

I. ORDER GRANTING MOTION(S) TO FILE AMENDED NOTICE OF CLAIM

A. JOHN AND DEBORAH EDWARDS

On August 14, 2000, John and Deborah Edwards, claimants of water right 57-1B, filed a *Motion to File Amended Notice of Claim* (Standard Form 4), seeking to change the claimed irrigation period of use to comport with the recommendation made by IDWR in the *Supplemental Director's Report* (July 26, 1999). The change sought was an increase in the period of use, originally claimed as 4-15 to 10-15, to a period of use of 3-1 to 11-15.

B. JOYCE LIVESTOCK COMPANY

On August 14, 2000, Joyce Livestock Company, claimant of water rights 57-1A and 57-2, filed *Motions to File Amended Notice of Claim* (Standard Form 4), seeking to change the claimed irrigation period of use to comport with the recommendation made by IDWR in the *Supplemental Director's Report* (July 26, 1999). The change sought in 57-1A was a decrease in the period of use, originally claimed as 2-1 to 11-30, to a period of use of 3-1 to 11-15. The change sought in 57-2 was an increase in the period of use, originally claimed as 3-15 to 11-15, to a period of use of 3-1 to 11-15.

C. R. T. NAHAS COMPANY

On August 14, 2000, R.T. Nahas Company, claimant of water rights 57-00177A, 57-00178A, 57-02221A, and 57-10469A, filed *Motions to File Amended Notice of Claim* (Standard Form 4), seeking to change the claimed irrigation period of use to comport with the recommendation made by IDWR in the *Supplemental Director's Report* (July 26, 1999). The change sought in 57-177A and 57-178A was an increase in the period of use, originally claimed as 3-15 to 11-15, to a period of use of 3-1 to 11-15. The change sought in 57-2221A was a decrease in the period of use, originally claimed as 3-15 to 11-15, to a period of use of 4-1 to 10-31 (with shoulder remarks). The change sought in 57-10469A was an increase in the period of use, originally claimed as 3-15 to 11-15, to a period of use of 3-1 to 11-15.

D. STANDARD OF REVIEW FOR AN AMENDED NOTICE OF CLAIM

An amended notice of claim filed with the Court in a reporting area where a Director's Report has been filed is reviewed under the criteria of I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *See AOI* § 4d(2)(e) (amendments to claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho Courts apply a "good cause" for untimeliness standard. I.R.C.P. 55(c). The "good cause" standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho at 935, 854 P.2d at 279. The I.R.C.P. 55(c) standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent; and
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

McFarland v. Curtis, 123 Idaho 931, 936, 854 P.2d 274, 279 (1993).

E. DECISION AND ORDER

With respect to the aforementioned *Motion(s) to File Amended Notice of Claim*, this Special Master finds that the Criteria of I.R.C.P. 55(c) have been met. There is no indication of any purposeful delay on the part of the claimants. Further, the objector, Jay Hulet, has not been misled to his prejudice by these amendments that simply conform the claim to that which was recommended by IDWR in the *Supplemental Director's Report*, where Hulet timely objected to the Director's recommendation. As to the presentation of a meritorious position, the *prima facie* weight statutorily provided to the Director's recommendation satisfies this requirement. I.C. § 42-1411(4) ("[T]he director's report . . . shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law."). Therefore, the *Motion(s) to File Amended Notice of Claim* filed in subcases 57-1B, 57-1A, 57-2, 57-00177A, 57-00178A, 57-02221A, and 57-10469A, are **granted**.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-captioned subcases were tried in Murphy, Idaho, on April 10 and 11, 2001. The Special Master, having heard the testimony of the witnesses and having reviewed the other evidence produced at trial, and having considered the briefs, closing arguments, and the proposed findings of fact and conclusions of law of the parties, makes the following findings:

1. The water rights at issue in these subcases have their source as Sinker Creek, which is a desert stream located in IDWR administrative basin 57 and which is tributary to the Snake River.

2. The following water right claims in the SRBA are based upon a decree issued on July 25, 1917 (*nunc pro tunc* to March 12, 1913) by the Owyhee County District Court in the case of *Joyce v. Rubin*: 57-1A, 57-1B, 57-2, 57-173, 57-174, 57-176, 57-180A, and 57-10428.

3. The following water right claims in the SRBA are based upon a decree issued on July 16, 1917 by the Owyhee County District Court in the case of *Rubin v. Montini*: 57-177A, 57-177B, 57-178A, and 57-178B.

4. The following water right claims in the SRBA are based upon a decree issued on May 22, 1981 (Amended November 21, 1984) by the Owyhee County District Court in the case of *Nahas v. Hulet*, Case No. 4091: 57-10469A and 57-10469B.

5. The following water right claim in the SRBA is based upon diversion and beneficial use: 57-10922.

6. The following water right claims in the SRBA are based upon Water License Number 27014 issued on April 24, 1969: 57-2221A and 57-2221B.

7. The following table summarizes the basis for the water right claims at issue, the irrigation period of use specified therein, if any, and the Director's recommended irrigation period of use:

CLAIM	SRBA CLAIMANT	BASIS OF CLAIM	IRRIGATION PERIOD SPECIFIED IN BASIS	IRRIGATION PERIOD RECOMMENDED BY IDWR
57-1A	Joyce Livestock	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-1B	Edwards	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-2	Joyce Livestock	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-173	Joyce Livestock	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-174	Joyce Livestock	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-176	Joyce Livestock	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-180A	Joyce Livestock	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-10428	Joyce Livestock	<i>Joyce v. Rubin</i>	None	03-01 to 11-15
57-177A	R.T. Nahas	<i>Rubin v. Montini</i>	None	03-01 to 11-15

	Company			
57-177B	BLM	<i>Rubin v. Montini</i>	None	03-01 to 11-15
57-178A	R.T. Nahas Co.	<i>Rubin v. Montini</i>	None	03-01 to 11-15
57-178B	BLM	<i>Rubin v. Montini</i>	None	03-01 to 11-15
57-2221A	R.T. Nahas Co.	Water License 27014	04-01 to 10-31	04-01 to 10-31
57-2221B	BML	Water License 27014	04-01 to 10-31	04-01 to 10-31
57-10469A	R.T. Nahas Co.	<i>Nahas v. Hulet</i>	Storage Season 11-01 to 04-01	Diversion to Storage 11-01 to 04-01 Irrigation from Storage 03-01 to 11-15
57-10469B	BLM	<i>Nahas v. Hulet</i>	Storage Season 11-01 to 04-01	Diversion to Storage 11-01 to 04-01 Irrigation from Storage 03-01 to 11-15
57-10922	Joyce Livestock	Beneficial Use	None	03-01 to 11-15

8. According to the *Joyce* decree the earliest appropriation on Sinker Creek occurred in 1865.

9. From 1865 to December 1977, the water right holders on Sinker Creek diverted water from Sinker Creek for irrigation purposes oftentimes early in February or March and continued diverting water for irrigation, when available, through late November. This practice of early and late season irrigation was authorized by IDWR or its predecessor, who in various years between 1921 and 1977 instructed the watermaster to distribute limited water supplies from Sinker Creek during February and March.

10. From the time of its construction in 1923 until its collapse in 1943, there existed a 66' high dam on Sinker Creek ("the original dam") located in approximately the same location as the current Hulet dam. During the 20-year existence of the original dam, the water right holders on Sinker Creek continued to divert water for irrigation purposes oftentimes in early February or March.

11. The objector, Jay Hulet and/or Hulet Farm Management Company, is the claimant in the SRBA of several Sinker Creek water rights. The following table summarizes some of these rights:

CLAIM NUMBER	CLAIMANT	IRRIGATION PERIOD OF USE RECOMMENDED BY IDWR	STATUS IN THE SRBA
57-179	Murphy Irrigation District c/o Hulet Farm Management Co	03-01 to 11-15	Partial Decree issued 11/25/97. Awaiting amendment to irrigation

			season of use
57-180B	Murphy Irrigation District c/o Hulet Farm Management Co	03-01 to 11-15	Partial Decree issued 11/25/97. Awaiting amendment to irrigation season of use
57-181	Hulet Farm Management Co c/o Jay Hulet	03-01 to 11-15	Partial Decree issued 9/10/01. Included amended irrigation season of use of 03-01 to 11-15
57-7152	Hulet Farm Management Co c/o Jay Hulet	03-15 to 11-15	Partial Decree issued 12/15/97. Awaiting amendment to irrigation season of use

The objectors water right claims, while relevant for impeachment purposes, are not at issue.

12. In 1967 Jay Hulet moved to Murphy, Idaho, where he purchased approximately 4,000 acres of farm ground located in an area commonly referred to as “Murphy Flat,” which is located northeast of the Sinker Creek drainage. Hulet’s farm ground is capable of being irrigated with water pumped from the Snake River or with Sinker Creek water delivered by gravity flow through the Murphy Mutual Canal.

13. In 1975, Hulet applied for a permit to store the spring run-off waters of Sinker Creek (Application 57-7152). The permit was approved, subject to all prior water rights.

14. In March 1976, Hulet completed construction of a 100’ high dam at approximately the same location as the original Sinker Creek dam and began storing water pursuant to his water right storage permit.

15. On July 9, 1992, IDWR issued License 57-7152 to Jay Hulet pursuant to the permit. The License allows irrigation storage year ‘round, with irrigation from storage from March 15 to November 15.

16. Following completion of Hulet’s dam, the senior water right holders in 1976 and 1977 continued to demand and receive their water rights in March.

17. In December 1977, as part of its statutory duty to distribute and allocate water, IDWR determined that the recent construction of Hulet’s dam on Sinker Creek necessitated that the water be allocated on Sinker Creek pursuant to a fixed irrigation season. IDWR determined that because there was no decreed season of use for the claimants’ decreed water rights that it would use what it referred to as the “default irrigation season” to allocate water between Hulet’s junior storage right and the claimant’s senior natural flow rights. The default irrigation period of use used by IDWR was from April 1 to November 1.

18. The default irrigation period of use used by IDWR is not based upon beneficial use or climatic data; it is based solely on IDWR's interpretation of Idaho Code § 42-1201 and *Twin Falls Land & Water Co. v. Lind*, 14 Idaho 348, 94 P. 164 (1908).

19. IDWR uses the default irrigation season only as an interim measure in cases where it believes that it is necessary to administer water rights that are lacking a specified irrigation period of use. IDWR intended for the default irrigation period of use for the Sinker Creek rights to serve only as an interim measure for water administration, until such time as a court ultimately determined the irrigation period of use for the Sinker Creek water rights.

20. Since December 1977, IDWR has administered the Sinker Creek water rights pursuant to the default irrigation period of use. Consequently, since that time Hulet has been allowed to exclusively store all water in Sinker Creek outside of the default season, i.e. from November 1 to April 1, subject only to a prior downstream storage right owned by the R. T. Nahas Company.

21. As a result of IDWR's implementation of the default irrigation period of use, the claimants since December 1977 have been unable to divert their senior natural flow rights prior to April 1, except during high water years when water emptied over the dam spillway.

22. The claimants never acquiesced to Hulet's exclusive storage of Sinker Creek water from November 1 to April 1. Claimants continued to make demands on IDWR and the watermaster to deliver their senior natural flow rights prior to April 1. IDWR denied the requests and instructed the watermaster to deliver water for irrigation no sooner than April 1.

23. In 1999, pursuant to its statutory mandate, IDWR investigated the extent of beneficial use for the Sinker Creek water rights with respect to the irrigation period of use element. Based upon climatic data and studies performed by the department engineers and the University of Idaho, IDWR determined that crop growth could occur in the Sinker Creek basin from March 1 through November 15 nine out of every ten years. Based on its investigation, IDWR issued director's reports recommending a March 1 to November 15 irrigation period of use for the Sinker Creek water rights which did not have a previously determined irrigation period of use.

24. Hulet timely filed objections to the period of use recommendations for the claimants' Sinker Creek water rights. Hulet's position is that the irrigation period of use on Sinker Creek is from April 1 to October 31. Hulet did not object to the director's report for his own Sinker Creek water rights which had a recommended irrigation period of use that exceeded April 1 to October 31.

25. The claimant's water rights, which have been diverted from Sinker Creek for irrigation purposes, have historically been, and can be, put to beneficial use from March 1 to November 15.

