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. 34-00012, 34-00013, 34-02507**
	)	**and 34-10873**
Case No. 39576	**)**	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON MOTIONS FOR**
	)	**RECONSIDERATION**

Motions to Reconsider Court's Memorandum Decision and Order of April 27, 1999 on Challenge to ***Order Granting Payette and Little Salmon's Motion to Alter or Amend; Amended Order Granting Walker's Motion to Dismiss and Denying BLRWUA's Motion to Alter or Amend***.

Appearances:

William Hollifield of Hollifield and Bevan, P.A., Twin Falls, attorney for Big Lost River Water Users Association ("BLRWUA").

Kent W. Foster of Holden, Kidwell, Hahn & Crapo, P.L.L.C., Idaho Falls, attorney for Big Lost River Irrigation District (hereinafter "BLRID" or "District") previously appeared in this action but was not present at oral argument.

Randall C. Budge of Racine, Olson, Nye, Budge & Bailey, Chartered, attorney for Claimant, Young Harvey Walker.

Ray W. Rigby and Gregory W. Moeller of Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chartered, Rexburg, attorneys for Sunset Trust Organization and Arthur W. Quist. Mr. Moeller argued.

Scott L. Campbell and Angela D. Schaer of Elam & Burke, P.A., Boise, attorneys for Payette River Water Users Association, Inc. (PRWUA) and Little Salmon River Water Users, Inc. (LSRWU). Ms. Schaer was present at oral argument but did not argue.

I.

PROCEDURAL BACKGROUND

1. The facts and procedural background of the underlying challenge involved here are set forth in this Court's Order of April 27, 1999, and will not be repeated here.

2. On April 27, 1999, this Court entered its ***Memorandum Decision and Order on*** [Big Lost River Water Users Association's (BLRWUA)] ***Challenge***.

3. On May 7, 1999, claimant Young Harvey Walker ("Walker"), by and through his counsel of record, filed a *Motion for Reconsideration and to Amend Judgment* [of the Court's April 27, 1999, Order]("Motion"). Oral argument was requested. This motion cites I.R.C.P. 11(a)(2)(B) and 59(a).

4. On May 10, 1999, claimants Sunset Trust Organization and Arthur W. Quist, by and through their counsel of record, filed a *Motion for Reconsideration*. Oral argument was requested as well. This motion cites no rule of procedure.

5. By letter dated June 11, 1999, counsel for Payette River Water Users Association and Little Salmon River Water Users Association advised the Deputy Court Clerk that they did not intend to participate further, subject to whether the associational standing issue was again raised.

6. On July 12, 1999, *Walker's Brief in Support of Motion for Reconsideration* was lodged.

7. On July 12, 1999, Sunset Trust Organization's and Arthur W. Quist's *Brief in Support of Motion for Reconsideration* was lodged.

8. On July 12, 1999, BLRWUA lodged its *Response to Motions for Reconsideration*.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on the motions was held in open court in Arco, Idaho on October 20, 1999. At the conclusion of the hearing, no party formally requested an opportunity to submit additional evidence (I.R.C.P. 59(a)(7)) or for the Court to take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order (I.R.C.P. 11(a)(2)(B)). Further, no party requested additional briefing, and this Court having ordered none, this matter was originally deemed fully submitted for decision on the next business day, or October 21, 1999. However, by letter dated October 21, 1999, the Court received additional information from Mr. Budge. Then, on October 27, 1999, by letter dated October 26, 1999, the Court received additional arguments from both Mr. Budge and Mr. Hollifield. Pursuant to these communications, the Court requested additional information/clarification from the parties and ultimately set the deadline for December 1, 1999. Both Mr. Budge and Mr. Hollifield submitted additional information on December 1, 1999. Therefore, this matter is deemed fully submitted for decision on the next business day, or December 2, 1999.

III.

