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	)	**Subcases 36-10033, 36-10035, 36-10037, 36-10090, 36-10863A, 36-11643, 36-11871, 36-13531, 36-14807, 36-15152, 36-15179, 36-15264A, 36-15264B, 36-15356 and 36-15458**
Case No. 39576	)	**ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

BACKGROUND

Claims

The *Director's Report* described 11 different claimants[1] who filed the above 15 claims for groundwater to irrigate an average of 408 acres in Blaine, Gooding, Jerome, Lincoln and Minidoka Counties. The largest parcel totals 1,229 acres and the smallest is 64 acres.

Each of the claims includes an enlargement or expansion of one or more water rights. The largest claim for an enlargement is 177 acres while the smallest is 3 acres for an average of 62.2 acres per claim.

The following additional facts were agreed to by the parties: All of the enlargements occurred before commencement of the SRBA and were part of the historic water use pattern. All were done without complying with Idaho's mandatory permit system, but with no increase in the rate of diversion under the original water right(s). Each enlargement resulted in more acreage under irrigation. There was no evidence that the enlargements reduced the quantity of water available to other water rights existing on the date of the enlargements in use. *Stipulation of Facts*, pp. 1-2.

Director's Report and Subordination Language

On November 2, 1992, IDWR filed with the SRBA Court its *Director's Report for Reporting Area 3 (Basin 36)*. The Director first recommended the claims as expansions under I.C. § 42-

[1] The claimants are: Sam and Margaret Large, W. H. and Velva Moller, G.L. Dean & Sons, Inc., Duncan Limited Partnership, Vernon and Marilyn Phillips, Roost Potato Company, Michael and Patricia Woodland, Dale Klingler, Kent and Jack Harman, Ross Hunsaker and Salmon Falls Land & Livestock Company, Inc.

1416(2). After that statute was repealed in 1994, the claims were re-recommended as enlargements under the new statute, I.C. § 42-1426, sometimes referred to as the "amnesty statute." However, this time, IDWR included the following subordination language for all enlargement claims:

> This water right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right.
> This right is based on an enlargement of (base rights) pursuant to Section 42-1426, Idaho Code.

Supplemental Director's Report Regarding IDWR's Recommendation for Water Right Numbers 36-10033 and 36-10035, p. 1, filed December 23, 1997.

IDWR recommended inclusion of the subordination language based on its reading of the Idaho Supreme Court opinion in Basin Wide Issue No. 4, *Fremont-Madison* v. *Ground Water Approp.*, 129 Idaho 454, 926 P.2d 1301 (1996). Specifically, IDWR cited the following language:

> ... [S]ome injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called junior appropriator. The junior appropriator will not receive the water that he/she would have received but for the enlargement if there is not enough water to serve all water users. It is difficult, if not impossible, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority....
> ...[I]t is clear that if there are no mitigation provisions that will assure that there will be no injury to the junior appropriator, the new right for the enlarged use must be advanced to a date one day later than the priority date for the junior water right injured by the enlargement. The provision for advancement of the priority date is adequate protection to junior appropriators.

Fremont-Madison, 129 Idaho at 461, 926 P.2d at 1308.

Since the claimants offered no mitigation proposals to reduce injury to junior appropriators, IDWR chose the date of enactment of I.C. § 42-1426, or April 12, 1994, as the priority date:

> IDWR recommended the date of enactment as the priority date because the enlargement rights were first recognized as valid on that date. Until enactment of the statute, enlargement rights were illegal and could injure earlier priority dates. The Department's recommendation of an earlier priority date than the date of enactment for enlargement rights would be a recognition of an invalid right at that time.

Supplemental Director's Report, p. 2.

Objections to Subordination Language

Claimant Salmon Falls Land & Livestock filed its *Objections* to priority date on September 25, 1997:

> We object, to the subordination clause, because our enlargement of irrigated acres was a result of our better utilizing of our existing water right.
> ...
> We want the subordination clause taken out. The date [various dates in 1974, 1975 and 1981] was when the land was put under irrigation and the date we want as the priority date.

The remaining claimants filed their *Objections* to priority date on October 16, 1997, or January 15, 1998, alleging that "there has been no showing by the holder of a water right with a priority date earlier than April 12, 1994 that they have been injured by [the various claimed priority dates]." Then, each claimant requested as their priority date the date of the base licensed right or the date of enlargement-- between 1966 and 1984.

