

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JUL - 8 2019

By _____ Clerk

Deputy Clerk

been the subject of significant, complex litigation in the five years since the Late Claims were filed. Many of the underlying issues affecting the Late Claims are concurrently being litigated in administrative proceedings before the Idaho Department of Water Resources (“Department” or “Director”). For purposes of judicial economy, the Late Claim proceedings in the SRBA were stayed for a time pending resolution of the administrative proceedings. During the stay of the SRBA litigation, the parties consistently worked on settling those issues. On February 19, 2019, the parties to the Late Claims notified the Court that they had reached a global resolution and filed motions seeking Court approval of the proposed settlement. The proposed settlement was submitted with the Department’s concurrence.

On March 13, 2019, the City of Boise (“Boise”) filed *City of Boise’s Motion to Participate* in the above-captioned subcases. On April 15, 2019, the City of Mountain Home (“Mountain Home”) filed a *Motion to Participate in Subcases 63-33734A, and 63-33734B; 63-303, 63-3613, 63-3614 and 63-3618; and 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738*. Attached as an exhibit to the *Motion* is a *Brief in Support of I.R.C.P. 12(b)(1)(2)(4)(5) and (6) Motion to Dismiss State’s Motion to Decree Water Right 63-33734A and 63-33734B; and State’s Motion to Alter or Amend 63-303, 63-3613, 63-3614 and 63-3618* (“Motion to Dismiss”). Concurrent with the filing of these *Motions*, Mountain Home also filed proposed *Standard Form 1 Objections* (SF1) to water right claims 63-33734A and 63-33734B.

B. Procedural Background.

The pending Late Claims have been litigated before this Court for over five (5) years. During this time, there has been significant litigation, beginning in 2013 with the filing of the Late Claims, to the present time when the parties filed a Settlement Agreement. In between those events, *Director’s Reports* were filed, *Objections* were filed by several irrigation entities, and *Responses* were filed by the State of Idaho and Suez Water Idaho Inc. In addition, during the five-year time span, the parties have taken depositions, served discovery, and pursued motion practice including filing motions for summary judgment. It would be an understatement to say that significant time, effort, and resources have been expended during the litigation process.

For purposes of ruling on the Motions to Participate, it is useful to recount the process and procedural history prior to and after the filing of the Late Claims.

a. The Base Rights.

This Court previously entered *Partial Decrees* for water right numbers 63-303, 63-3613, 63-3614, 63-33737 and 63-33738. These are storage rights associated with Arrowrock, Anderson Ranch and Lucky Peak dams. The Court will refer to these rights as “Base Rights.” The Base Rights were decreed as follows:

Right	Point of Diversion	Source	Quantity	Priority	Purpose	Period
63-303	Arrowrock Dam	Boise River	271,600 afy	01/13/1911	Irrigation Storage Irrigation from Storage	01/01-12/31 03/15-11/15
63-3613	Arrowrock Dam	Boise River	15,000 afy	06/25/1938	Irrigation Storage Irrigation from Storage	01/01-12/31 03/15-11/15
63-3614	Anderson Ranch Dam	South Fork Boise River	493,161 afy	12/09/1940	Irrigation Storage Irrigation from Storage Industrial Storage Industrial from Storage Power Storage Power from Storage Municipal Storage Municipal from Storage	01/01-12/31 03/15-11/15 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31 01/01-12/31
63-3618	Lucky Peak Dam	Boise River	293,050 afy	04/12/1963	Irrigation Storage Irrigation from Storage Recreation Storage Streamflow Maintenance Storage Streamflow Maintenance from Storage	01/01-12/31 03/15-11/15 01/01-12/31 01/01-12/31 01/01-12/31

The Base Rights were claimed by the United States Bureau of Reclamation (“USBOR”) based on prior licenses. They are decreed in the name of the USBOR. However, title to the use of the water is held by the consumers or users of the water. *See, United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 115, 157 P.3d 600, 609 (2007). *Partial Decrees* for the Base Rights 63-303 and 63-3613 were issued on June 28, 2007. A *Partial Decree* for 63-3614 was issued February 25, 2009, and a *Partial Decree* for 63-3518 was issued December 18, 2008. Together, the Base Rights provide for a cumulative storage capacity of 1,072,811 acre feet annually.

b. Basin-Wide Issue 17.

The issue of how filling a reservoir after the release of flood waters should be addressed in the SRBA began in earnest in 2007. During 2007, a controversy arose in Basin 01 (Main Stem of the Snake River) when the USBOR amended its claims for storage rights seeking a remark authorizing the right to refill under the priority date for any water released for flood control.² On June 8, 2012, various water delivery entities holding decreed Base Rights on the Boise River sought leave of court for *amicus* participation in the proceedings in Basin 01. Thereafter, on June 11, 2012, some of those same parties filed a *Petition to Designate a Basin-*

² See SRBA subcase nos. 01-2064 and 01-2068.