ISSUES RAISED BY THE MOTIONS TO RECONSIDER AND THE BRIEFING THEREON

Sunset Trust Organization's and Arthur W. Quist's two page *Brief in Support of Motion for Reconsideration* essentially states that these two claimants concur in and adopt the legal arguments made by Walker.

BLRWUA's two page *Response to Motions for Reconsideration* essentially states that this Court did not exceed its authority, did not commit error, and the Motions to Reconsider should be denied.

Walker filed an eleven page Brief in which he raises six issues. They are:

1. The District court inappropriately expanded the relatively narrow procedural scope of the BLRWUA's *Notice to Challenge*.

2. The *Standard Form 5* represented a settlement agreement between the parties to establish the elements of BLRID's water rights, not an agreement for the delivery of water rights outside the district.

3. The Court's conclusion that members of BLRID are injured by the *Standard Form 5* is clearly erroneous and contrary to all evidence in the record.

4. BLRWUA's motion was not timely filed.

5. The *Standard Form 5* is not an *ultra vires* act by BLRID. Regardless, the doctrine of equitable estoppel applies.

6. Walker's rotation of water to his lands outside the District is an "accomplished transfer" under Idaho Code § 42-1425, lawfully entitling his use to continue.

IV.

MOTIONS FOR RECONSIDERATION AND MOTION TO AMEND JUDGMENT

Motion for Reconsideration

Motions for reconsideration are governed by I.R.C.P. 11(a)(2)(B), which provides:

> (B) Motion For Reconsideration. A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of the final judgment. A motion for reconsideration of any order of the trial court made after entry of final judgment may be filed within fourteen (14) days from the entry of such order; provided, there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b).

In *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990), the Court considered a motion for reconsideration of an interlocutory order in a case involving the specification of facts deemed established pursuant to I.R.C.P. 56(d). It wrote:

[T]he trial court should reconsider those facts in light of any new or additional facts

that are submitted in support of the motion. This view of the effect of I.R.C.P. 11(a)(2)(B) is consistent with the discussion of reconsideration in *J.I. Case Company v. McDonald*, 76 Idaho 223, 280 P.2d 1070 (1955). There, this Court said:

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Id. at 229, 280 P.2d at 1073.

We acknowledge that before this Court had adopted I.R.C.P. 11(a)(2)(B), we had ruled that a trial court correctly treated a motion for reconsideration of a memorandum decision following trial as a motion to alter or amend judgment pursuant to I.R.C.P. 59(e). *Obray v. Mitchell*, 98 Idaho 533, 539, 567 P.2d 1284, 1290 (1977). As our Court of Appeals correctly pointed out in *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982) (citations omitted):

> A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

However, we view the function of the trial court to be different when presented with a motion for reconsideration of an interlocutory order pursuant to I.R.C.P. 11(a)(2)(B). When considering a motion of this type, the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. The burden is on the moving party to bring the trial court's attention to the new facts. We will not require the trial court to search the record to determine if there is any new information that might change the specification of facts deemed to be established.

118 Idaho at 823.

Motions to amend a judgment are governed by I.R.C.P. 59(a) and 59(e). This portion of Walker's *Motion* needs little discussion. This Court having not yet entered any "judgments" or partial decrees in these respective subcases, there are presently none to be amended.

V.

INITIAL ISSUE

Before discussing the six enumerated issues raised by Walker, the Court wishes to address one statement made by Walker in the "Introduction" section of his Brief, which states: "The Court has effectively undermined the vested authority of the BLRID Board of Directors to settle this case and has substituted its discretion for that of the Board."

This Court readily agrees that the BLRID Board of Directors is vested with the authority to settle the case so long as the settlement is **lawful**. This vested authority does not extend to unlawful or extra legal acts -- those which are *ultra vires*. I.C. §§ 43-316, 43-1001; *Yaden v. Gem Irrigation District*; 37 Idaho 300, 216 P. 250 (1923); *Jensen v. Boise-Kuna Irr. Dist.*, 75 Idaho 133, 269 P.2d 755 (1954); *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969).