26. The *Decree* entered in *Joyce v. Rubin* did not specify a period of use element for the water rights decreed therein.

27. The *Decree* entered in *Rubin v. Montini* did not specify a period of use element for the water rights decreed therein.

28. The period of use recommended by IDWR for the water right claims based on the *Joyce* and *Montini* decrees (i.e. 03-01 to 11-15) was based upon climatic data and studies performed by the department engineers and the University of Idaho, and not necessarily upon an examination of the historical extent of beneficial use of those water rights.

29. In the event that a previously decreed water right does not include all of the elements of a water right as required by Idaho Code § 42-1409, the director is statutorily required to make a recommendation for such elements based upon the extent of beneficial use as of the date of the commencement of the adjudication. I.C. § 42-1427. However, with respect to the Sinker Creek water rights at issue, such a determination would be invalid due to IDWR's implementation of the default irrigation period of use for those rights during that time.

30. Where a claimant can present evidence of beneficial use to establish the parameters of the omitted element as of the date of the prior decree, reliance on the provisions of I.C. § 42-1427 becomes unnecessary. *See Memorandum Decision and Order on Challenge*, Subcases 36-00003A et al., at page 45 (November 23, 1999).

31. The evidence produced at trial clearly shows a pattern of water use on Sinker Creek with a wide variation in the dates on which the water users typically began diverting water and/or called upon the services of the watermaster. Indeed, a watermaster had been called upon to distribute water as early as February 7th. Most, if not all of this evidence was for dates occurring after the entry of the *Joyce* and *Montini* Decrees. However, it is reasonable to infer, and this Special Master finds, that this same pattern of use occurred in the approximately fifty years of water use prior to the entry of the *Joyce* and *Montini* Decrees.

32. Additionally, the pattern of water usage, and the conduct of the water users, that occurred following the entry of the *Joyce* and *Montini* Decrees indicates that those Decrees were not

intended to constrain the Sinker Creek water users to any particular beginning or ending date for irrigation.

33. With respect to the water right claims based upon the *Joyce* and *Montini* decrees, this Special Master finds that the claimants have satisfied their burden of persuasion that those water rights have been historically beneficially used for irrigation purposes from March 1 through November 15.

34. The *Judgment and Decree* entered in *Nahas v. Hulet* decreed to the plaintiff in that action, R. T. Nahas Co., the right to store 729 acre feet of water per year in an “unnamed lake” between the months of November 1 and April 1. The water so stored was stated to be for “later irrigation” of 122.8 acres of land. In its *Findings of Fact and Conclusions of Law*, the Owyhee County District Court defined the non-irrigation season as “those days falling between November 1 and April 1”, and the irrigation season was defined as “April 1 through November 1.” The water right at issue in *Nahas v. Hulet* had two components: 1) the storage of Sinker Creek water during the non-irrigation season, and 2) the use of the water so stored for irrigation. The water right was subsequently split in the SRBA; R. T. Nahas Co., is the claimant of 57-10469A, and the United States Bureau of Land Management is the claimant of 57-10469B.

35. The *Judgment and Decree* entered in *Nahas v. Hulet* specified the period of the year in which water from Sinker Creek could be diverted into the “unnamed lake.” However, the *Judgment and Decree* did not specify the irrigation period of use for the water impounded in the “unnamed lake.” Therefore, the *Judgment and Decree* is not *res judicata* as to the irrigation period of use element. While the Owyhee County District Court defined the irrigation season in its *Findings of Fact and Conclusions of Law*, that Court also stated that “[t]his lawsuit involves the right to divert, appropriate and store for later irrigation purposes the winter flow or run off waters of Sinker Creek **during the non-irrigation season.**” *Findings of Fact and Conclusions of Law* at page 2 (emphasis added). The period of the year during which the water impounded in the “unnamed lake” could be released for irrigation purposes was not at issue in that action.

36. In actions to determine and settle water rights, it is a settled principle of law that decrees and judgments “should be so definite and certain as to the exact rights of each party as to constitute an estoppel between the parties, and to be a full, complete, and definite adjudication of the entire

subject matter, as between the parties to the action.” See 3 Clesson S. Kinney, *Kinney on Irrigation and Water Rights* § 1563 (2d ed. 1912). At best, the *Judgment and Decree* entered in *Nahas v. Hulet* offers only limited probative value with respect to the irrigation period of use element for the water right decreed therein.