Wide Issue.³ The Court designated Basin-Wide Issue 17 as follows: “Does Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” *Order Designating Basin-Wide Issue, Basin-Wide Issue 17*, (Subcase no. 00-91017) (Sept. 21, 2012). This Court held *inter alia* that Idaho law did not allow a senior storage right to refill in priority water released for flood control purposes. *Memorandum Decision*, at 7-8 (Subcase no. 00-91017) (March 20, 2013).⁴ The Idaho Supreme Court reversed and instructed that contests to the Department’s accounting methodology for determining when a decreed water right has been filled should be addressed by the Department pursuant to the Administrative Procedures Act. *In re SRBA*, 157 Idaho 385, 394, 336 P.3d 792, 801 (2014). That Supreme Court ruling was followed by the administrative proceedings before the Department.

c. Administrative Proceedings.

On October 24, 2014, the Director commenced a contested case proceeding to address the controversy regarding how water is counted or credited towards the fill of water rights for the federal on-stream reservoirs located in the Boise River System. Following a five-day administrative hearing, the Director issued a *Final Order* (Oct. 20, 2015). On December 17, 2015, two *Petitions for Judicial Review* were filed seeking review of the *Final Order*. Hearings were held, and on September 1, 2016, this Court issued its opinion in the judicial review proceedings. See *Memorandum Decision and Order*, Case No. CV-WA-2015-21376 (Consolidated Ada County Case No. CV-WA-2015-21391) (Sept. 1, 2016). In that opinion this Court stated:

The Director has explicitly found that the irrigators have historically diverted, stored and used water identified as unaccounted for storage for irrigation following flood releases in flood control years. He acknowledges this use has occurred pursuant to a long-standing practice, and even condones the continued practice of diverting, storing, and using water consistent with how it has been done historically.

....

If unaccounted for storage water has been historically and continuously diverted, stored and used by the irrigators for irrigation dating back before 1971, as the Director expressly recognizes, then the United States and irrigators have acquired a vested constitutional method water right in that water under Idaho law. Indeed the United States and the various water users have claimed beneficial use water

³ SRBA subcase no. 00-91017.

⁴ In the opinion the Court noted “that since this issue has arisen some reservoir storage right holders have filed motions to file late claims for separate beneficial use rights to address refill.” *Memorandum Decision and Order* at 10, fn.7.

rights in the SRBA for that water identified by the Director as unaccounted for storage. *See* SRBA Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737 and 63-33738.

Memorandum Decision and Opinion at 16-17 (internal citations to record omitted).

Thereafter, the parties filed *Petitions for Rehearing*. On November 14, 2016, the Court denied the *Petitions for Rehearing*. **Order Denying Rehearing**, Case No. CV-WA-2015-21376 (Consolidated Ada County Case No. CV-WA-2015-21391) (Nov. 14, 2016). Beginning in December 2016, multiple appeals and cross-appeals were filed with the Idaho Supreme Court. While the appeal was proceeding, the parties jointly sought a stay of the appeal based on pending settlement negotiations. On July 30, 2018, the Idaho Supreme Court granted the stay and suspended the appeal. *Order Granting Joint Motion to Suspend Appeal and Reset Oral Argument*, Docket No. 44677-2016, Ada County District Court CV-WA-2015-21376 (July 30, 2018).

d. Late Claims.

Meanwhile, litigation on the related Late Claims was proceeding. On January 31, 2013, prior to this Court issuing its ruling in Basin-Wide 17, the USBOR as well as the Boise Project Board of Control and various irrigation districts sought leave to file Late Claims based on beneficial use of water historically used to refill the reservoirs following flood releases. Notice was served pursuant to SRBA docket sheet procedure. A hearing was held on the Motions, and the Court granted leave to file the Late Claims on May 22, 2013. **Order Granting Motions to File Late Claims**, Water Right Claims: (01-10620, *et.al*-US-BOR) (May 22, 2013); **Order Granting Motions to File Late Claims**, Water Right Claims: 63-33737 & 63-33738 (May 22, 2013). The Late Claims were claimed as follows:

