural channel or stream. They are not waters of the state subject to appropriation. Hence, Respondents can claim no injury and waste water is not subject to subordination.

! Because waste water is surface water, A&B made constitutional appropriations in 36-15193B and 36-15194B dating from its application to beneficial use-- 1965 and 1968 respectively. Therefore, there should be no subordination of these pre-1971 claims.

! Enactment of I.C. § 42-1426 simultaneously with repeal of I.C. § 42-1416 acted as a re-enactment of I.C. § 42-1416; therefore, vested rights acquired by A&B due to its reliance upon I.C. § 42-1416 were preserved.

! A&B should be allowed to rely on the amnesty statute, I.C. § 42-1416; if subordination is required, it should date from enactment of that statute.

! Respondents are estopped from contesting A&B's claims because they failed to object to its claims and thereby waived their rights to assert injury.

Hearing on Motion for Partial Summary Judgment

A hearing on Respondents' *Motion for Partial Summary Judgment* was held on February 23, 2001, at the SRBA Courthouse in Twin Falls, Idaho. Roger D. Ling appeared

for A&B; Kathleen M. Carr appeared in court and David Gehlert appeared by telephone for the United States; John M. Marshall appeared for Respondents; and Nicholas B. Spencer and Candice M. McHugh appeared by telephone for IDWR. The United States made no separate arguments, instead relying on A&B's presentation. Following the hearing, the matter was taken under advisement. There are no genuine issues as to any material facts to determine the Respondents' *Motion for Partial Summary Judgment*.

DISCUSSION

IDWR agreed with both A&B and the United States on the number of irrigated acres added to the A&B Irrigation District between 1965 and 1984 through A&B's groundwater conservation efforts-- 2,363.1 acres. IDWR even recommended slightly more total groundwater (39.2 cfs) than either A&B or the United States claimed (39.18 cfs and 38.81 cfs, respectively). The central issues raised by Respondents are the claimed source and priority dates. Secondarily related to those two issues are the bases of the claims (constitutional or beneficial use versus I.C. § 42-1426) and whether to include IDWR's subordination remark. The United States agreed I.C. § 42-1426 applies to the claims, but suggested that subordination be "tied to a mitigation plan."

Waste Water and Place of Use

The term "waste water" seems to best describe the water claimed by A&B as the source for 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B. Waste water has been defined as "(1) water purposely discharged from the project works because of operation necessities, (2) water leading from ditches and other works, and (3) excess water flowing from irrigated lands, either on the surface or seeping under it." *Water Rights Laws in the Nineteen Western States*, Wells A. Hutchins, vol. II, p. 568.

The term "waste water" does not necessarily imply the resource is being wasted. While Idaho has declared it a misdemeanor to waste irrigation water (I.C. § 42-4302), the State acknowledges some waste will occur and approves of its re-use:

> The rule . . . has been that some loss of water through seepage or evaporation is considered a prerogative of the appropriator, so long as the loss is reasonable. *Glenn Dale Ranches* v. *Schaub*, 94 Idaho 585, 494 P.2d 1029 (1972). The senior appropriator retains his right to all of the water, including that which is

> lost through reasonable seepage, and thus may reclaim it, for instance, by improving his transmission system.

Hidden Springs Trout Ranch v. *Hagerman Water*, 101 Idaho 677, 681, 619 P.2d 1130, 1134, 1980.

A&B was correct in pointing out that Idaho law follows the general rule throughout the West: "It is settled law that seepage and waste water belong to the original appropriator and, in the absence of abandonment or forfeiture, may be reclaimed by such appropriator as long as he is willing and able to put it to a beneficial use." *Reynolds Irrigation Dist*. v. *Sproat*, 70 Idaho 217, 222, 214 P.2d 880, 883 (1950). However, the question remains whether A&B may apply its waste water to land not covered by the original water right after 1963,[9] without some statutory approval. With the exception of I.C. § 42-1426, general western water law suggests it cannot be done and A&B could cite no case law on point to support its position:

> Most water is 'reused.' Agricultural water is diverted, spread on fields, and then some is returned through tail ditches or by seepage to a stream. . . . Maximizing the number and extent of uses promotes efficiency and is an important conservation goal. It is important to consider at what point the right of the original appropriator to continue using water ceases.
>
> Waters originating within the watershed can be recaptured and reused by an appropriator if no enlargement of rights under a permit or decree results **and if the recapture and reuse occur within the land for which the appropriation was made**. Thus an appropriator ordinarily may "recycle" irrigation return flows or capture seepage and use it within limits imposed by state law [emphasis added].

Water Law, David H. Getches, pp. 135-136.

In 1997, Idaho's Attorney General was asked whether the Lava Hot Springs Foundation could authorize use of its water by private parties on private land. The answer was, no:

> [T]he Foundation may not authorize the use of any portion of its water in a manner that is inconsistent with its state water right. Other parties seeking to use the Foundation's waste water **for new uses or on lands other than the authorized place of use** must file for a permit from the Idaho Department of Water Resources.
>
> . . .
>
> Unquestionably, the law of prior appropriation is specified as the method to establish the right to use water in Idaho. Absent a clear statutory expression by

[9] On March 25, 1963, the application, permit and license procedure became the exclusive means of acquiring groundwater in Idaho. See I.C. § 42-229. Surface water, on the other hand, could be appropriated by the constitutional method until July 1, 1971, when the legislature specified that all future water rights must be obtained by the application, permit and license procedure. See I.C. §§ 42-103 and 42-201.

> the legislature to create an exception to the appropriation statutes, all rights to the use of water in Idaho must be acquired by appropriation.
> . . .
> The Foundation's water rights acquired under the appropriation process are the same type of water rights held by other water users in the state and are subject to regulation under title 42 of the Idaho Code.
> . . .
> However, as with all appropriators of water, the Foundation must use its water in a manner that is consistent with its underlying water rights. **The Foundation's water rights are appurtenant to the lands described in Idaho Code § 67-4403 and should not be applied to other lands.** If an adjacent property owner desires to make beneficial use of the Foundation's waste water, that person needs to file an application for permit to appropriate water with the Idaho Department of Water Resources. **The Foundation does not have the ability to enter into contracts authorizing the use of its waste water on lands not authorized under the water right** [emphasis added].

Idaho Attorney General Opinion No. 97-1.

Admittedly, the Lava Hot Springs Foundation *Opinion* concerned a second party seeking permission to use Foundation waste water. But the main points still apply in the present subcases: A&B's water right 36-02080 is appurtenant to certain land and any effort to apply its waste water to new land requires appropriation in compliance with title 42 of the Idaho Code.

Beginning in 1963, Idaho's mandatory groundwater statute, I.C. § 42-229, stopped all further constitutional or beneficial use claims to groundwater. The sole means of acquiring a ground water right for new lands beginning in 1963, was compliance with title 42 of the Idaho Code.

Priority Dates and Source

When claims 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B were first filed, the earliest claimed priority date was 1965. There is no evidence that A&B applied any of its waste water to additional acreage within the A&B Irrigation District before 1963. Therefore, the only viable basis for A&B's claims is I.C. § 42-1426, and A&B is not entitled to the 1948 priority date of the original right for the added acreage.

A&B sought to avoid the 1963 cut-off date and the strictures of I.C. § 42-1426 for two of its claims, 36-15193B and 36-15194B, with a unique argument. It argued the surface water cut-off date of 1971 applies because groundwater diverted under 36-02080 became surface

water when it was recaptured in A&B's drain ditches and beneficially used in 1965 and 1968. That being true, A&B then argued it is entitled to 1965 and 1968 priority dates because the claims are constitutional or beneficial use claims.

Licensure

Before any license is issued, IDWR examines the final proof to ensure "that the law was fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended." I.C. § 42-219 (1). A license to irrigate must describe the land and incorporate a description of "the works from which such water is taken" and "the capacity of such works." I.C. § 42-219 (2) and (3). A license is not valid if issued with respect to the use of water upon land not mentioned in the original application for permit. *Bassinger* v. *Taylor,* 36 Idaho 591, 211 P. 1085 (1922); also see "Idaho Law of Water Rights," Wells A. Hutchins, 5 Idaho L. Rev., no. 1, p. 24. Thereafter, the license is *prima facie* evidence of the water right and binding on the state. I.C. § 42-220. Any license holder seeking to change the point of diversion and place of use "shall first make application to the department of water resources for approval of such change." I.C. § 42-222.