VI.

[WHETHER] THE DISTRICT COURT INAPPROPRIATELY EXPANDED THE RELATIVELY NARROW PROCEDURAL SCOPE OF THE BLRWUA'S *NOTICE TO CHALLENGE*.

Walker (and hence the other claimants) asserts this Court improperly considered issues not raised in BLRWUA's Challenge. This assertion is in error for several reasons.

First, BLRWUA's *Notice of Challenge*, filed September 11, 1998, states in relevant part as follows:

> 5. Did the Special Master err in granting Young Harvey Walker and Sunset Trust's Motion to Dismiss, after she previously ruled that actions taken by the Directors of the Big Lost River Irrigation District were *ultra vires* in granting or delivering water outside the district?
>
> 6. Did the Special Master err in her factual conclusion that it was appropriate to deliver water outside the District?

Therefore, the propriety of delivery of BLRID water outside the boundaries of the District was in fact directly raised on Challenge. Further, BLRWUA's mischaracterization that the Special Master's conclusion was "factual," when it is clearly a legal conclusion, is not

binding on this Court. As it relates to this issue, the "facts" of what occurred in the recommendation are not at issue; rather, it is the legal aspect of the recommendation. See *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

Second, findings of fact of a special master are reviewed under the "clearly erroneous" standard. I.R.C.P. 53(e)(2): *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, *Higley v. Woodard*, 124 Idaho 531, 534, 861, P.2d 101 (Ct. App. 1993). Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial, although perhaps conflicting, evidence. *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276 (Ct. App. 1989); *Higley*, 124 Idaho at 534.

In contrast to the standard of review of findings of fact, a special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive. This permits the district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378; *Higley*, 124 Idaho at 534. Accordingly, the district court's standard of review of the conclusions of law of a special master are not protected by, nor cloaked with, the "clearly erroneous" standard. Within this statement of the law is the inherent authority (and obligation) of the Court to raise and address matters of law. I.R.C.P. 53(e)(2) provides in part: "The Court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." A court is free to adopt a special master's proposed conclusions of law **if** they correctly state the law. *Rodriguez,* 120 Idaho at 378.

Accordingly, what is before the referring District Court to accept, reject, modify, etc., is **the entire *Special Master's Report* or *Recommendation***. I.R.C.P. 53(e)(2). Therefore, the suggestion that this Court exceeded its authority is wrong, ignores the requirements of I.R.C.P. 53(e)(2), and is oblivious to the established standard of review. To the contrary, this Court would be remiss in its responsibilities to function in the manner argued by Walker, especially in light of the specific facts and circumstances of these particular subcases, including their rather unique procedural history involving BLRWUA's attempts to participate which were originally denied (this is outlined in detail in this Court's Order of April 27, 1999). The asserted fact that the parties "anticipated" that the Court would "[only] decide the minor procedural issues

presented" is without legitimacy. What was properly before the Court was the Special Master's **entire** recommendation, not what Walker or his counsel wanted the Court to be limited to.

Furthermore, the record reveals that on March 3, 1998, BLRID and Walker entered into a "Water Rights Agreement" ("Agreement"). Article 4, paragraph 2 thereof provides:

> 2. **Entry of Decreed Rights.** **The parties agree to move the SRBA District Court for adoption of a Decree awarding Walker** natural flow water rights in the Big Lost River and **the right to the beneficial use of storage water of BLRID in the Mackay Reservoir** as set forth in Article 3 of this Agreement, and jointly to support and defend this Agreement against any and all objections or other challenges that may arise in any phase of the SRBA. **If the Court fails to approve all terms of this Agreement, then Walker, at his option, may elect to declare this Agreement null and void** upon notice to BLRID.

(emphasis added).

A fair reading of this language cannot support the assertion that the parties did not contemplate that the District Court would review the entire matter, including the Agreement which forms the basis for the *Standard Form 5*s and which, in turn, forms the basis for a ***Special Master's Report and Recommendation*** filed March 25, 1998.

Finally, Walker cites no authority for his assertion that a referring district court must "rubber stamp" a special master's recommendation. This concept will be discussed further in the next section of this ***Decision***.

VII.

[WHETHER] THE *STANDARD FORM 5* REPRESENTED A SETTLEMENT AGREEMENT BETWEEN THE PARTIES TO ESTABLISH THE ELEMENTS OF BLRID'S WATER RIGHTS, NOT AN AGREEMENT FOR THE DELIVERY OF WATER RIGHTS OUTSIDE THE DISTRICT

This Court is aware of the legal principle that when parties to an action resolve an issue through an agreed upon stipulation, the outcome is controlled by the agreement and the issue becomes moot. *Burgess v. Salmon River Canal Co., Ltd.* 127 Idaho 565, 570, 903 P.2d 730, 735 (1995); *Gunter v. Board of Trustees, Pocatello Sch. District No. 25,* 123 Idaho 910, 916, 854 P.2d 253, 259 (1993). However, this principle is necessarily inapplicable to the particular

circumstances of this case because the Board of Directors of BLRID holds legal title to the property [the storage water] in trust for its members. I.C. § 43-316. Because existing Idaho law is to the effect that delivery of non-surplus District waters outside the boundaries of the District is *ultra vires*, for the outcome here to be controlled by the Agreement, the Agreement itself (contractual or settlement agreement) must necessarily be lawful. *Yaden*, 37 Idaho at 308.

Walker next argues that the *Standard Form 5* ("SF5") set forth the elements of BLRID's water rights and are not a contract compelling delivery of [BLRID non-surplus] water outside of District and should not be construed as such. The label placed on the respective documents (SF5 or Water Right Agreement) is not determinative; rather the effect of the respective document controls. To the extent either document compels delivery of non-surplus BLRID water outside its boundaries, it is invalid. It is improper to circumvent the direct mandate of I.C. § 43-1001 by entering into an SF5 which has the net effect of listing some of BLRID's places of use outside District boundaries.[1]

More directly, however, a close examination of the record reveals two distinct features of the transaction. First, despite Walker's assertions to the contrary, there is an express contract for delivery of District water outside its boundaries. Article 4, paragraph 3 of the Water Rights Agreement states:

> 3. Delivery. **The BLRID agrees to continue permanently the delivery of** Walker's decreed natural flow rights and **storage water to the described places of use**. The delivery of said water rights and storage water shall be based upon priority, in accordance with historic practices and procedures, and subject to all BLRID's lawful assessments.

(emphasis added).

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[1] Standard Form 5 in subcase 34-10873 is the document to which is attached the document entitled, "Idaho Department of Water Resources Recommended Water Rights Acquired Under State Law," and which lists all of the elements of the recommended water right. I.C. §§ 42-1412(6) and 42-1411(2). Walker's, Sunset Trust's (Arthur Quist) and Jay Jensen's lands located outside the boundaries of BLRID are not listed under the "place of use" element of subcase 34-10873. I.C. § 42-1411(2)(h). They are, however, listed under the "other provisions necessary for definition or administration of this water right" element (I.C. § 42-1411(2)(j)) with the following language: "In addition to the place of use described for this right, historical practice has been to deliver storage water to the following lands: [Walker's, Sunset Trust's and Jensen's lands outside the boundaries of BLRID are then listed]." Likewise, the SF5s for subcases 34-00012, 34-00013 and 34-02707, under the "other provisions necessary for definition or administration of this water right" element (I.C. § 42-1411(2)(j)), each state: "See remarks under 'other provisions necessary for definition or administration included in right no. 34-10873 for additional places of use.'" Thus, while each of the proposed water rights do not list the subject lands outside BLRID boundaries under the "place of use" element, the net effect is the proposed decrees in fact sanction lands outside district boundaries as authorized places of use of dedicated district water.

Second, the SF5 in subcase 34-10873, lists BLRID as the owner, quantity of 20,666 acre feet per year and the places of use including Walker's and the other claimants' land within the boundaries of the District. As noted in detail in footnote 1, the SF5 goes on to state, under the "other provisions necessary for definition or administration of this water right" (I.C. §§ 42-1411(2)(j) and 42-1412(6):

> IN ADDITION TO THE PLACE OF USE DESCRIBED FOR THIS RIGHT, HISTORICAL PRACTICE HAS BEEN TO DELIVER STORAGE WATER TO THE FOLLOWING LANDS

Walker's, Sunset Trust's (Arthur Quist) and Jensen's lands outside the District are then enumerated. Therefore, there is both a contract for delivery of District storage water and a water right [in the name of BLRID] for delivery of District water to lands outside the District.

Walker then argues that the record reflects that for some 50 years, Walker (and his predecessors) have used District water outside the boundaries of the District "all with the knowledge and without objection by the District." This Court is aware of no claim pending on the basis of adverse possession and, even if one were pending, a person cannot obtain adverse possession against a public entity. Additionally, this assertion continues to disregard the Idaho Supreme Court's holding in *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969). In *Jones*, the Supreme Court stated, " the only questions presented by this appeal are whether certain findings of fact are supported by substantial and competent evidence and whether the conclusions of law are correct." *Jones*, 93 Idaho at 228. Thus, the facts as found and the conclusions of law of the trial court were directly in issue in *Jones*. They were not just dicta. The Supreme Court specifically affirmed the trial court's finding of fact that "**the district** [BLRID] **did not permit** or authorize **diversion of storage water at points outside the district**." *Jones*, 93 Idaho at 228 (emphasis added). As to the conclusion of law, the Supreme Court stated:

> As to the conclusions of law in question, we find no error. The respondent [BLRID] had no duty or obligation to deliver storage water outside the boundaries of the district. **In fact under the holding of this court it could not have done so.**

Jones, 93 Idaho at 229 *citing Yaden v. Gem Irrig. Dist.*, 37 Idaho 300, 216 P. 250 (1923).

Therefore, Walker's claim that the District delivered dedicated District water to Walker's lands outside the District for 50 years is untenable. That issue has already been decided. In *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 80 856 P.2d 868 (1993), the Idaho Supreme Court states:

> Walker asserts that he and his predecessors have combined and rotated the different forms of water available for irrigation between the lands within BLRID's boundaries and those not within BLRID's boundaries since the early 1940's. BLRID records establish that BLRID has delivered stored water to Walker's property that is not within BLRID's boundaries in the past and that until 1990 BLRID did not refuse delivery of stored water to Walker's lands not within BLRID's boundaries.
>
> In 1990, after a number of years of drought, BLRID, through its board of directors, notified Walker that the district planned to enforce its policy of not delivering stored water outside BLRID's boundaries. During that irrigation season, BLRID refused to deliver stored water to Walker's lands not within BLRID's boundaries.

This pronouncement of the Supreme Court in 1993 is of little use to this Court for at least three reasons. First, and as noted in *Jones*, *supra*, the Supreme Court upheld the finding of the District Court that the BLRID did not permit delivery of district water outside its boundaries. So at least as of the date of that finding, no BLRID water had been delivered outside the district and any delivery of District water outside the boundaries of BLRID necessarily had to start after that point in time. Second, as to the years in which BLRID allegedly delivered District water outside District boundaries, there is no finding of what years non-surplus (vs. surplus) District water was delivered, if any. Third, the trial court's judgment in *Walker* was reversed and vacated because the trial court had no jurisdiction, hence there are no valid findings of fact.