Responses to Subordination Language Objections

On October 31, 1997, three ground water districts, plus three individuals [2] ("respondents"), filed *Joint Responses* to each of the subordination language objections. The respondents alleged:

> The use involved in this claim is an enlarged use which began, and has continued, without complying with the mandatory permit system applicable to water diversions and uses under Idaho law. Accordingly, the enlarged use must cease unless it qualifies as an enlargement as defined in I.C. § 42-1426, a statute which became effective April 12, 1994. To the extent the use qualifies as an enlargement, it may be recognized as a new water right in the SRBA only if it is subordinated to all other, non-enlarged water rights existing on that date or given a priority date no earlier than April 12, 1994. If the new water is not conditioned in this manner, it will cause injury to the priorities and the water rights of other water right holders, including members of respondent.

All the parties agreed that they divert ground water from the same source, the Eastern Snake Plain Aquifer, and some or all of the respondents' water rights were appropriated after the claimants' enlargements. The parties also agreed that no delivery call has yet required curtailment or mitigation impacting respondents' water rights. The claimants have not proposed any mitigation plan relative to their enlargements. *Stipulation of Facts*, pp. 2-3.

Claimants' Motion for Summary Judgment

On May 15, 1998, the claimants filed a *Motion for Summary Judgment* asking for new water rights for their enlargements with date of enlargement priority dates. They argued:

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[2] The respondents are: Magic Valley Ground Water District, Aberdeen-American Falls Ground Water District, Bingham Ground Water District, Tim Deeg, Mack Neibaur and Ralph Breding. Boards of directors of ground water districts have the power "to represent district members, with respect to their individual water rights, in general water rights adjudications...." I.C. § 42-5224(6).

1. After the enlargements, there was no increase in the rate of diversion or consumptive use over the original water rights alone;
2. There was no injury to existing water rights on the date of the enlargements;
3. No person with a water right earlier than April 12, 1994, filed a petition with IDWR asserting injury and they are now barred;
4. Without proof of injury, there is no basis for including subordination language;
5. On March 1, 1985, when I.C. § 42-1416(2) was enacted, the Legislature "waived the mandatory permit requirements" and no injury can be shown to a water right acquired after that date; and
6. Since the claimants did not amend their claims after enactment of I.C. § 42-1426 in 1994, the claims are not subject to further objections. In the absence of an objection, the Director lacks authority to include subordination language.

Respondents' Motion for Summary Judgment

On May 18, 1998, the respondents filed their *Motion for Summary Judgment*. The respondents argued:

1. The Idaho Supreme Court ruling in *Fremont-Madison* answered the key question-- whether IDWR's subordination language is a lawful condition to impose in granting the claimants' new water rights for enlargements;
2. I.C. § 42-1426 is constitutional because only enlargements which fully mitigate any potential injury to junior water rights existing on the date of the amnesty statute are permitted; and
3. IDWR's proposed subordination language achieves adequate mitigation.

Summary Judgment Hearing

A hearing on both *Motions for Summary Judgment* was held on July 8, 1998, at the SRBA Courthouse in Twin Falls, Idaho. Roger D. Ling appeared for the claimants, Jeffrey C. Fereday for the respondents and Nicholas B. Spencer and Peter R. Anderson for IDWR. Before arguing their *Motions for Summary Judgment*, the parties argued the respondents' *Objection and Motion to Strike Portions of Affidavits*.

In the *Motion*, the respondents asked that certain portions of the claimants' affidavits be stricken.[3] Specifically, they sought to strike all averments concerning 1) consumptive use of water, 2) the effect of the claimants' water use on the Snake Plain Aquifer or other water users, 3)

[3] The claimants offered 15 affidavits, one in support of each claim, signed by: Calvin Jones, Mike Henslee, Vernon Phillips, Michael Woodland, Bruce Hunsaker, Jack Harman, Paul Duncan, Dennis Gleed, Sam Large and Norman Bagnall.

respondents' knowledge of the claimants' enlargements and 4) all other matters not based on the claimant's personal knowledge or where there was no demonstration of competence.