The evidence is clear that 1) the license issued in 36-02080 was for groundwater, 2) the license described certain lands within the A&B Irrigation District and 3) A&B enlarged the irrigated acreage without compliance with I.C. § 42-222. Therefore, A&B's theoretical change in the source and diversion works from groundwater to surface water and its actual change in place of use by adding acreage were unlawful. Groundwater is the only source for 36-02080 and its enlargements. Use of that water to irrigate land beyond the land described in the license is an enlargement. A&B's sole remedy now is to claim the additional acreage as enlargements under Idaho's "amnesty statute," I.C. § 42-1426.

Compliance with I.C. § 42-1426

The parties agreed A&B's claims 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B meet the criteria of I.C. § 42-1426; that is:

! A&B's enlargements under licensed water right 36-02080 occurred after enactment of Idaho's mandatory permit system (March 25, 1963, for groundwater) and before commencement of the SRBA (November 17, 1987);

! The enlargements were done through water conservation and other means;

! There was no increase in the rate of diversion of the original water right (1,100 cfs) and the rate of diversion provided in I.C. § 42-202 was not exceeded;

! The enlargements were done without complying with Idaho's mandatory permit system;

! The enlargements were done with the knowledge of other water users;

! Water has been distributed based upon the rights as enlarged;

! Junior water users made appropriations based upon a water system that reflected the enlargements; and

! The enlargements did not reduce the quantity of water available to other water rights on the date of the enlargements.

Mitigation and Injury

A&B attached to its *Brief in Opposition* the "Preliminary Report, A&B Irrigation District – Use of Drain Water", dated August 2, 2000, written by Dr. C.E. Brockway, Brockway Engineering. In his Preliminary Report, Dr. Brockway addressed the hydrologic impact of alternatives to drainage wells for the district. The original drainage design by the Bureau of Reclamation included the use of drain or injection wells, but they are being abandoned because of potential aquifer contamination. Now, the alternatives are: 1) contain irrigation return flows and non-irrigation runoff on the project, 2) pump return flows out of the basin or 3) use return flows on land in the district service area. Dr. Brockway concluded:

> Utilization of pump back systems **to existing lands** with the resultant reduction in retention pond area results in a decrease in net aquifer depletion over current practices and reduced evaporation from pond surfaces. This scenario is the preferred alternative to eliminate drainage wells and provides both local and regional hydrologic benefits within the Eastern Snake Plain aquifer. [emphasis added]

Brockway "Preliminary Report," p. 11.

It is not clear from the Preliminary Report whether Dr. Brockway endorsed pumping back only to land licensed under 36-02080 or to all land currently being irrigated under 36-02080, including enlargements made since 1965.

> If pumping systems with small ponds are utilized to pump water back **to presently irrigated lands**, this can result in improving irrigation application and improved yields because of better uniformity and coverage. In addition, because of reduced or eliminated pond evaporation and enhanced water supply to the farms, the annual volume pumped from the aquifer can be reduced and

> the net depletion from the aquifer reduced from historical levels. [emphasis added]

Brockway "Preliminary Report," p. 6.

In either event, Dr. Brockway's preferred scenario of pump back systems to existing lands describes good husbandry of the resource, but does not fit the definition of mitigation under I.C. § 42-1426 (2): "An enlargement may be decreed if conditions directly related to the injury can be imposed on the original water right and the new water right that mitigate any injury to a water right existing on the date of enactment of this act [April 12, 1994]." Instead, A&B's plan of using its waste water on any land within the district while claiming a 1948 priority date would effectively allow A&B to administer its own enlargement water rights in place of IDWR. A&B could unilaterally choose how much and where to apply its waste water.

In *Fremont-Madison*, the Idaho Supreme Court held there is injury when an enlargement takes priority over validly established junior water rights. Nevertheless, I.C. § 42-1426 was held valid because of its mitigation provision-- any potential injury to junior water rights must be fully mitigated as of the date of enactment of I.C. § 42-1426. Based on this decision, IDWR determined the only way to fully mitigate potential injury to junior water rights was to recommend that A&B's enlargements be subordinated to all other water rights with priority dates earlier than April 12, 1994.

It is possible that A&B's pump back system favored by Dr. Brockway will provide both local and regional hydrologic benefits within the ESPA by reducing the annual volume of water pumped from the ESPA and by reducing the net depletion from the ESPA from historical levels. However, there is no evidence that all potential injury to junior appropriators will be fully mitigated. The only certain way to accomplish that is to subordinate A&B's enlargement claims to all other water rights with priority dates earlier than April 12, 1994. It will properly be left to IDWR to determine whether a future call of A&B's enlargement water rights will be "futile" given the net benefits to the ESPA found by Dr. Brockway with A&B's pump back systems.

Reliance on I.C. § 42-1416 and Estoppel

In its final arguments, A&B said if subordination is required, it should be allowed to rely on I.C. § 42-1416, "the presumption statute," and Respondents are estopped from

claiming injury caused by A&B's enlargement claims. A&B argued the United States withdrew applications for permits to use waste water within the A&B Irrigation District relying on enactment I.C. § 42-1416 in 1985. Therefore, A&B acquired "vested rights" with a priority date as of 1985, and Respondents failed to object to those claims. A&B also argued when I.C. § 42-1416 was repealed in 1994, and replaced by I.C. § 42-1426, A&B preserved its vested rights.

I.C. § 42-1416 (2), read in part:

> Expansion of the 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.

A&B essentially argued that upon enactment of the presumption statute, the Legislature created vested expansion water rights. However, the language in I.C. ∋ 42-1416 (2) suggests otherwise. The words Apresumed≅ and Ain the absence of injury to other appropriators≅ indicate significant contingencies. The presumption of validity of any expansion claim could be overcome by proof of injury to other appropriators. It would be difficult to argue that vested water rights are subject to such contingencies. More basically, though, the whole presumption statute was repealed in 1994, and is no longer a viable basis for expansion claims. The presumption statute was merely the basis for expansion claims. When the Legislature repealed the presumption statute, that basis disappeared. The Legislature replaced the presumption statute with I.C. ∋ 42-1426, the enlargement portion of the Aamnesty statutes.≅ Parties who filed claims under I.C. ∋ 42-1416 were left with I.C. ∋ 42-1426. A&B acquired no vested water rights under I.C. ∋ 42-1416.

A&B's argument that Respondents waived any rights they may have had to A&B's enlargement claims by their failure to object to A&B claims recommended under I.C. § 42-1416 is not persuasive. Respondents had no duty to object when the statutory basis of the claims was being challenged, all court proceedings were stayed and the United States and A&B were sorting through ownership and the bases of their claims.[10]

[10] I.C. § 42-1416 was repealed on April 12, 1994; the same day, I.C. § 42-1426 was enacted. One week later on April 19, 1994, then-Presiding Judge Daniel C. Hurlbutt, Jr., entered an ***Order*** staying all proceedings in IDWR Basins 34, 57 and 36. An amended *Director's Report* of enlargement claims based on I.C. § 42-1426 in IDWR Basins 34 and 36 was filed on September 19, 1997, and Respondents filed a

ORDER

THEREFORE, IT IS ORDERED that the Respondents' *Motion for Partial Summary Judgment* is **granted**. The source of water for 36-15127B, 36-15193B, 36-15194B, 36-15195B and 36-15196B is groundwater; the provisions of I.C. § 42-1426 apply; and the priority dates shall be when the water was first put to beneficial use, subject to IDWR's recommended subordination remark.

Dated March 26, 2001.

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TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

Joint Response on October 31, 1997. IDWR filed another *Director's Report* on August 21, 1998, splitting A&B's claims into parts A and B and on October 30, 1998, Respondents filed *Responses*. There was no claim the *Responses* were not timely.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING RESPONDENTS' MOTION FOR PARTIAL SUMMARY JUDGMENT was mailed March 26, 2001, with sufficient first-class postage to the following:

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