The next argument Walker raises is the assertion that the District's boundaries were uncertain prior to this litigation. Other boundaries of the District are not relevant to this case. The relevant question here is whether BLRID and Walker knew whether some of Walker's land on which District water was sought to be used was within or without the District. Previously, Walker has as much as admitted he knows certain of his lands on which he wishes to use District water are outside the boundaries of the District. More importantly, *Jones* specifically discusses the subject District boundary at this location, the Arco canal, and ownership of lands within and

without the boundaries -- the very lands of Walker's outside the boundaries of the District and which are at issue here. *Jones*, 93 Idaho at 228. Thus, several of Walker's arguments represent an impermissible collateral attack on the *Jones* decision.[2]

Walker next asserts that neither the bylaws of the District, the District's Plan of Operation, or the 1936 Judgment and Decree establishing the District expressly preclude the delivery of storage water outside the District, except for nonpayment of assessments. It would be redundant for the documents to state the preclusion because preclusion is already the law.

VIII.

[WHETHER] THE COURT'S CONCLUSION THAT MEMBERS OF BLRID ARE INJURED BY THE *STANDARD FORM 5* IS CLEARLY ERRONEOUS AND CONTRARY TO ALL EVIDENCE IN THE RECORD

First, it is stated in *Yaden*,

> To bond the lands of the settlers within the district to acquire the right to the use of water and then to deprive them of such right in order that it may be furnished to lands without the district would clearly be taking property of the land owners within the district without due process of law.

Yaden, 37 Idaho at 309. Thus, there is injury as a matter of law.

Second, it reasonably follows that in non-surplus water years, any District water transferred outside the boundaries of the District directly results in less and/or inadequate water supply for members of the District. Although quoted above, the same passage needs to be repeated here. Again, according to the Idaho Supreme Court, the genesis of *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 856 P.2d 868 (1993) was stated to be:

> Walker asserts that he and his predecessors have combined and rotated the different forms of water available for irrigation between the lands within BLRID's boundaries and those not within BLRID's boundaries since the early 1940's. BLRID records establish that BLRID has delivered stored water to Walker's property that is not within BLRID's boundaries in the past and that until 1990 BLRID did not refuse delivery of stored water to Walker's lands not within BLRID's boundaries.

[2] Whether other boundaries of BLRID are unknown or confused is of no relevance here because, as stated above, this particular boundary is known. Second, as discussed in footnote 3, it is curious that Walker would rely on this asserted unknown boundary when his counsel informed the Court that Walker had sought to annex his lands outside District boundaries into the District, which annexation failed.

> In 1990, after a number of years of drought, BLRID, through its board of directors, notified Walker that the district planned to enforce its policy of not delivering stored water outside BLRID's boundaries. During that irrigation season, BLRID refused to deliver stored water to Walker's lands not within BLRID's boundaries.
>
> Walker sued BLRID to obtain a writ of mandate and a permanent injunction to compel BLRID to deliver the stored water to Walker's lands not within BLRID's boundaries. Walker also sued for damages to his crops as a result of BLRID's failure to deliver the stored water.

Thus, depending on the available water supply in any given year, there can be injury to the other members of the District as a matter of fact.

Lastly, the question of injury is only one part of the equation. Because transfer of non-surplus district water outside the boundaries of the district is *ultra vires*, it cannot be lawfully accomplished, injury or not.

As stated before, I.C. § 43-1001 provides Walker and the other claimants the appropriate remedy -- annexation. If no member is injured by delivery of District water outside the boundaries of the District, two reasonable questions become apparent: (1) Why did BLRID take the action it took in 1990 which started the first lawsuit?; and (2) Why do Walker and the other claimants not simply follow the annexation provisions of the code?[3]

IX.

[WHETHER] BLRWUA's MOTION WAS NOT TIMELY FILED

As this Court noted in its ***Memorandum Decision and Order on Challenge***, filed April 27, 1999, under AO-1 13(f) and I.R.C.P. 53(e)(2), the Court can proceed without BLRWUA's challenge or motion to alter or amend, even if BLRWUA lacks standing. As the Court noted, "this Court utilizes the challenge to frame the issues in considering the Special Master's Recommendation." April 27, 1999 ***Order***, page 13.

[3] Walker's counsel, at oral argument on October 20, 1999, acknowledged that Walker had previously sought annexation of his lands outside the District into the District but was unsuccessful. This was also confirmed by his December 1, 1999, correspondence to the Court.

X.

[WHETHER] THE *STANDARD FORM 5* IS NOT AN *ULTRA VIRES* ACT BY BLRID. REGARDLESS, THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES.

Walker cites I.C. § 43-304, the general powers of an irrigation district board for the authority of BLRID to "enter into contracts for a water supply to be delivered to the canals and works of the district…" This statement is correct to the extent that "sufficient water may be furnished to the lands in the district for irrigation purposes" I.C. § 43-304. However, it is not a correct statement for lands outside an irrigation district.

Walker next argues that nothing in the SF5 is unlawful on its face or creates an unlawful obligation upon BLRID and there is no authority to support the Court's conclusion that the SF5 is an *ultra vires* contract. The Court has already discussed the problem at length. To recap here, there is both the Water Rights Agreement and the SF5's. The Water Rights Agreement expressly provides for delivery of BLRID water outside the boundaries of the District. The SF5's effectively sanction the place of use of District water outside the boundaries of the District. This is a violation of I.C. § 43-1001 and established case law of this state. *Yaden*, 37 Idaho 300. Neither the Water Rights Agreement nor the SF5s make a distinction between surplus vs. non-surplus waters.

Walker's next line of argument is to the effect that once BLRID chose to contract with the Arco Tract Association for the delivery of water for use outside the District, it became obligated to continue such delivery, and also cites *Yaden*, 37 Idaho at 307. The distinction to be made, however, is that the issue involved in the instant case is not the continued delivery (through BLRID's system) of water represented by Walker's individually owned water rights, to lands outside the district; rather it is the delivery of water represented by BLRID's water rights to storage water to lands outside of the District.

Lastly, contrary to Walker's assertions that *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969), is distinguishable and not controlling in this case, the Court finds it to be controlling. Specifically, *Jones* dealt with the same issues involved here and makes the clear distinction about delivery of individually owned decreed surface rights to the

boundaries of the District for use outside of the District versus the prohibition of delivery of dedicated non-surplus storage water of the District to lands outside the boundaries of the District. As such, *Jones* is controlling and is still the law of this state.

XI.

[WHETHER] WALKER'S ROTATION OF WATER TO HIS LANDS OUTSIDE THE DISTRICT IS AN "ACCOMPLISHED TRANSFER" UNDER IDAHO CODE § 42-1425, LAWFULLY ENTITLING HIS USE TO CONTINUE.

I.C. § 42-1425(2) provides in part:

> Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right **by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state** prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, **provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right**. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho code, are hereby waived in accordance with the following procedures:

(emphasis mine).

Walker does not meet the criteria of the statute. First, Walker is not entitled to the use of (non-surplus) BLRID storage water outside the boundaries of the District. Second, Walker does not own land (referring to land outside the boundaries of the District) to which [BLRID] water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state. Simply put, Walker is seeking an accomplished transfer of BLRID's water right, not his own. Furthermore, as previously discussed, other water rights [BLRID rights for use on lands within District boundaries] would be injured both as a matter of fact and as a matter of law.

Additionally, an accomplished transfer within an irrigation district requires the consent of the district. Here, the BLRID could not lawfully consent because of the *ultra vires* problem

previously discussed.

Lastly, the one aspect of I.C. 42-1425 which Walker asserts here (an accomplished transfer of the place of use) contemplates a change in the place of use, i.e., a cessation of water use in one place and transferring the water to a different place. To accomplish this transfer in the place of use, there can be no injury to other existing water rights and there can be no enlargement. Here, Walker and the other claimants did not cease irrigating their lands within the district, rather they use the dedicated district water both within and without the district. This is a prohibited enlargement in the use of district water.

IT IS ORDERED.

DATED _____.

_____
BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

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