In support of their *Motion to Strike*, respondents offered David R. Tuthill's three page affidavit. He is the Adjudication Bureau Chief for IDWR. Mr. Tuthill said that while IDWR recognizes a 5% error rate exists in its standard measuring technique, IDWR will require a separate water right for expansions of less than 5% where reliable measurements can be made. He also said:

1. IDWR can generally identify expansion acres within a place of use;
2. Generally, consumptive use increases when the irrigated acreage increases; and
3. Conversion to a sprinkler system does not necessarily result in more water or the enhancement of subsequent water rights. *Affidavit of David R. Tuthill, Jr.*, p. 2.

The claimants did not challenge Mr. Tuthill's testimony. Rather, they argued that the claimants were better able to address specific factual issues. They said that "each claimant is qualified as an expert by his knowledge, skill and experience, and in the absence of any rebuttal, such facts must be accepted as true." *Brief in Opposition to Objection and Motion to Strike Portions of Affidavits*, p, 5.

DISCUSSION

Motion to Strike

I.R.C.P. 56(e) states that in summary judgment proceedings, "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The claimants argued that their affiants were competent to testify as experts based on their knowledge, skill and experience. Therefore, their statements of fact must be accepted as true.

I.R.E. 702. Testimony by experts, states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise [emphasis added].

If a person is not qualified as an expert, their testimony is governed by I.R.E. 701. Opinion testimony by lay witness:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

In the claimants' affidavits, the affiants described themselves variously as: the claimant, president or vice-president of the claimant corporation, son of the claimant, operator/lessee of lands of the claimant or son-in-law of the claimant and actual farmer of the lands. But the affiants offered no information about their knowledge, skill, experience, training or education. Hence, the court had nothing upon which to judge their qualifications in water matters. As the claimants themselves argued, formal training or an advanced decree is not essential to qualify as an expert, but practical experience or special knowledge must be shown. *IHC Hosp., Inc.* v. *Board of Com'rs*, 108 Idaho 136, 697 P.2d 1150 (1985). Also, see D. Craig Lewis, *Idaho Trial Handbook* (1995), p. 184. The claimants have shown neither practical experience nor special knowledge. Therefore, the affidavits must be considered as the opinions or inferences of lay witnesses.

David Tuthill's affidavit is another matter. IDWR's Director, and by inference, the Adjudication Bureau Chief, have been assigned the role of an "independent expert and technical assistant" in the SRBA. I.C. § 42-1401B(1). While the Idaho Supreme Court has held that the statute is of no effect to the extent that it constitutes a legislative determination as to the Director's status as an expert,[4] Mr. Tuthill has previously testified as an expert in the SRBA on water use and water rights investigation and administration.[5] His affidavit, therefore, presented the opinions of an expert.

[4] *In Re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614 (1995).

[5] See, e.g., subcases 36-02356, 36-07210, 36-07427 and 36-07720.

Now, the task is to decide which portions, if any, of the claimants' affidavits should be stricken. Stated another way, which opinions or inferences of the lay witnesses are rationally based on the perception of the witness and are helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue? The text of specific statements to which the respondents objected in their *Motion to Strike* will be examined just as they were presented in their *Motion.*[6] The Special Master's discussion follows each "statement" and alleged "problem":

Statement	**Problem**
¶ 6: Enlargement done "in full view of all other appropriators...including each of the Respondents."	Lack of personal knowledge; relevancy.

One of the legislative findings stated in I.C. § 42-1426(1)(a), was that "enlargements have been done with the knowledge of other water users, and water has been distributed based upon the right as enlarged." The affiant's statement is relevant in the sense that it confirms the claim falls within one definition of an enlargement for which the Legislature waived mandatory permit requirements in 1994. In fact, it would be difficult to imagine any enlargement *not* done in full view of other appropriators. How could an irrigator "hide" irrigated land?

Whether the affiant personally knew that all other appropriators, including the respondents, actually saw the enlargements is not at issue. The point is that other appropriators *could* have seen the enlargement if they looked. The statement should not be stricken.

¶ 7: "Many of the enlarged acres were formerly irrigated under the original water rights of this affiant incidentally on the banks of the conveyance systems used prior to converting to sprinkler, and the consumptive use on these lands has not increased."	Lack of personal knowledge; not qualified as expert or otherwise competent to testify to the matter stated; speculative; relevancy.

It is reasonable that a farmer would know where his irrigated acreage is located, including which land was irrigated incidentally and is now irrigated by sprinkler. However, a farmer's knowledge of consumptive use of water cannot be presumed. As Mr. Tuthill stated, "the determination of the amount of consumptive use is a technically complicated determination involving several variables. Simple comparisons of acreage and irrigation systems are not adequate." *Affidavit of David R. Tuthill, Jr.*, p. 2. The portion of the statement concerning consumptive use should be stricken.

[6] In their *Motion to Strike*, the respondents referred only to the affidavit of Bruce R. Hunsaker, "because the affidavits are all essentially identical in form and raise the same substantive problems...." *Objection and Motion to Strike Portions of Affidavits*, p. 2.

¶ 8: "had this affiant not converted to a sprinkler system...additional water would have been diverted,... all of which would have been lost to the Eastern Snake Plain Aquifer in view of the nature of the soils which prevent any excess water from returning to the aquifer, and such waste would have eventually evaporated and been lost to the system."	Lack of personal knowledge; not qualified as expert or otherwise competent to testify to the matter stated; speculative; relevancy.

Just as a farmer knows his irrigated acreage, it is reasonable that he would know the amount of water required for furrow irrigation versus sprinkler irrigation. However, a farmer's knowledge of whether water would be lost to the Eastern Snake Plain Aquifer must be proven-- the sort of proof which would probably qualify the farmer as an expert witness.

> On the matters of water percolation and sprinkler systems, Mr. Tuthill said:
> IDWR is not aware of any evidence which suggests that the soils in the above captioned water rights [the 15 claims] prevent excess waste water from returning to the aquifer.
> . . .
> Conversion to a sprinkler system does not necessarily result in more water availability or the enhancement of subsequent water rights.

Affidavit of David R. Tuthill, Jr., p. 2.

All of the statement should be stricken.

¶ 9: "By the conversion of this affiant to an irrigation system using sprinklers, more water was made available in the Eastern Snake Plain Aquifer for subsequent appropriators, thereby enhancing subsequent water rights...."	Lack of personal knowledge; not qualified as expert or otherwise competent to testify to the matter stated; speculative; relevancy.

The same discussion in ¶ 8 above applies here. All of the statement should be stricken.

¶ 10: Respondents "waived any right to object" to IDWR's previous recommendation of affiant's rights based on the presumption statute, I.C. § 42-1416(2).	Legal conclusion; relevancy.

Whether respondents waived any rights is purely a matter of law. Witnesses may not testify concerning legal conclusions. For example, University of Idaho Law School Professor Dennis C. Colson, whom some consider an expert in Idaho water law, could not testify concerning 1994

amendments to SRBA statutes-- purely legal issues. ***Order Prohibiting Use of Submission by IDWR or Reports Regarding Basin-Wide Issue No. 3***, Subcase 91-00003, September 22, 1994.

The statement should be stricken.

¶ 11: "None of this affiant's water rights are located within a critical ground water area."	Relevancy.

Whether or not the affiant's water rights are within a critical ground water area, as defined in I.C. § 42-233a, is relevant. Although there is no mention of such designation in I.C. § 42-1426, it is mentioned in I.C. § 42-1416B which governs claims for expanded use in critical ground water areas.[7] If the present claims for ground water *were* within a critical ground water area, the priority date for the enlargements would be June 30, 1985, not the date of enlargement urged by the claimants. The statement should not be stricken.

¶ 12: After IDWR's publication of a Notice of Enlargement of affiant's claim, "no objections were filed against this claim of affiant asserting any claimed injury from this affiant's enlargement of a valid water right."	Hearsay; relevancy; lack of personal knowledge.

It is likely that the affiant would know whether an objection has been filed against his enlargement claim given the SRBA's generous notice requirements. The statement should not be stricken.

¶ 13: "There is no requirement...in Section 42-1426...that the Director include a subordination condition to this affiant's claim for an enlarged use in the absence of an objection and the establishment of an injury by the objector."	Legal conclusion; relevancy; lack of personal knowledge.

The same discussion under ¶ 10 above applies here. The statement should be stricken.

¶ 15: "In reliance upon § 42-1416," affiant withdrew an application he had filed for a water right to irrigate the enlarged acres.	Relevancy.

The affiant is stating a fact, that he relied on I.C. § 42-1416 when he withdrew an application for a water right. Whether that reliance was well placed is another matter and a question of law. The statement should not be stricken.

[7] Both I.C. § 42-1416 ("presumption statute") and I.C. § 42-1416A ("accomplished transfer statute") were repealed in 1994. But, I.C. § 42-1416B remains valid. Presumably, the Legislature intended that the terms "expanded use" (I.C. § 42-1416B) and "enlargements" (I.C. § 42-1426) are synonymous.

¶ 16: "No reduction in the rate of diversion by affiant under his licensed rights will occur should there be a curtailment in the irrigation of any enlarged acres...."	Lack of personal knowledge; not qualified as expert or otherwise competent to testify to the matter stated; speculative; relevancy.

Most farmers know their irrigation requirements in detail. For instance, given certain circumstances, a farmer might say with some certainty that his rate of diversion to irrigate 110 acres would be the same for 100 acres. However, to say that would be true under all circumstances is too speculative. Such variables as changes in well capacity, electricity costs, crops grown, ambient air temperatures or equipment performance will likely impact the diversion rate.

Given those variables, it is not credible to say that a reduction in acreage will never change the rate of diversion. The statement should be stricken.

Motions for Summary Judgment

All 15 claims fit the definition of enlargements for which the Legislature waived mandatory permit requirements. That is, the enlargements were made after Idaho's mandatory permit system provided in I.C. §§ 42-201 and 42-229, but before commencement of the SRBA (November 19, 1987). All the claims are based on licensed rights.[8] All the enlargements were made without an increase in the rate of diversion of the original or base rights and none exceed the rate of diversion for irrigation provided in I.C. § 42-202. And the enlargements of use did not reduce the quantity of water available to other water rights existing on the date of the enlargements.

The Legislature waived mandatory permit requirements for these claims "to insure the economic and agricultural base in the state of Idaho as it existed on the date of the commencement of the Snake River basin adjudication and to maintain historic water use patterns existing on that date." I.C. § 42-1426(1)(b).

[8] More exactly, the claimants are "persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation...." I.C. § 42-1426(1)(a).

The Legislature established a bifurcated system for IDWR and the SRBA Court to handle enlargement claims under I.C. § 42-1426.[9] First, the Director of IDWR would publish notice of all enlargement claims he recommended under the statute. If no petitions asserting injury from an enlargement were filed and no objections were filed in the SRBA, the claimant would be entitled to a new water right with a date of enlargement priority date. However, if petitions asserting injury were filed within 120 days of the notice, the Director would determine whether there was injury. If he found there was injury, the Director would determine the appropriate mitigation. If the injury could not be mitigated, then the priority date of the enlarged right would be one day after the junior right injured by the enlargement. No appeal from the Director's determination was allowed. An aggrieved party's only recourse would be to file an objection to the water right claim in the SRBA.

That was the process envisioned by the Legislature in 1994. Then, in 1996, the Idaho Supreme Court issued its opinion in *Fremont-Madison* v. *Ground Water Approp*. The decision reviewed the constitutionality of I.C. §§ 42-1425, 42-1426 and 42-1427, the "amnesty statutes." The Court found that the enlargement provision in I.C. § 42-1426 is constitutional as a consequence of the mitigation provision:

> The clear and unambiguous language of the statute provides that only those enlargements which do not increase the rate of diversion, do not injure other water rights existing on the date of enlargement, and which fully mitigate any potential injury to junior water rights existing as of the date of enactment of the amnesty statutes are permitted.... Section 42-1426 of the Idaho Code is constitutional as written because it provides that an enlargement cannot be allowed that would injure a junior appropriator.

Fremont-Madison, 129 Idaho at 460-461, 926 P.2d at 1307-1308.

IDWR and the respondents focused on one sentence of the Supreme Court's opinion in support of their argument for inclusion of subordination language in all enlargement claims: "It is difficult, if not impossible to perceive of a situation in which an enlargement would not injure an appropriator who had an established right [a junior appropriator] if the enlargement receives priority." *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. By focusing on that sentence, IDWR and the respondents seemed to argue that the only solution in this "difficult, if not impossible" situation, was to include subordination language in all enlargement claims.

The claimants, who want all subordination language removed, focused on the very next sentence of the Supreme Court opinion: "However, there is at least the possibility that an appropriator seeking an enlargement of one water right might accept a diminution of another water

[9] "A person who has not filed a claim in the adjudication who claims injury from the enlargement may petition the Department to assert the claim. A person who has filed a claim in the SRBA does not have to petition the Department separately to oppose an enlargement." *Fremont-Madison*, 129 Idaho at 462, 926 P.2d at 1309.

right held by the same appropriator to assure that the enlargement of the one water right will not reduce the total volume available to the junior appropriator." *Fremont-Madison*, 129 Idaho at 461, 926 P.2d at 1308. The claimants saw another solution in this language. They argued that if junior appropriators had claimed injury from their enlargement claims, they should have the opportunity to propose some form of mitigation. The claimants said the problem was that no one with a priority date earlier than April 12, 1994, filed a petition with IDWR asserting injury.

That brings us to the legal issue presented in the two *Motions for Summary Judgment*: Does the Director of IDWR have the lawfully authority to include subordination language in his recommendations of all enlargement claims?[10] Another way of viewing the issue is whether the Idaho Supreme Court opinion in *Fremont-Madison* obviated a major portion of I.C. § 42-1426.[11] Though not apparent at first, it is clear that IDWR had no alternative but to recommend inclusion of the subordination language.

The Supreme Court found that I.C. § 42-1426 was valid *only* because of its mitigation provision. If a claim for an enlargement unconditionally received a priority date as of the date of enlargement regardless of injury to a junior appropriator, the statute would be unconstitutional. It would violate Article XV, § 3 of the Idaho Constitution: "Priority of appropriations shall give the better right as between those using the water...."

Since the Supreme Court was not presented with specific claims of injury, the Court was left to define the term. It held that:

> ...[S]ome injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called junior appropriator. The junior appropriator will not receive the water that he/she would have received but for the enlargement if there is not enough water to serve all water users.

Fremont-Madison, 129 Idaho at 461, 926 P.2d at 1308.

The parties agreed that there is no evidence that the enlargements reduced the quantity of water available to other water rights existing on the date of the enlargements. *Stipulation of Facts*, p. 2. However, that will not always be the case:

> When there is not enough water for both senior and junior appropriators, the doctrine of priority allows the full senior right to be exercised before the junior can use any water. The first user to be limited is the most junior on the list of priorities; juniors must abate their use until everyone senior to them has been served.

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[10] The Supreme Court said that IDWR's determination on any claim of injury "is presumptively correct." *Fremont-Madison,* 129 Idaho at 462, 926 P.2d at 1309. It is not clear whether this presumption is identical to the *prima facie* weight given the Director's Report under I.C. § 42-1411(4).

[11] At this point, the Special Master considered the sage advise of Yogi Berra, who said, "When you come to a fork in the road, take it." Yogi Berra, *The Yogi Book*, p. 48, Workman Publishing, New York, 1998.

David H. Getches, *Water Law in a Nutshell*, 2d edition, p. 101, 1990.

When a "call" is made, by definition, there is not enough water to serve all users. In that event, if the enlargement claims were allowed to have a date of enlargement priority date, they would take priority over validly established water rights held by junior appropriators. That is, enlargements would receive water while land covered by licenses granted after the enlargements were made would be restricted. That cannot be allowed under Idaho's Constitution.[12]

There is no doubt that the Legislature can waive Idaho's mandatory permit requirements "to insure the economic and agricultural base in the state of Idaho as it existed on the date of the commencement of the Snake River basin adjudication and to maintain historic water use patterns existing on that date." I.C. § 42-1426(1)(b). But, it must "fully mitigate any potential injury to junior water rights existing as of the date of enactment of the amnesty statutes...[emphasis added]." *Fremont-Madison*, 129 Idaho at 460, 926 P.2d at 1307. None of the enlargement claimants presented to IDWR any kind of mitigation proposal to avoid injury to junior appropriators. *Supplemental Director's Report Regarding IDWR's Recommendation for Water Right Numbers 36-10033 and 36-10035*, p, 2. So, the only way IDWR could fully mitigate potential injury to junior water rights was to include subordination language in the enlargement claims.

There is no evidence that the Director concluded that injury to junior appropriators cannot be mitigated, as the claimants suggested. Rather, he found that no mitigation was proposed after petitions asserting injury were filed with IDWR.[13]

The Supreme Court imagined at least one possible situation where an enlargement might not injure an appropriator with an established right if the enlargement receives priority--where the claimant seeking an enlargement might accept a diminution of another of his rights to assure that the enlargement will not reduce the total volume available to the junior appropriator. But the Court also recognized that the issue of mitigation cannot be decided in a vacuum. The Director of IDWR had to decide the issue in practical application.

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[12] I.C. § 42-106 mirrors the Constitution: "As between appropriators, the first in time is first in right."

[13] Two of the respondents, Tim Deeg and Ralph Breding, sent undated letters to IDWR alleging injury to their water permits if subordination language was not included in the all recommendations for enlargement claims. Exhibit D to *Respondents' Opening Brief in Support of their Motion for Summary Judgment.* Nothing in the records explains why the claimants did not receive copies of these letters.

The mitigation provisions of I.C. § 42-1426 presented the Director with a daunting task. Assume that the Director determined the sort of mitigation suggested by the Supreme Court in *Fremont-Madison*-- where a claimant for an enlargement agreed to diminution of another of his rights. Administration of those rights would be formidable. First of all, there is the possibility (likelihood?) that others claiming injury would file objections to the same enlargement claim in the SRBA. The SRBA Court would then be left to determine additional injury and mitigation.[14] That would add more layers of administration for the Director. Assuming further that mitigation was decreed, there remain several questions. What happens when the diminished right or the injured right is transferred, split or forfeited? Would the same mitigation or relative priority dates apply? Would the injury or mitigation ever change? On top of those problems of administration, the Director would have to contend with mitigation of rights which he did *not* recommend but which could be decreed after the dissatisfied applicant or permittee intervenes in the SRBA and asserts their claim of injury in an objection to the water right? I.C. § 42-1426(3).

It is against this backdrop that the Director recommended the only way to "fully mitigate any potential injury to junior water rights existing as of the date of enactment of the amnesty statutes." That was to recommend that all enlargements be subordinate to all water rights with a priority date earlier than April 12, 1994. By doing so, the Director "saved" the amnesty statute from claims of unconstitutionality and, coincidentally, greatly simplified his job of administering water rights in priority.

[14] It is far from clear whether the SRBA Court can consider injury and order mitigation in the context of the general adjudication, at least under the current statutes. That assumes, of course, that "injury" and "mitigation" can be adequately defined where ground water is involved.

> One last issue should be addressed. The claimants argued that on March 1, 1985, when I.C. § 42-1416(2), the presumption statute, was enacted, the Legislature "waived the mandatory permit requirements" and no injury can be shown to a water right acquired after that date. The statute read: Expansion of the use after acquisition of a valid unadjudicated water right in violation of the mandatory permit requirements shall be presumed to be valid and to have created a water right with a priority date as of the completion of the expansion, in the absence of injury to other appropriators.

I.C. § 42-1416(2).

The core of the claimants' argument is that upon enactment of the presumption statute, the Legislature "created a water right." Therefore, claims of injury by junior appropriators are barred.

The language in I.C. § 42-1416(2) supports the view that the statute did not create water rights. The words "presumed" and "in the absence of injury to other appropriators" indicated a significant contingency. The presumption of validity of an expansion claim could be overcome by proof of injury to other appropriators. It would be difficult to argue that a "right" is subject to such a contingency.

But, a simpler response to the claimants' argument is that the presumption statute was repealed in 1994, and is no longer a viable basis for an expansion or enlargement claim. The key word there is "claim," because until an expansion or enlargement claim is finally adjudicated by the SRBA Court, it is not a "water right." The presumption statute was merely the basis for expansion claims. When the Legislature repealed the presumption statute, that basis disappeared. The Legislature replaced the presumption statute with I.C. § 42-1426, the enlargement portion of the "amnesty statutes." Now, parties who filed claims under I.C. § 42-1416(2) are left with I.C. § 42-1426. The claimants acquired no "rights" under I.C. § 42-1416(2).

CONCLUSIONS OF LAW

The pleadings and affidavits show there is no genuine issue as to any material fact and the respondents are entitled to judgment as a matter of law. The respondents have proven that the Director of IDWR had the lawful authority and duty to recommend inclusion of subordination language in the claimants' enlargement claims. Conversely, the claimants are not entitled to judgment as a matter of law.

ORDER

THEREFORE, IT IS ORDERED that:

1. The respondent's *Motion to Strike Portions of Affidavits* is **granted**, in part, and **denied**, in part;
2. The respondents' *Motion for Summary Judgment* is **granted**; and
3. The claimants' *Motion for Summary Judgment* is **denied**.

DATED September 11, 1998.

_____
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that true and correct copies of the ***ORDER ON MOTIONS FOR SUMMARY JUDGMENT*** were mailed on November 25, 2002, by first-class mail to the following:

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