Right	Point of Diversion	Source	Quantity	Priority	Purpose	Period
63-33732 (USBOR)	Arrowrock Dam	Boise River	1,436,389 afy	09/30/1965	Irrigation Storage Irrigation from Storage	10/01-09/30 03/01-11/15
63-33733 (USBOR.)	Anderson Ranch Dam	South Fork Boise River	1,307,035 afy	09/30/1965	Irrigation Storage Irrigation from Storage Industrial Storage Industrial from Storage Power Storage Power from Storage Municipal Storage Municipal from Storage	10/01-09/30 03/01-11/15 10/01-09/30 01/01-12/31 10/01-09/30 01/01-12/31 10/01-09/30 01/01-12/31
63-33734 (USBOR)	Lucky Peak Dam	Boise River	3,672,732 afy	09/30/1965	Irrigation Storage Irrigation from Storage Recreation Storage Streamflow Maintenance Storage Streamflow Maintenance from Storage	10/01-09/30 03/01-11/15 01/01-12/31 10/01-09/30 01/01-12/31
63-33737 (Boise)	Arrowrock Dam	Boise River	177,816 afy	01/13/1911	Irrigation Storage	01/01-12/31

Project et al.)						
63-33738 (Boise Project et al.)	Anderson Ranch Dam	Boise River	241,144 afy	12/09/1940	Irrigation Storage	01/01-12/31

The Late Claims filed by the USBOR provide for a cumulative storage capacity of 6,416,156 acre feet annually.

i. Director's Reports.

The Late Claims were forwarded to the Department for investigation and filing of a *Director's Report and Recommendation*. The Late Claims were reported in the *Director's Report of Late and Miscellaneous Claims* ("*Director's Report*") filed with the Court on December 31, 2013. The *Director's Report* recommended that the Late Claims be decreed **disallowed**. Notice of the filing was pursuant to SRBA docket sheet notice. The *Director's Report* established *Objection* and *Response* deadlines as March 20, 2014 and May 22, 2014, respectively. Although the *Director's Report* recommended disallowance of the rights, the recommendation recognized that use of water captured in evacuated flood control space for irrigation and other beneficial purposes was a historical practice in Basin 63. The *Director's Report* recommended that the historical practice be recognized in the SRBA through a general provision rather than a water right. Therefore, the *Director's Report* filed in 2013 put parties on notice that the use of water captured after evacuation for flood control was considered a historic use.

ii. Proceedings on the Late Claims.

Following the expiration of the *Objection* and *Response* period on the Late Claims, Suez Water Idaho Inc. (formerly United Water) filed a *Motion to Participate* in the proceedings. The Court granted Suez's *Motion* on September 30, 2014. Thereafter, the State of Idaho filed a *Motion to Dismiss* the Late Claims filed by Boise Project Board of Control and other irrigation districts based on the holding in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). See ***Order Granting in Part and Denying in Part Motion for Summary Judgment***, (Subcase Nos: 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, 01-10620, 01-10621, 01-10622, 01-10623, 63-33732, 63-33733, 63-33737 and 63-33738) (Jan. 9, 2015). Following a ruling on the legal issue, the Court referred the subcases to the Special Master for determination of the elements of the Late Claims. Thereafter, on September 17, 2015, the Special Master granted Pioneer Irrigation District leave to participate in the proceedings based on stipulation of

the parties. On October 9, 2015, the Special Master issued a lengthy *Memorandum Decision* and a *Special Master's Report and Recommendation*. The parties filed *Motions to Alter or Amend the Special Master's Report* on November 27, 2015. On February 26, 2016, the Special Master issued another lengthy opinion denying the *Motions to Alter or Amend*. Thereafter, on March 14, 2016, the parties filed *Notices of Challenge*. On September 1, 2016, following proceedings on the *Challenges*, this Court recommitted the matter back to the Special Master. *See Memorandum Decision and Order on Challenge and Order of Recommitment to the Special Master*, Subcase Nos. 63-33732 (consolidated subcase no. 63-33737), 63-33733 (consolidated subcase no. 63-33738), and 63-33734 (Sept. 1, 2016).⁵ On February 2, 2017, the Special Master stayed the proceedings for purposes of judicial economy, pending resolution of the administrative proceedings by the Idaho Supreme Court.

e. Stipulated Settlement and Related Motions.

In the meantime, the parties to the Late Claims were working diligently to reach a settlement. In 2019, the parties informed the Court that they had entered into a stipulated settlement ("Settlement"). The terms of the Settlement call for: (1) joint support for passing legislation; (2) decreeing of two water rights to describe the Late Claims (these were given new numbers although they are derived from the original Late Claims); (3) amending the Base Claims to refer to the Late Claims; and (4) dismissing all other claims, appeals, and cross-appeals related to the Late Claims.

To effectuate the Settlement, all parties agreed to support the State's filing of the following three motions: (1) *Motion to Decree Water Right 63-33734A*; (2) *Motion to Decree Water Right No. 63-33734B and Disallow Water Right Claim Nos. 63-33732, 63-33733, 63-33734, 63-33737, and 63-33738*; and (3) *Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614, and 63-3618*. Each is explained below:

i. Motions to Disallow Late Claims

The *Motion to Disallow Water Right Claims* seeks the issuance of a decree disallowing the pending Late Claims. This *Motion* was to disallow the Late Claims filed under the original

⁵ On December 13, 2016, some of the parties filed motions seeking to have the Court's Order I.R.C.P. 54(b) certified for purposes of proceeding with an appeal. The Court denied the motions.

numbers. This is a standard practice in the SRBA to ensure that duplicate water rights are not decreed after the rights are assigned new numbers.

ii. Motions to Decree Water Rights 63-33734A and 63-33734B.

This *Motion* seeks the issuance of *Partial Decrees* for two rights identified as 63-33734A and 63-33734B. These two proposed rights incorporate the water usage described in the original Late Claims, but assigned them new numbers. The elements are as follows:

Right	Diversion	Source	Quantity	Priority	Purpose	Period
63-33734A	Arrowrock, Anderson Ranch, & Lucky Peak.	Boise River	3,672,732	9/30/1965	Irrigation Storage	01/01-12/31
					Municipal/Industrial Storage	01/01-12/31
					Streamflow Maintenance Storage	01/01-12/31
63-33734B	Arrowrock, Anderson Ranch, & Lucky Peak.	Boise River	587,056	03/16/1973	Irrigation Storage	01/01-07/31
					Municipal/Industrial Storage	01/01-07/31
					Streamflow Maintenance Storage	01/01-07/31

The two proposed *Partial Decrees* provide for a cumulative storage capacity of 4,259,788 acre feet annually. The proposed decrees also include certain remarks.

The proposed decree for 63-33734A contains the following subordination remark under the “**Priority**” element:

This water right is subordinate to all water rights established pursuant to Idaho law for uses within the IDWR Administrative Basin 63, except water rights to store more than 1,000 acre feet of surface water permitted or licensed after April 15, 2019. This water right shall not be administered as subordinate to water rights permitted or licensed for managed ground water recharge after April 15, 2019 or any water rights for the storage or use of water for power purposes.

Both proposed decrees include the following combined annual diversion limitation remark under the “**Quantity**” element:

Water right nos. 63-33734A, 63-303, 63-3613, 63-3614, 63-3618, and 63-33734B, are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

Both water right claims include the following remark in the “**other provisions**” element:

The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided however, the annual time period will begin (1) day after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become

available to water rights junior in priority to January 12, 1911, or on Nov. 1, whichever is earlier.

The “**Purpose and Period of Use**” elements for both water rights includes a comment providing that water “accruing to this right supplements water accrued under water right nos. 63-303, 63-3613, 63-3614, and 63-3618.” This explains how 63-33734A and B relate to the Base Claims.

Comment 5 to the “**Other Provision**” element of the proposed decree for 63-33734B, subordinates the right to all “surface water rights within . . . Basin 63 with a priority date earlier than May 1, 2014, with . . . a diversion rate of less than 0.1 CFS,” and to a number of other listed rights.

iii. Motion to Alter or Amend Base Rights.

The *Motion to Amend* the Base Rights is brought pursuant to I.R.C.P. 60(b)(6) and seeks to add remarks to the *Partial Decrees* previously issued for the Base Rights. Specifically, the Base Rights would be amended with a volumetric limitation.

In the “**Quantity**” element, the following combined volume limit remark would apply:

Water rights nos. 63-303, 63-3613, 63-3614, 63-3618, 63-33734A, and 63-33734B are limited to the total combined annual diversion volume necessary to allocate a total of 1,044,011 acre-feet of storage water per year to the consumers or users of the storage water.

In the “**Other Provisions**” element, the following remark addressing “reset” would apply:

The annual time period for accruing natural flow to the on-stream reservoir storage water rights in IDWR Administrative Basin 63 will be determined by the Watermaster as supervised by the Director of the Department of Water Resources; provided, however, the annual time period will begin (1) after the day of allocation and when there is no natural flow available to water rights junior in priority to January 12, 1911, and (2) before natural flow has again become available to water rights junior in priority to January 12, 1911, or on Nov. 1, whichever is earlier.

Mountain Home is focused primarily on language proposed to be included under the elements which would settle the subcases, in part, by subordinating 63-33734A and 63-33734B to certain other rights.

II. ANALYSIS

A. Legal standard for participation/intervention.

The Late Claims for Arrowrock, Anderson Ranch and Lucky Peak Reservoirs were filed in 2013, and have been before the Court for more than five years. The overarching question which must be answered is whether Boise's and Mountain Home's *Motions to Participate* are timely and well grounded. As non-parties to the Late Claims, the *Motions* for Mountain Home and Boise request leave to participate under **SRBA Administrative Order 1 (AO1)**, §10.k. Rule 10.k establishes the parameters:

Any party to the adjudication who is not a party to a subcase may seek leave to participate in a subcase by filing a timely *Motion to Participate*. A *Motion to Participate* shall be treated like a motion to intervene under I.R.C.P. 24 and shall be decided by the Presiding Judge or the assigned Special Master. A party to the adjudication who does not file an objection, a response or a timely *Motion to Participate* waives the right to be a party to the subcase and to receive notice of further proceedings before the Special Master, except for *Motions to Alter or Amend*.

AO1 10.k. Boise and Mountain Home must obtain leave to participate because they are not currently parties to the Late Claim subcases. **AO1 2.p.** defines "party to a subcase" as follows:

The claimant, any objector or respondent to a water right recommendation, any party to a subcase which has been consolidated with another subcase, any party to the adjudication granted leave to participate in a subcase by the Presiding Judge or Special Master, and any party to the adjudication filing a *Motion to Alter or Amend the Special Master's Recommendation*.

AO1 2.p In order to determine whether Boise or Mountain Home may participate at this late time in the proceedings, the Court looks to I.R.C.P. 24(a). Rule 24(a) sets forth the standard for intervention of right:

On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by an Idaho statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede

the movant's ability to protect its interest, unless existing parties adequately represent that interest.

I.R.C.P. 24(a). The Idaho Supreme Court distinguished the timeliness standard for intervention of right in the context of the SRBA. *State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000) (hereafter "*Smith Springs*"). The Supreme Court held that intervention of right in subcases to which a party has a generalized interest was timely in the context of the SRBA if filed within the response period. The Court rejected the argument that intervention of right was timely if filed prior to the date set for trial and held:

Given the monumental scope of the SRBA, which is adjudicating the rights of all water rights holders in the Snake River Basin, we agree with the SRBA court that a "generalized interest is insufficient to intervene in a subcase as a matter of right because the requirements for filing timely objections or responses under I.C. § 42-1412 would become meaningless[,] depriving the court and all parties to the SRBA the structure necessary to administer the case."

Id. at 110, 996 P.2d at 810.

In *Smith Springs*, the Idaho Supreme Court also addressed the standard for permissive intervention. "I.R.C.P. 24(b) allows permissive intervention by a person '[u]pon timely application' and 'when an applicant's claim . . . and the main action have a question of law or fact in common.'" *Id.* at 110, 996 P.2d at 810. Further, "[t]he decision of whether to grant the motion to intervene is discretionary with the trial court. A court acts within its discretion if it perceives the issue as discretionary, acts within the outer boundaries of its discretion and consistently with applicable legal standards, and reaches its decision by exercise of reason." *Id.* at 110, 996 P.2d at 810.

B. Arguments of the Parties.

The Court has considered the arguments of the movants and parties, their briefs and affidavits in reaching its conclusions.

a. Mountain Home.

i. Intervention as of right.

Mountain Home argues that it meets the requirements for intervention under both I.R.C.P. 24(a) and 24(b) and should be allowed to intervene in subcases 63-33734A, and 63-33734B; 63-303, 63-3613, 63-3614 and 63-3618; and 63-33732, 63-33733, 63-33734, 63-33737

and 63-33738. Specifically, Mountain Home asserts that its *Motion* is timely because the rights proposed in the Settlement, 63-33734A and 63-33734B, constitute *new* water rights which have only been opened as of February 2019. Mountain Home bases this conclusion on the allegation that the Settlement resulting in the two renumbered water rights is not within the parameters of the *Director's Reports and Claims*. It argues that the Department has sidestepped SRBA procedures by not requiring new claim forms and providing notice by issuing new or amended *Director's Reports*. In sum, Mountain Home argues that the two renumbered water right numbers are really new claims rather than settlement of existing claims.

The first argument is Mountain Home's assertion that if the Department had followed proper SRBA procedure for new claims, its participation would be timely.

Second, Mountain Home asserts that its interest in the Late Claims is based on a conditional permit for groundwater recharge filed by Elmore County. The new permit authorizes groundwater recharge near the City of Mountain Home. Mountain Home argues that the settlement of the Late Claims results in water rights with priority dates senior to the Elmore County permit. The Late Claim settlement thus has the potential to impact the groundwater recharge.

Third, Mountain Home argues that the early priority dates and quantities of 63-33734A and B, compared to the junior priority date of the Elmore County permit, would result in impairment of groundwater recharge under the permit. The argument is that previously unappropriated water from the South Fork Boise River would not be available. As a result, Mountain Home contends that its interest in Elmore County's permit will not be protected by the terms of the Settlement.

Last, Mountain Home argues its interests are not adequately represented by existing parties as they are all irrigators in Basin 63, and outside the Mountain Home area.

ii. Permissive Intervention.

In the alternative to intervention as a matter of right, Mountain Home also asks the Court to consider permissive intervention under Rule 24(b). Mountain Home asserts that its Motion is timely and would not unduly delay or prejudice the rights of the other parties.

iii. Other Arguments.

In addition to its arguments for intervention pursuant to Rule 24(a) and 24(b), Mountain Home asserts three reasons why the Court should dismiss the State's Motions: (1) the Court

lacks jurisdiction to consider subcases 63-33734A and 63-33734B; and (2) the subcases cannot be decreed because there are no claim forms or *Director's Reports*.

b. Boise.

i. Intervention as of right.

Boise argues it is entitled to participate as a matter of right because the terms of the Settlement could alter administration of its own water rights from the Boise River and its particularized interest in the Lucky Peak Base Right 63-03618. Boise's two main arguments for intervention of right are that the merits of the Late Claims have not been addressed by the parties or the Court and that the reopening of the Lucky Peak Base Right could affect Boise's interests as a party to that subcase.

ii. Permissive intervention.

In the alternative, Boise requests the Court to allow it permissive intervention with reasonable conditions. Such reasonable conditions would involve limiting its participation in the Late Claims to those issues that could affect its own water rights, and particularly amendments to the Lucky Peak Base Right.

C. Discussion.

a. Proposed water rights 63-33734A and 63-33734B are not new water right claims.

Mountain Home argues that proposed claims 63-33734A and 63-33734B constitute new claims, and therefore should be required to follow SRBA procedure for new claims. This view of the pleadings would give Mountain Home a hook to get into these subcases on a timely basis. That is because new claims require the filing of a *Director's Report* and allow parties to file objections and responses.

This Court disagrees that the proposed claims in the Settlement constitute new claims. Only the nomenclature for the claim numbers is different. The water use that is the subject of the proposed claims is the same water use described in the original Late Claims. As explained below in this opinion, the elements for the proposed claims are within the parameters of the Late Claims. No new water use or additional quantity was added. The water claims were simply reconfigured and renumbered. Put differently, the proposed claims do not claim anything

beyond what was in the original Late Claims. Of course, the parties could have labeled the proposed claims with the existing numbers for the Late Claims. Apparently, the parties saw merit in using different numbers in the interest of avoiding later confusion. However, the mere renumbering of the claims did not expand them or transform them into new claims. In order to make a colorable argument that the Settlement established new claims, the parties would have to establish that the claims when compared to the previously filed Late Claims asserted a greater quantity of water, or water from a different source, or added additional places of use, earlier priorities, a larger period of use, or new purposes of use. The movants did not make any such assertions.

The Court is unaware of any rules or IDWR policies which require new claims and new *Director Reports* be filed when claims are merely renumbered. Indeed, movants did not cite to any rules, policies or procedures. The Court finds that assigning different numbers to the proposed Late Claims does not implicate new claims or raise any due process issues for third parties.

b. The Court has jurisdiction to preside over the proposed water rights.

Mountain Home argues that the Court is without jurisdiction to address the proposed water rights because the subcase numbers were not identified in the *Final Unified Decree* as pending subcases over which the SRBA Court retained jurisdiction at the time of entry of the *Final Unified Decree*. This argument is without merit. The subcase numbers for each of the Late Claims were identified in the *Final Unified Decree* and in a separate order the Court issued in each of the subcases prior to entry of the *Final Unified Decree*. See *Order Regarding Subcases Pending Upon Entry of Final Unified Decree*, Subcase Nos. 01-00219 et al, (see attached list) (Aug. 26, 2014). Indeed the Court retained jurisdiction by this *Order* over the subject matter of the Late Claims. Proposed water rights 63-33734A and B are a compilation of the Late Claims. The fact that the proposed water rights use different numbers does not divest the Court of jurisdiction over the proposed water rights.

c. An Amended Claim/Director's Report is not required for the proposed water rights.

Mountain Home argues 63-33734A and B are not within the parameters of the original Late Claims and *Director's Reports*. It therefore asserts amended claims are required along with amended *Director's Reports* and new objection and response periods. Although no additional

quantity was added, Mountain Home asserts that the subordination clause included in 63-33734A puts the Settlement outside the original Late Claims. This argument lacks merit.

The parties sought approval of the Settlement through the filing of motions. This motion practice is consistent with *AOI* 4.d.(3) which establishes that when parties reach agreement, they may file a *Standard Form 5* or some other stipulation acceptable to the court. Alternatively, the parties could have submitted *Standard Forms 5* (“*SF5s*”) for each of the two proposed water rights. Whether the parties use an *SF5* or some other form of stipulation, the process is the same.

Where the Department concurs with a proposed settlement, the Court is not required to conduct a hearing on the settlement. *AOI* 4.d.(3)(c). Here, the Department is a signatory to the proposed Settlement; therefore a hearing is not required. Moreover, even where a hearing is required, the hearing process for approving the settlement does not reopen the subcase to new parties, subject to those instances where the settlement expands the water right beyond what was originally claimed.

The law of the case for amended claims is well established in the SRBA. In settlement proceedings, an amended claim and *Director’s Report* are required only where the settlement expands the right beyond the parameters of the original claim and the director’s recommendation.⁶ *Memorandum Decision and Order Granting in Part, and Denying in part, Motion to Stay Subcases* (Case 39576) (Feb. 13, 1998). In that *Memorandum Decision and Order*, the SRBA Court recognized notice issues where claims are amended to enlarge the burden on the stream system. Therefore, motions to amend claims “seeking quantity of water/additional places, periods, or purposes of use; or to assert a different [earlier] priority than originally claimed shall be noticed on the Docket Sheet allowing sufficient time for SRBA parties to seek subcase participation on the motion prior to hearing. Claim amendments for a change of ownership or reduction or elimination of a) diversion rate, b) volume, or c) purposes of use are not required to be noticed on the Docket Sheet.” *Id* at 9. The policies of this

⁶ The law of the case was codified in the procedural rules for the CSRBA. It provides:

If the settlement results in an expansion of the water right beyond what was originally claimed (i.e. increase in rate of diversion, acreage, more consumptive purpose of use etc.), or results in a change that would potentially affect a party not already a party to the Subcase, then an Amended Claim/Director’s Report is required to provide notice to third parties not already parties to the Subcase. The Amended Claim/Director’s Report shall appear on the Docket Sheet to provide notice and an opportunity to object to persons not already a party to the Subcase.

Amended CSRBA Administrative Order 1, §4.d.(4).(e).

Memorandum Decision were incorporated in the Department's policies for new claims and *Amended Director's Reports*. The policy is based on principles that third parties are on notice of the claims and the *Director's Reports* and should expect that a settlement will fall somewhere between the *Director's Report* recommendation and the claim. Settlements routinely represent a compromise between the right as claimed and the right as recommended. To the extent third parties have an interest in the outcome of the proceedings, they were afforded the opportunity to enter the subcase at its inception through the filing of an objection or a response. The settlement process would be severely undermined if third parties were permitted to enter a subcase as a matter of right every time a settlement is reached. This concept is particularly true where, as here, there was no expansion of the claims, and indeed the Settlement involved a reduction of sorts in that the Settlement involved subordination to a large group of water rights.

The Idaho Supreme Court acknowledged the problem in a situation similar to the present circumstances. In *N. Snake Groundwater Dist. v. Gisler*, 136 Idaho 747, 750, 40 P.3d 105, 108 (2002), the Court held that parties who tried to come into a subcase after it was settled were untimely. The Court instructed, "To allow a new party to enter a subcase after it has been settled through the SF5 process would unfairly burden the claimant, who would be forced to try a case in which he had just reached a settlement, obviously defeating the purpose of the SF5 process." *Id.*

In this case, the proposed water rights fall within the parameters of the *Director's Report* recommendation and the original claims. In reviewing 63-33734A and B, the Court finds no expansion of the Late Claims. The combined quantities for the proposed water rights (4,258,988 afy) are considerably less than the combined quantities for the original Late Claims filed by the USBOR (6,416,156 afy). The priority date for proposed water right 63-33734A is the same as that of the Late Claims. The priority date for proposed water right 63-33734B is junior to that of the Late Claims. The periods of use for the proposed rights, although shifted for some of the purposes, are not expansive of the Late Claims.

Mountain Home points to the subordination clause, which does not apply to water rights outside of Basin 63, as making the proposed water rights expansive of the Late Claims. Mountain Home further asserts the subordination clause may be improper because the State is a party to a Settlement that treats parties differently. Specifically the water users in Basin 63 which benefit from the subordination clause are treated differently than water users outside of Basin 63

where the subordination clause does not apply. Mountain Home argues that if the approval of the Settlement were before a Special Master, the City would be able to enter the subcase and raise questions of law on a motion to alter or amend. *See Memorandum Decision and Order on Challenge*, Subcase Nos. 36-00061, 36-00062 and 36-00063, 9/27/1999 (“*Morris*”) (acknowledging that “litigants who were not parties to a subcase should be able to argue about the propriety of matters of law.” *Morris* at 16, fn. 12). These arguments are without merit.

As an initial matter, the Late Claims filed by the USBOR did not include a subordination remark. The entire 6,416,156 afy claimed under the three USBOR Late Claims was unsubordinated to any water rights.

Next, parties to a subcase can agree to a variety of terms in a settlement agreement so long as the terms are within the scope of the *Director’s Report* recommendation and the original claim. *See Morris* at 15-16. This analysis is unchanged when applied to subordination remarks. There is nothing contrary to law or public policy about the Court decreeing a subordination remark if agreed to by all of the parties to the subcase. It is not unheard of for parties in Idaho water cases to include voluntary subordination provisions that depart from standard water law principles. *See Idaho Power Co. v. State*, 104 Idaho 575, 587, 661 P.2d 741, 753 (1983) (noting that a voluntary agreement, like the one at issue between Idaho Power and future upstream water users, “not to assert ownership rights to their fullest are common in today’s society”). In the Nez Perce Consent Decree proceedings, the parties agreed to subordinate certain of the tribal claims to certain existing junior state-law based claims to reach a settlement. *See Memorandum Decision and Order Dismissing Objections in Part with Prejudice and In Part without Prejudice* (Consolidated Subcases No. 92-00080 (Nez Perce Tribe Multiple-Use Claims), p.6 (Sept. 5, 2006).⁷

In the subcases at issue here, all parties to the adjudication were provided notice of the Late Claims had and ample opportunity to participate in the subcases. Because the Settlement claims (63-33734A and B) fall within the parameters of the *Director’s Report* recommendation and the Late Claims, and there is nothing improper about the parties agreeing to a subordination

⁷ That provision provided:

Notwithstanding the Priority Date of this water right, the Tribe and the United States shall exercise this right in a manner that ensures persons lawfully diverting water prior to April 20, 2004, will continue to receive their full entitlement under state law.

remark as a term of the Settlement, amended claims and *Director's Reports* are not required to put third parties on notice of the Settlement.

d. Mountain Home's and Boise's *Motions* are not timely under I.R.C.P. 24(a) or (b).

Both Mountain Home and Boise have interests relating to the Late Claims. Boise has water rights from the Boise River and argues that administration of the Late Claims could impact the administration of its rights and that the disposition of the Late Claims may impair Boise's ability to protect its interests. Mountain Home's interest relates to an unperfected conditional permit for groundwater recharge in Basin 61 held by Elmore County. The groundwater rights held by Mountain Home would benefit from Elmore County's recharge permit and Mountain Home's interest is not represented by any other party to the Late Claims. The Court agrees with these assertions.

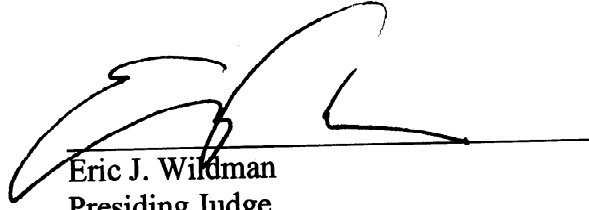
However, the Court finds both Boise and Mountain Home's *Motions to Participate* to be untimely. As previously illustrated, these subcases have been going on for over five years and have involved a significant amount of litigation as well as extensive settlement negotiations. The resolution of water disputes relies extensively on settlement negotiations and contested cases are routinely set on dual litigation and settlement tracks. Allowing third parties to enter a subcase and pick apart the terms after a settlement is reached undermines the entire settlement process. In fact, it largely makes the process more expensive than sitting on the sidelines, and makes participation throughout the litigation process pointless and potentially never ending. The Idaho Supreme Court discussed this problem in *Gisler*. Allowing a new party to enter a subcase after it has been settled unfairly burdens the claimant and parties who would be forced to try a case in which they had just reached a settlement, obviously defeating the purpose of the settlement process. *Id.* at 750, 40 P.3d at 108. Allowing a new party to enter the subcases at this point in these proceedings would be extremely prejudicial to the parties. Both Boise and Mountain Home had the opportunity to participate in the subcases, including through the objection and response periods, filing motions to participate early in the proceedings like Suez and Pioneer Irrigation District, and by filing a motion to alter or amend the *Special Master's Report and Recommendation* issued October 9, 2015. For whatever reason, the movants elected not to participate. For these reasons the *Motions to Participate* are denied.

III.
ORDER

Therefore, IT IS HEREBY ORDERED that Mountain Home's *Motion to Participate* is **denied**. IT IS FURTHER ORDERED that Boise's *Motion to Participate* is **denied**.

IT IS SO ORDERED.

Dated July 8, 2019.



Eric J. Wildman
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTIONS TO PARTICIPATE was mailed on July 08, 2019, with sufficient first-class postage to the following:

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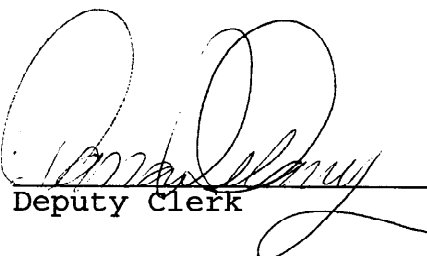
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