37. With respect to the water right claims based upon the *Judgment and Decree* entered in *Nahas v. Hulet*, this Special Master finds that the claimants have satisfied their burden of persuasion that those water rights have been historically beneficially used for irrigation purposes from March 1 through November 15.

38. Water License 27014 was issued on April 24, 1969. The License specifically states an irrigation period of use of April 1 to October 31.

39. IDWR recommended the irrigation period of use in conformity with the License. Idaho Code § 42-220 requires IDWR to accept licenses as conclusive proof of a user’s right to use water as stated in the license. See *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409 (1997). An attempt to re-define or modify the period of use element facially stated in License 27014 would constitute an impermissible collateral attack on the License. If the claimants or their predecessors-in-interest were not satisfied with the period of use contained therein, the proper time and place to litigate that issue would have been in accordance with Idaho Code § 42-224 as that provision existed as of the date of issuance of the License.²

40. With respect to the water right claims based upon License 27014, this Special Master finds that claimants have satisfied their burden of persuasion with respect to an irrigation period of use of 04-01 to 10-31 (with shoulder remarks).³

41. With respect to the claim based upon diversion and beneficial use, this Special Master finds that the evidence adduced at trial is sufficient to establish an historical irrigation period of use of 03-01 to 11-15, as reported by the Director.

² Idaho Code § 42-224, as it existed at the time License 27014 was issued, stated in pertinent part that “any one feeling himself aggrieved by the statements contained in the license issued by the department . . . may appeal therefrom to the district court of the county in which the place of use of the water claimed shall be situated. Such appeal shall be taken within sixty (60) days from the date of such license . . .”

³ It would appear that upon the granting of the *Motion to File Amended Notice of Claim* in subcase 57-2221A, resulting in the claimant seeking the same period of use as is contained in the license and recommended by IDWR, that this subcase is really no longer at issue. However, the claimant of the “B” portion of the split right, the Bureau of Land Management, has not sought to amend its claim, and as such the claim in subcase 57-2221B stands as originally claimed, or 03-15 to 11-15.

42. Idaho Code § 42-1201, as interpreted by the Idaho Supreme Court in *Twin Falls Land & Water Co. v. Lind*, 14 Idaho 348, 94 P. 164 (1908), does not create a state-wide irrigation period of use. IDWR's interim default irrigation period of use based thereon does not reflect the historical extent of beneficial use of the Sinker Creek water rights at issue and cannot serve as a basis for decreeing the irrigation period of use for the Claimants' water rights.

43. Beneficial use is the ultimate determinate of the irrigation period of use. *Memorandum Decision and Order Re: Basin-Wide Issue 5*, Subcase 91-00005, at 12 (April 26, 1996). With respect to the water rights at issue in these subcase that have not had a previous determination of the irrigation period of use (i.e. all of the rights except the two based on a license), the evidence of historical beneficial use presented at trial is sufficient to establish a beginning irrigation date of March 1, and an ending date of November 15. With respect to the two water right claims based on License 27014, evidence of historical beneficial use is irrelevant, as the irrigation period of use of April 1 to October 31 is clearly set forth in the license.

III. SPECIAL MASTER'S RECOMMENDATION

Having weighed the entirety of the evidence presented, there is sufficient evidence to support the period of use recommended by IDWR for the water rights at issue. Accordingly, this Special Master recommends that the irrigation period of use for water rights 57-00001B, 57-00001A, 57-00002, 57-00173, 57-00174, 57-00176, 57-00180A, 57-10428, , 57-00177A, 57-00177B, 57-00178A, 57-00178B, 57-02221A, 57-02221B, 57-10469A, and 57-10469B **be decreed** as set forth in the attached *Special Master Recommendations for Order Amending Irrigation Period of Use Element in Partial Decree*. Additionally, this Special Master recommends that water right 57-10922 be decreed as set forth in the attached *Special Master's Recommendation for Partial Decree*.

DATED December _____, 2001.

THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication