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: 41-0008C (Taysom)**
	)	**41-0008D (Weston) and**
Case No. 39576	)	**41-0008F (7UD Ranches)**
	)	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON CHALLENGE**
	)	
	)	**ORDER OF FURTHER**
	)	**PROCEEDINGS IN RELATED**
	)	**SUBCASE 41-8B**
	)	

Holding: Court denies motion to set aside partial decrees based on no errors in respective *Director's Reports* and failure to plead meritorious defense. Spillett still may pursue objection. 7UD, Taysom, Weston and R. Spillett permitted to file late responses within 30 days. Special Master ordered to conduct trial within 60 days thereafter. If Spillett prevails Court will determine remedy for reconciling inconsistent partial decrees with prior decree.

I.
APPEARANCES

Scott J. Smith, Racine Olson Nye Budge & Bailey Chartered, Pocatello, Idaho, appearing on Behalf of 7UD Ranches.

Jason D. Walker, Ling Robinson & Walker, Rupert Idaho, appearing on behalf of Juan James Spillett.

II.
PROCEDURAL BACKGROUND

A. On November 2, 1999, the Idaho Department of Water Resources (IDWR or Director) filed the *Director's Report for Irrigation and Other, Reporting Area 7, IDWR Basin 41 (Director's Report)*. The *Director's Report* contained recommendations for subject water right claims 41-8C, 41-8D, and 41-8F. The *Director's Report* also contained recommendations for water right claims 41-8B and 41-8E, which are related to 41-8C, 41-8D, and 41-8F because all of the claims are derived from the same "parent" water right 41-8.

B. James Juan Spillett ("Spillett"), the party filing the *Motion to Set Aside partial Decrees* in this matter and claimant to 41-8B, timely filed an objection to the *Director's Report* for 41-8B. No other objections were filed. Relevant to these proceedings, Spillett objected to the recommendation for the quantity and place of use elements. Spillett claimed a quantity of 0.6 cfs. The *Director's Report* recommended a quantity of 0.533 cfs. Spillett claimed irrigated acreage of 120 acres. The *Director's Report* recommended irrigated acreage of 30 acres.

C. The *Director's Report* for water right claims 41-8C, 41-8D, 41-8E and 41-8F were uncontested and ultimately decreed by the SRBA Court as recommended. Spillett did not object to the *Director's Report* for these rights. Although each of the claims are potentially affected by Spillet's objection to 41-8B, the claims were not identified as uncontested overlaps or withheld from being decreed pursuant to I.C. § 42-1412(7). ***Partial Decrees*** were issued for 41-8C, 41-8D, 41-8E and 41-8F on July 28, 2000.

D. Spillett's objection to 41-8B was referred to a Special Master. For reasons unclear to this Court, Spillett's objection is still pending before the Special Master. On June 14, 2004, Spillett, through counsel, filed the subject *Motion to Set Aside the Partial Decrees* issued for water rights 41-8C, 41-8D and 41-8F. The *Motion* alleges that the cumulative quantities decreed for the three rights and 41-8E, in addition to the quantity claimed by Spillett exceeds the quantity previously decreed to parent water right 41-8

from which the "children" rights, 41-8B, 41-8C, 41-8D, 41-8E and 41-8F were all split. Spillett argues that the Court cannot decree a cumulative quantity for the children rights exceeding the quantity previously decreed for the parent right.

E. Spillett's *Motion to Set Aside* was referred to the Special Master, together with special instructions to take into consideration when determining whether to grant the *Motion*. The ***Order of Reference*** to the Special Master provided, *inter alia*, not to consider setting aside the ***Partial Decrees*** unless there was an acknowledgment from IDWR that errors were made in allocating the water among the children rights split from the 41-8 parent right. The intent of the Court was to avoid a situation where the quantities decreed to the children rights exceeded the quantity previously decreed to the parent right.

F. The Special Master requested an I.R.E. 706 Report/ Supplemental Director's Report (*Supplemental Director's Report*) from IDWR on the question of whether errors were made in the quantity recommendations for the children rights. The *Supplemental Director's* report addressed the known history of the claims and explained that the recommendation for the quantities was based on current billings by the watermaster for delivery of their respective rights as opposed to "historic" numbers.

G. On May 2, 2005, the Special Master issued a *Special Master's Report and Recommendation*, recommending that the ***Partial Decrees*** issued for 41-8C, 41-8D and 41-8F be set aside. The Special Master relied on I.R.C.P. 60(b)(5) and concluded that it was no longer equitable that the ***Partial Decrees*** have prospective application reasoning that if Spillett in litigating his objection in subcase 41-8B proved a quantity in excess of the recommendation the cumulative amount decreed to the children rights would exceed the quantity previously decreed to the parent right. The Court would be decreeing water that did not exist or "sunshine water." 7UD Ranches, the claimant to water right 41-8F, opposed Spillett's *Motion to Set Aside* and ultimately filed this challenge to the *Special Master's Recommendation*.

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument was held December 14, 2005. No party has requested additional briefing, nor does the Court require further briefing. Therefore, this matter is deemed fully submitted for decision the next business day, or December 15, 2005.

IV.
STANDARDS OF REVIEW

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 Stone, 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.

B. Motion to Set Aside Partial Decrees

In the SRBA, a motion to set aside a partial decree is treated similar to a motion to set aside a default judgment and reviewed in accordance with the criteria set forth in I.R.C.P. 60(b). *See* ***Administrative Order 1*** § 14d (parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)). I.R.C.P. 60(b) permits a court to relieve a party from a final judgment, order, or proceeding for the following reasons: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; 3) fraud, misrepresentation or other misconduct of an adverse party; 4) the judgment is void; 5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, **or it is no longer equitable that the**

judgment should have prospective application; and 6) any other reason justifying relief from the operation of the judgment. I.R.C.P. 60(b) (emphasis added). The decision to grant or deny relief under I.R.C.P. P. 60(b) is one of discretion. *See e.g. Schraufnagel v. Quinowski,* 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

Under I.R.C.P. 60(b)(5), a court may provide for relief from a judgment if it is "no longer equitable" for the judgment to have prospective application. The Rule requires some material change in circumstances that make continued enforcement inequitable. The Rule is not a substitute for an appeal nor does it allow re-litigation of issues previously resolved by the judgment. *Gordon v. Gordon*, 118 Idaho 804, 806-807, 800 P.2d 1018 (1990) (citing 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2863, pp. 206-07 (1973). [1]

In addition to satisfying one of the criteria set forth in I.R.C.P. 60(b), the movant must also allege facts, which if established, would constitute a meritorious defense. The legal standard of what must be shown to satisfy the meritorious defense requirement has been discussed several times by the Idaho Appellate Courts. *See McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993); *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979); *Thomas v. Stevens*, 78 Idaho 266 (1956). The meritorious defense standard requires that a movant : 1) allege facts; 2) which if established; 3) would constitute a defense to the action, and 4) the facts supporting the defense must be detailed. The detailed factual requirement also goes beyond the mere general notice requirement that would ordinarily be sufficient if pled prior to default. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). The policy behind pleading a meritorious defense is founded on the doctrine that "it would be an idle exercise for a court to set aside a default judgment if there is in fact no justiciable controversy." *McFarland*, 123 Idaho at 934, 854 P.2d at 277 (quoting *Hearst Corp.,* 100 Idaho at 12, 592 P.2d at 68).

[1] The Special Master relied on I.R.C.P. 60(b)(5) as the basis for his recommendation. For reasons set forth elsewhere in this opinion the Court need not address the Special Master's application of the rule at this time.

V.
DISCUSSION AND ANALYSIS

A. Water right claims 41-8B, 41-8C, 41-8D, 41-8E and 41-8F are all derived from the same prior decree.

The complete history of water right claims 41-8B, 41-8C, 41-8D, 41-8E and 41-8F is not entirely clear from the record. The parent right 41-8 was included in an 1890 arbitration of claims to the use of water of Rock Creek and its tributaries. A *Notice of Award* in the matter was filed with the District Court of the Fifth Judicial District of Idaho in and for Oneida County on June 6, 1903, and recorded in Oneida County's records of judgments. Although a formal judgment was never entered consistent with the arbitration decision or "*Houtz Decree*", the *Houtz Decree* was filed with the district court on April 1, 1890. Since that time the *Houtz Decree* has been treated as a water right decree and has served as the basis for administration of Rock Creek water rights, including the creation of a water district based on the *Houtz Decree*.

The *Houtz Decree* also provided for a method of measuring all flows awarded together with details on the construction and placement of a box ("Houtz box") used to measure water. The "box method" has been used for the delivery of water rights in the Rockland valley for over 100 years. In 1990, IDWR discovered the box method actually delivered 15-30 percent less than a normal miner's inch or .02 cfs. IDWR informed affected water users, in conjunction with its investigation and reporting of water right claims, that the recommendations would be "based on historical beneficial use and historical diversion rate represented by use of the box method." *Supplemental Director's Report* at 4.

The *Houtz Decree* confirmed 160 inches or 3.2 cfs to parent water right 41-8 diverted from Rock Creek via the Adshead ditch. The *Decree* originally apportioned ownership of the right among three individuals but did not refer to or define any place of use. At some point prior to the enactment of mandatory transfer requirements, the right

was split among five different water users on the Adshead ditch. None of the instruments reflecting the splits or evidencing conveyed quantities are part of the record.

Historically, all five water users rotated the use of the entire 160 inches or 3.2 cfs on a twelve-day rotation schedule with each water user diverting the entire 3.2 cfs for a portion of the twelve (12) days. According to Spillett's *Motion*, Spillett is entitled to, and has historically diverted, the entire flow for two (2) out of every twelve (12) days. Spillet has not alleged that his claimed right was ever used outside of the rotation. A copy of the rotation agreement between the parties is not part of the record and it is not clear as to whether or not one exists.

In 1988, Spillett filed for a transfer of his portion of the 41-8 water right to move the point of diversion downstream on Rock Creek. A protest was filed because of the potential for injury to the other water users on the Adshead ditch that would result from withdrawal of the rotated portion of the right. The *Second Proposed Memorandum Decision and Order* issued by IDWR in the transfer proceedings recited that Spillett was entitled to divert .60 cfs under the 41-8B right for the irrigation of 40 acres. (The right was used in conjunction with .20 cfs diverted under water right 41-13.) The *Second Proposed Memorandum Decision and Order* ultimately concluded that although Spillet could transfer the point of diversion he could not withdraw from the rotation arrangement.

All five claims are derived from portions of the 41-8 water right. The *Director's Report* recommended the quantities as follows:

41-8B (Spillett)	.533 cfs	30 acres
41-8C (Taysom)	.367 cfs	47.6 acres
41-8D (Weston)	.533 cfs	26 acres
41-8E (R. Spillett)	.355 cfs	43 acres
41-8F (7UD Ranches)	1.41 cfs	112 acres
TOTAL:	3.198 cfs	258.6 acres*

* All of the recommendations contain combined acreage limitations when used in conjunction with other rights.

In conjunction with seeking the 0.6 cfs instead of the recommended 0.533 cfs in subcase 41-8B, Spillett has moved the Court to set aside the ***Partial Decrees*** for 41-8C, 8D and 8F. The ***Partial Decree*** for 8E was previously set aside without objection.

B. The Court cannot collectively decree more water to the children rights than was previously decreed to the parent right by the prior decree.

This case illustrates a problem that occasionally arises in the SRBA when multiple claims are based on a prior decree and the cumulative of the quantities claimed exceeds the quantity of the prior decree. Ideally, the issue is identified from the outset through objections filed by the various claimants. If less than all of the claims are contested IDWR or the Court attempts to identify whether any of uncontested claims are potentially affected by the objections to the contested claims. Any identified uncontested claims are then withheld from being decreed until the contested claims have been litigated. *See* I.C. § 42-1412 (7) (court may exclude uncontested claims from being decreed if uncontested claim may be affected by the outcome of a contested matter). This prevents the problem of the Court unintentionally decreeing more water than was decreed under the prior decree. Unfortunately, it is not always possible for the Court to identify uncontested overlaps.

In this case, despite Spillett's objection to the quantity recommendation for 41-8B, the other claims were not identified as potentially being affected by the outcome and therefore were not withheld from being decreed with the rest of the uncontested claims. The parties share some of the responsibility for the problem. Spillett failed to file timely objections to the *Director's Reports* he is now seeking to set aside. 7UD and the other claimants to portions of the 41-8 parent right, failed to file responses to Spillett's objection and become parties to the 41-8B subcase.[2] Had either of these occurred, the Court, the Special Master or IDWR could have more readily identified the uncontested

[2] The Court acknowledges that in certain circumstances it can be difficult for claimants to identify which other claimants are claiming under the same prior decree for purposes of reconciling the recommendations in the *Director's Reports* with the prior decree. Subsequent conveyances of portions of water right can make tracing the chain of title for the right difficult. However, this is not one of those situations. There are only five claims based on the 41-8 right. An objection to any one of the recommendations should have put the remaining claimants on notice that their rights could be affected by the outcome of the proceedings.

overlaps prior to partial decrees being issued. As a consequence, if Spillett prevails on his objection in 41-8B, the Court is faced with the situation where the cumulative total of the water rights-whether proven up through litigation or decreed based upon the *prima facie* nature of the *Director's Report*—exceeds the amount in the prior decree.

This Court cannot decree collectively more water than was previously decreed to the 41-8 water right under the *Houtz Decree*. A similar issue previously arose in the SRBA before then Presiding Judge, the Hon. R. Barry Wood, involving multiple claims all based on water right previously decree under the *New International Decree*. At issue in ***Memorandum Decision and Order; Order Granting State of Idaho's Motion for the Court to take Judicial Notice of Adjudicative Facts, Order of Recommitment with Instructions to Special Master***, subcase nos 36-00003A *et al.* (Nov. 23, 1999), were multiple claims collectively claiming a quantity exceeding the quantity of the previously decreed right on which the claims were based. Two of the claims, which claimed the majority of the available water, were uncontested and partial decrees issued.[3] Although the rest of the claims were contested there remained substantially insufficient water available under the prior decree to satisfy the various quantities claimed. One of the issues presented was whether the Court could decree a quantity in excess of the prior decree. Judge Wood held that because all of the claimant's were bound by the prior decree, the cumulative total of their respective claims could not exceed the previously decreed quantity. He reasoned:

> The Claimants to the 03 right are bound by the New Int'l Decree to a cumulative total of 20 cfs between them. The water right elements decreed in the New Int'l Decree are *res judicata* as between the parties and privies to that Decree, and the Claimants are bound thereby as to any water right elements **definitively** adjudged by the New Int'l Court. The New Int'l Decree is the progenitor of the water right claims at issue in this Challenge. Because these claims arise from a prior decree, this Court cannot allocate more water to them than is available from their origin. In other words, each Claimant is purportedly tracing the title to their water right back to the third right listed in the New Int'l Decree with an 1884 priority date, and the sum of the claims cannot exceed the 20 cfs on which they are based. To hold otherwise would be to allow the Claimants of the 03 right to unilaterally expand the quantity element previously decreed, while maintaining the ancient priority date, or place an additional burden

[3] In that case the remaining claimants did not seek to have the partial decrees set aside.

> on the water master to administer the rights collectively, not to exceed the 20 cfs total.
> . . .
> Hence, in claiming a portion of a previously decreed – and then subdivided – water right, each of the Claimants are required to produce evidence which demonstrates their ownership of a share of such right. Each Claimant has the burden to show privity of estate with the party to whom the water right was originally decreed (i.e. New International Mortgage Bank). This may be done by showing express conveyances of the water right in each deed or other conveying instrument in the chain of title. If all of the prior conveyances are silent regarding the portion of any water right that is appurtenant to a particular Claimant's land, then by operation of law that Claimant would receive a percentage share that correlates to the amount of land received. *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916 (1984); *Hunt v. Bremer*, 47 Idaho 490, 493, (1929)("A division of a tract of land to which water is appurtenant, without segregating or reserving the water right, works a division of such water right in proportion as the land is divided."). On the other hand, some of the conveyances may have expressly included all or most of the water rights, and the others being silent would be construed as conveying less water. In any event, the Claimants are not entitled to a "fresh start" in showing the quantity of water necessary to irrigate their land, where the water rights they claim stem from a prior decree.

Memorandum Decision and Order at 31-33. In a footnote to the text, the Court also clarified that the "[t]he Claimants are not bound by the [prior decree] as to any water right elements which were undefined by that Decree. Likewise, the Claimants are not bound by the [prior decree] as to water right claims which do not purport to rely on that Decree, if any." ***Id.*** at 31, fn.10.

This legal reasoning is sound, supported by the law, has been consistently applied in the SRBA, and remains law-of-the-case. Therefore the total cumulative quantity of water that this Court can ultimately decree to the five claims relying on the 41-8 right is limited to the 3.2 cfs.

C. Spillet has not pled a meritorious defense for purposes of setting aside the other decrees.

One of the prerequisites for setting aside a judgment or in this case a partial decree, pursuant to I.R.C.P. 60(b) is that the movant demonstrate a meritorious defense. This requirement is based on the policy that it would be an idle exercise for a court to set

aside a judgment or partial decree if the movant is unable to present facts which if established would result in a justiciable controversy. *McFarland*, 123 Idaho at 934, 854 P.2d at 277.

In this case, Spillett has failed to plead facts explaining why his water claim should be more than 0.533 cfs. Spillett also has not pled facts which, if proved, would show why the quantities decreed to 41-8C, D, and F are in error and should be reduced, which of these rights should be reduced, and by what quantities they should be reduced. Spillett's claim is solely based on the prior decree for 41-8. Nonetheless, Spillett has failed to explain how specifically he acquired his portion of the 41-8 right. As explained in the case involving the *New International Decree*, the rationale supporting the prohibition against the Court decreeing a quantity greater than was previously decreed is that each user is purportedly tracing the title to the water right claim back to the to the prior decree. Specifically, if Spillett is claiming 0.6 cfs of the 41-8 right then he must trace his chain of title back to the *Houtz Decree* evidencing that portion of the right he was conveyed. Spillett has never pled or otherwise shown that he was specifically conveyed 0.6 cfs of the 41-8 right or alternatively was conveyed land with an appurtenant right equal to 0.6 cfs. Spillet has not pled what portions of the 41-8 right 7UD Ranches, Taysom, Weston and R. Spillett were conveyed or legally apportioned.[4] Instead Spillett relies solely on a 1965 watermaster's record which is purported to reflect the quantities of water historically delivered among the five users on the Adshead ditch. However, as discussed below, the subject watermaster's record in no way reflects the realities of the historical use and administration of the five claims as Spillett has described in his pleadings, briefings and at oral argument. Spillett has provided no explanation as to what information the figures are based upon.

D. The Director's recommendation for Spillett's claim appears to be in line with Spillett's historical use.

[4] By legally apportioned the Court is referring to a legal apportionment of an interest in real property either through instrument, appurtenance, or other exception to the writing requirement.

Spillett argues that errors were made by IDWR in making the recommendations because the recommendations were based on the "billed" quantities (the quantities of water used to calculate billing by the watermaster) instead of the actual "historic" quantities used. Spillet argues that the "billed" amounts have no real basis in fact. However, this Court's review of the record reflects just the opposite. For purposes of deciding this *Motion* only, it appears based on information contained in the record that Spillett's historical use as well as the historical use of the other users is completely in line with the recommendation in the *Director's Report*. The *Houtz Decree* did not decree a place of use or acreage limitation. The children rights also have not been previously split into separate rights each with its own elements. More importantly, there are no instruments of conveyance in the record evidencing how the 41-8 right was split or otherwise apportioned. In almost all respects the 41-8 right has been treated and administered as a single right apportioned among five different users with each user being entitled to divert the entire flow of the right for a time certain.[5]

As far as can be determined from this Court's review of the record and what has been pled and argued by Spillett, the rotation has historically been integral to the use of the 41-8 right. The 41-8 right has never been formally apportioned other than through the length of time each user diverted under the rotation. Spillett has always used his portion of the 41-8 right in the rotation. Spillett's historical use of the right has always been limited to a diversion of the full 3.2 cfs for a period of two out of twelve days. Spillett does not allege that he has ever used more than two days of the twelve day rotation. Based on Spillet's historic use, Spillett's portion of the overall quantity would be one-

[5] Presumably, this process has allowed the irrigation of more acreage than would otherwise be available for a 3.2 cfs or 160 inch water right under the statutory duty of water for irrigation of an inch per acre. *See* I.C. § 42-220. IDWR recommended a cumulative acreage of 258.6 acres for a 160 inch or 3.2 cfs right (in combination with other rights). Spillett also filed an objection to the acreage recommendation of 30 acres and claiming a place of use of 120 acres. To satisfy all users in accordance with the rotation, the entire right must be diverted continuously during the irrigation season. While such an expansion of a water right would not be permitted today, the *Houtz Decree* preceded the enactment of the duty of water statute. In addition, Idaho Code § 42-1427 recognizes that many prior decrees did not uniformly contain all the elements describing a water right that are now required. Where a prior decree does not define all of the statutorily required elements, Idaho Code § 42-1427 provides that the rights be recommended "based on the conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right." I.C. § 42-1427 (1)(b).

sixth (1/6) or 0.1667 of the entire flow of the 3.2 cfs, which calculates to a rate of diversion of 0.533 cfs and which is consistent with the recommendation in the *Director's Report* for the 41-8B claim. IDWR, in its *Supplemental Director's Report* correctly notes that based on the rotation practice **"the only way a change in the quantity allotted to each user would be evidenced is through a change in the length of the rotation."** *Supplemental Director's Report* at 15. (emphasis added). As a result, for purposes of apportioning the right in order to recommend the statutorily required elements for each of the five claims, IDWR could appropriately look to a mathematical formula to determine the quantity each user historically received based on the length of the respective diversions. In fact, the only way the respective quantities received under the rotation could be calculated is through mathematical formula.[6]

In the *Supplemental Director's Report* IDWR concludes that it cannot determine for certain whether or not errors were made in the recommending the five claims delivered through the Adshead ditch. The *Supplemental Director's Report* simply offers the explanation that all of the claims recommended based on the *Houtz Decree* were based on "historic" quantities, except for the claims on the Adshead ditch, which were based on "billed" quantities. Apparently the labels "historic" and "billed" are labels that were used by the parties during settlement negotiations to describe delivery records kept by two different watermasters.

Attachment 2 to the *Supplemental Director's Report* is a page from a watermaster's delivery record which divides the right among the five users or their predecessors into miner's inches. *See* table below. These figures were compiled by a watermaster in 1965 and have been referred to as the "historic" quantities. The notation next to Spillett's claimed right indicates 30 of the 160 miner's inches. However, because the rights have always been historically used in rotation, the basis or justification regarding how the watermaster arrived at these "historic" quantities is not apparent from the record. There are no instruments of conveyance in the record evidencing that the 41-

[6] Another method for apportioning the right would be to take the percentage of total historical irrigated acreage used by each user and multiply the percentages by the total rate of diversion. This method would be problematic in this case because the five rights are used in conjunction with other rights on the same acreage. Presumably the length of the historical rotation for each user corresponds with the relative acreage irrigated by each.

8 right was previously apportioned in any manner other than according to the rotation. This is the "historic" quantity on which Spillett relies in support of his *Motion*.

Attachment 3 to the *Supplemental Director's Report* is a copy of Attachment 2 with penciled in modifications. Attachment 3 was prepared by a subsequent watermaster. In Attachment 3 the prior figures are crossed out and the number of hours each user is allocated within the twelve (12) day rotation is interlineated. The inches of water allocated to each of the five users are also modified from the original. The modification to the inches was based on number of hours of rotation allocated to each user. *See* table below. These are the "billed" quantities on which the *Director's Reports* were based. As demonstrated in the following table, the percentage of the total rotation hours of 288 multiplied by the 3.2 cfs is consistent with the recommendation.

	Attach. 2 "historic"	**Attach 3 "billed"**	**compute cfs and inches**	**cfs**	**inches**
41-8F (7 UD)	70"	70.56"-127 hrs	127/288 x 3.2 cfs = or 127/288 x 160"=	1.41	70.56"
41-8C (Taysom)	20"	18.33"- 33 hrs	33/288 x 3.2 cfs = or 33/288 x 160" =	.367	18.33"
41-8D (Weston)	30"	26.67"- 48 hrs	48/288 x 3.2 cfs = or 48/288 x 160"=	.533	26.67"
41-8B (Spillett)	30"	26.67"- 48 hrs	48/288 x 3.2 cfs = or 48 /288 x 160"=	.533	26.67"
41-8E (R. Spillett)	10"	17.77"- 32 hours	32/288 x 3.2 cfs = or 32/288 x 160"=	.355	17.77"
Totals	**160"**	**160" 288 hours**		**3.198**	**160"**

Spillett has not disputed the lengths of the respective turns in the rotation. Absent any instruments of conveyance apportioning the 41-8 water right differently, Attachment 3 more accurately reflects the historical use and allocation of the 41-8 water right than does Attachment 2. Spillett has not explained how the watermaster in 1965 arrived at the figures in Attachment 2 nor has Spillett explained the basis for his reliance on Attachment 2. What is clear is that the figures in Attachment 2 do not support historic use as explained by Spillett, despite being referred to as "historic." Since the water rights were never formally split and had always been used in rotation, the watermaster in 1965 could have simply been rounding off the figures as there was no need for a specific allocation. Simply put, without an explanation as to how the watermaster arrived at the "historic" quantities, the "billed" quantities more accurately reflect how the right has historically been apportioned.

In the *Supplemental Director's Report* IDWR explained that the rights on the Adshead ditch were the only ones based on the "billed" figures in Attachment 3 as opposed to the "historic" figures in Attachment 2. *Supplemental Director's Report* at 15. However, this does not mean the methodology used was in error. It not clear whether a rotation practice was integral to the other rights decreed under the *Houtz Decree*. To the extent the other rights were previously split as reflected in instruments of conveyance or a rotation was not utilized, the methodology used for apportioning the 41-8 right would be unique to that right.

Spillett also cites to the *Second Proposed Memorandum Decision and Order* where it is recited that Spillett was entitled to divert 0.6 cfs of the 41-8 water right, however, the quantity was not at issue. The opinion doesn't even address or discuss the basis for the recitation that Spillett was entitled to divert .06 cfs. The *Order* therefore does not quantify Spillett's right.

Finally, the five rights are all being administered according to the rotation. No party has contested the application of the rotation. Under the rotation, no matter whether 0.60 or 0.533 cfs is ultimately decreed for Spillett's right, so long as the rights are subject to the rotation, the quantity is always going to be the diversion of the full 3.2 cfs for two out of every twelve days and no more.

In sum, the *Director's Reports* for each of the five rights appear to be entirely consistent with the historical use of those rights. To the extent Spillett's reliance is based on the Attachment 2 without any explanation regarding the basis for those figures, such as instruments of conveyance etc., the Court is unwilling to set aside the other ***Partial Decrees*** on that basis as it appears there would be nothing to litigate. The figures contained in Attachment 2 simply do not reflect the realties of how the rights have historically been apportioned and administered. In addition, as discussed below, Spillett need not set aside the other partial decrees in order to proceed with his objection in subcase 41-8B.

E. The Court's purpose in issuing special instructions to the Special Master was to determine whether apportionment of children rights reconciled with prior decree.

In issuing the ***Order of Reference Appointing Special Master*** with the special instructions, this Court was concerned that IDWR may have made errors in converting the Houtz standard to cubic feet per second. A potential problem became evident based on a perceived inconsistency between the quantity and acreage recommended for Spillett's water right. The recommendation for water right 41-8B was 0.533 cfs for 30 acres. Under an inch per acre standard, 0.533 cfs calculates to only 26.65 acres while 0.6 cfs is required to irrigate 30 acres. Because all of the rights were split from the 41-8 water right this Court was concerned that the respective quantities recommended for the individual children rights may be inconsistent with the quantity previously decreed for the 41-8 water right. The Court, however, was unaware of the specifics regarding the rotation practice. The practice of rotation historically allowed water users to irrigate more acreage than if the water rights were used independently. Because four of the five claims were uncontested without further inquiry the Court had no way of knowing whether the claims were uncontested for failure of the claimant's to review their recommendations and hence the decrees contained errors or whether the claimant's reviewed their recommendations and were in agreement. The Court wanted to ensure that the individual partial decrees reconciled with the prior decree irrespective of whether the rights were uncontested. At his juncture it appears that the claimants to 41-8C, D and F

reviewed and were in agreement with the recommendations. The *Special Master's Recommendation* recommended that the ***Partial Decrees*** be set aside based on IDWR's assertion in the *Supplemental Director's Report* that there may have been errors in the recommendations because the recommendations were based on "billed" versus "historic" quantities. Upon further scrutiny, the discrepancy between the "billed" and "historic" quantities accurately reflects the realities of the actual historic use of the 41-8 water right. It is clear to this Court that based on the available information IDWR did not make errors in its methodology for recommending the five rights.

For these reasons, Spillett's *Motion to Set Aside Partial Decrees* is **Denied**. Therefore at this time the Court need not address the Special Master's application of I.R.C.P. 60(b)(5).

F. Spillett may continue pursuing his objection in 41-8B without the other *Partial Decrees* being set aside.

The next issue is whether Spillet can continue to pursue his objection in light of the Court declining to set aside the other ***Partial Decrees*** given insufficient water remains under the 41-8 right to satisfy Spillet's claim. Stated another way, are the other ***Partial Decrees*** *res judicata* as to the portion of Spillett's claim which exceeds the 3.2 cfs decreed to the 41-8 right when considered with the other decreed rights? Under the facts and circumstances of this case, the Court holds that it is not. Spillett timely objected to the recommendation for his claim but failed to object to the recommendations for the other claims derived from the 41-8 right. The other claimants did not object to the recommendations for their claims but failed to file responses to Spillett's objection. The result is that the claims proceeded through the SRBA process on different tracks despite being integrally related. Because 41-8C, D, and F were uncontested they went through the process faster than Spillett's objection which is still pending. Unfortunately, the uncontested rights were not identified as being related and consolidated with the contested subcase. This appears to be an anomaly uniquely inherent in general stream adjudications. To now hold that the ***Partial Decrees*** issued for the uncontested rights are *res judicata* would result in a "race to the partial decree" with the advantage going to the first parties which had their rights decreed in parallel proceedings. Alternatively, if

instead of filing motions to set aside the partial decrees Spillet pursued and prevailed on his objection and his right was ultimately decreed the Court would be faced with the problem of having decreed more water than was available. Should the Court then give precedence to those rights first decreed? Another example would be if none of the rights were contested and the cumulative of the quantity recommendations exceeded the prior decree, would the Court give precedence to those rights that were actually file stamped first? Again these issues appear to be unique to the context of a general adjudication.

In the case involving the *New International Decree* Judge Wood held that the failure of a claimant to object to competing claims to a prior decree did not constitute a waiver of the right to contest the recommendation for the claimant's own claim. Specifically,

> **Issue No. 2: Does the failure of each Claimant to the 03 right to object to competing claims to the 03 right constitute a waiver of the right to contest IDWR's quantity recommendation for that Claimant's own claim?**
> Although it clearly would have been helpful in adjudicating the water rights at issue, the Claimants are not required to object to competing claims to the 03 right, and failure to do so does not constitute a waiver of the right of each Claimant to object to IDWR's quantity recommendation for their own claim. The State has not directed the Court to any authority that dictates otherwise. To the contrary, competing claimants to a property right in Idaho are required to demonstrate their ownership of the property right on the strength of their own title, and not on the weakness of the competitor's title. *Rice v. Hill City Stock Yards Co.*, 121 Idaho 576, 582, 826 P.2d 1288 (1991), *rehearing denied* March 27, 1992, *citing Owen v. Boydstun*, 102 Idaho 31, 624 P.2d 413 (1981); *Pincock v. Pocatello Gold and Copper Min. Co., Inc.*, 100 Idaho 325, 597 P.2d 211(1979); *Nelson v. Enders*, 82 Idaho 285, 353 P.2d 401 (1960). Thus, while not technically required to object, the end result may essentially be the same, i.e., by not objecting, and given the cap, these Claimants may well have prejudiced themselves. With a "cap" of 20 cfs with claims totaling 26 cfs, and with nobody objecting, the desired result is like a "sweet heart decree" (commonly seen in private adjudications) in the SRBA; a result which is repugnant to this Court's statutory duties. To be clear, and by way of example, assume 10 claimants are on a common ditch with a 100 inches of water maximum. Each claimant claims 15 inches of water. Nobody on the ditch objects. Out of "thin air", is this Court to decree 150 inches of water where the "Creator" only put 100?

Memorandum Decision and Order at 35-36.

The case involving the *New International Decree* is also different in a couple respects. In that case the issue arose in context of a challenge to a *Special Master's Recommendation* which recommended more water than was available under the prior decree. The issue of setting aside the other decrees was never even addressed. Lastly, the Court was able to find available water under other rights decreed under the same decree but for which no claims had been filed. The parties were then permitted to file late claims for the available water.

For these reasons the Court holds that Spillett may continue to pursue his objection despite the Court's refusal to set aside the other ***Partial Decrees.*** However, given this Court's review of the basis supporting Spillett's motion, the support for his objection to the recommendation for the 41-8B and the basis for the Director's recommendation, any further prosecution of the objection must be pursued in good faith and with proper foundation. Spillett's objection has been pending since 1999. The other related claims were decreed in 2000. Without tracing which portions of the 41-8 right were specifically taken by conveyance, any allocation of the right based on historic use must factor into account the historical rotation practice in determining quantity. In taking the historic practices into account the *Director's Report* recommended a quantity of 0.533 cfs, and this recommendation carries *prima facie* weight under I.C § 42-1411(4), and Spillett carries the burden of overcoming the presumption of the *Director's Report*. From the outset, proceeding to trial solely to argue the significance of the 1965 watermaster's delivery chart without any underlying support for those figures is entirely insufficient. No instruments of conveyance or other explanation supporting the basis for the figures has yet been offered and the figures do not accurately reflect the historic use of the right as that use has been represented throughout the course of these proceedings.

G. Conclusion

Based on what has been represented in support of Spillett's Motion, if the Court were to set aside the three partial decrees the Court cannot envision any other manner of resolving the matter other than the method that has been used for making the recommendations in the *Director's Report*. For this reason, Spillett has failed to plead a meritorious defense. The Court is only faced with the problem of decreeing "sunshine

water" should Spillett prevail on his objection in 41-8B. For these reasons, Spillett's *Motion to Set Aside Partial Decrees* is **Denied**.

VI.
ORDER OF FURTHER PROCEEDINGS IN RELATED SUBCASE 41-8B

IT IS ORDERED that the Special Master is to allow the filing of late responses by the claimants of 41-8C, D, E, and F (7UD Ranches, Taysom, Weston and R. Spillett) to Spillett's objection to 41-8B within 30 days of the date this order is file stamped. The Special Master is then ordered to conduct a trial on the matter within 60 days thereafter. If Spillett prevails on his objection the Court will determine at that time how to proceed with input from the parties so that the ***Partial Decrees*** can be reconciled with 41-8 water right. The other claimants are not required to file responses. However, if the other claimants decline to file responses and Spillett prevails on his objection as a single party subcase, the Court will approach the remedy *sua sponte* in the same manner as if all the rights were uncontested and partial decrees issued for a quantity exceeding the prior decree -- whatever remedy that may be. The problem that occurred here is unique to general stream adjudications. The Idaho Supreme Court has already recognized that "water right adjudications present unique circumstances, often requiring a departure from established rules of procedure." *State v. Higginson*, 128 Idaho 246, 254, 912 P.2d 614, 622 (1995). Consequently, such remedies could include amending partial decrees to reflect a *pro rata* adjustment or including a remark necessary for administration of the rights. The Court need not address that issue at this time.

VII.
SERVICE OF THIS ORDER

The SRBA Clerk of the Court is instructed to include claimants Kevin and Suzane Taysom, water right 41-8C; R. Scott and Herbert Weston, water right 41-8D; and Robert R. and James V. Spillet, water right 41-8E in the certificate of mailing for this ***MEMORANDUM DECISION AND ORDER ON CHALLENGE AND ORDER OF***

FURTHER PROCEEDINGS IN RELATED SUBCASE 41-8B. The SRBA Clerk of the Court is further instructed to docket and file a copy of this Order in subcase 41-8B.

VII.
RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for the delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED

__/s/ JOHN MELANSON___
JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication