

Sorensen

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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

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	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION
Case No. 39576	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	
	)	FOR WATER RIGHTS 34-00496A,
	)	34-00692D, 34-02428, 34-07096,
	)	34-07096A, 34-07096B, 34-07097,
	)	34-07097A, 34-07097B, 34-07223, and
	)	34-12416

I. INTRODUCTION/PROCEDURAL BACKGROUND

A notice of claim was filed for each of the water rights listed above. The Director of the State of Idaho Department of Water Resources (IDWR) examined the water system for Reporting Area 1 (Basin 34) and investigated these water rights.

The *Director's Report for Reporting Area 34 (Director's Report)* recommended these water rights to the claimant Mitchell Sorensen. There were four objectors to these water rights. Kirby Jensen and Doyle Jensen (Jensens) filed Objections to the *Director's Report* for each water right. The Big Lost River Water Users Association (The Association) filed Objections to the *Director's Report* for water rights 34-00692D, 34-02428, 34-07223, and 34-12416. The claimant Mitchell Sorensen filed objections to water rights 34-02428, 34-07096, 34-07097, 34-07223, and 34-12416. Claimant and objectors each participated at trial and presented evidence.

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II. STANDARD OF REVIEW

A. DIRECTOR'S REPORT

The trial of these subcases focused on objections to changes in these water rights. The Association objected to changes in place of use, changes from supplemental right to primary right,¹ changes in allowing combined use of the rights, and changes allowing expansion in acreage.

B. PRIMA FACIE WEIGHT

The *Director's Report* has *prima facie* weight as set forth in I.C. § 42-1411(4)-(5). The term *prima facie* evidence is an alternative label for a rebuttable presumption. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409, 418 (1997); *State v. Hebner*, 108 Idaho 196, 97 P.2d 1210 (Ct. App. 1985). Thus, giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *Prima facie* proof does not shift the burden of persuasion on an issue. *Reddy v. Johnson*, 77 Idaho 412, 293 P.2d 945 (1956); D. Craig Lewis, IDAHO TRIAL HANDBOOK §§ 1.4-12.7 (1995). When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409, 418 (1997).

The *Director's Report* as *prima facie* evidence draws a conclusion as to a particular element of a water right. A presumption exists until the objector presents "substantial evidence" that the element is other than as recommended. If the objector presents such evidence, the presumption disappears. Nevertheless, the facts upon which the presumption is based are to be weighed with all other facts that may be relevant. *Id.* at 419.

C. AMNESTY STATUTES

1. Issues Raised by The Association

The Association objected to changes to various water right recommendations in the *Director's Report* asserting the changes were analyzed improperly under the Amnesty Statutes,

¹ It is common for farmers to have two rights on the same land. Often a well is drilled as a supplemental groundwater right which is available when the surface water right is not. The surface water right is usually the primary right, and the groundwater right is supplemental because it is secondary to an existing surface water right.

I.C. §§ 42-1425, 1426 & 1427. First, The Association urged the court to reject changes in place of use for rights which were transferred to an area known as Era Flat. The Association claimed that allowing rights to be used at this new place injured existing rights.

Second, The Association asked the court to reject changes in use allowing groundwater rights originally supplemental to surface water rights to be used as primary rights. The Association argued that the *Director's Report* improperly analyzed this change from supplemental to primary pursuant to I.C. § 42-1425 which does not allow expansions of rights.

Third, The Association urged the court to reject changes allowing multiple water rights owned by a single water user to be used together on a combined place of use. The Association argued that these changes injured existing water rights.

Finally, The Association asked the court to reject expansions in acreage which were recommended in the *Director's Report*. IDWR analyzed these expansions pursuant to I.C. § 42-1426 which allows for expansions. The Association, however, argues these expansions should not be endorsed because they improperly injure existing water rights.

2. Standards Under the Amnesty Statutes

The amnesty statutes, I.C. §§ 42-1425, 42-1426, and 42-1427, have been thoroughly analyzed by the Idaho Supreme Court in *In re SRBA Case No. 39576, Fremont-Madison Irrigation District v. Idaho Groundwater Appropriators*, 129 Idaho 454, 457, 926 P.2d 1301, 1304 (1996). The amnesty statutes were tailored to protect status quo water uses by water users who had failed to follow the statutory procedure for development or change to water uses. *Id.*

a. Accomplished Transfers Under I.C. § 42-1425

I.C. § 42-1425 is entitled "accomplished transfers" and addresses changes in place of use, purpose of use, points of diversion, nature of use or period of use of existing water rights. Section 1425 provides for transfers of existing water rights for any change made prior to the date of commencement of the SRBA, regardless of compliance with I.C. §§ 42-108 and 42-222. *Id.* at 129 Idaho 458.

Two limitations exist for an accomplished transfer under this section: (1) there must be no injury to other water rights existing on the date of the change; and (2) the transfer cannot constitute an "enlargement" of the original right. *Id.* The Idaho Supreme Court

defined the term enlargement in this context to include such events as "an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion." *Id.* Enlargements are not allowed under I.C. § 42-1425. However, a water user may seek an enlargement under I.C. § 42-1426 subject to the limitations included in that section.²

The party aggrieved by the director's recommendation, whether that was the party claiming the accomplished transfer or the party claiming injury, has the burden of proof under I.C. § 42-1425.

b. Enlargements Under I.C. § 42-1426

A water user may seek an enlargement in the SRBA under I.C. § 42-1426. Unlike proceedings under I.C. § 42-1425, this section allows the enlargement of existing water rights under certain conditions. I.C. § 42-1426(2) allows an enlargement only if it does not injure water rights existing on the date of enlargement of use. *Id.* at 460. Section 42-1426 provides that if injury to a water right later in time cannot be mitigated, "then a new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement." *Id.*

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. *Id.* The Idaho Supreme Court reserved the issue of what conditions directly related to the injury could be imposed to adequately mitigate injury to junior water rights existing on the date of enactment of the statute. *Id.* at 461. However, the Court recognized that some injury from an enlargement is identified if the enlargement takes priority over a validly established water right held by a junior appropriator. *Id.* The same reasoning applies in the event injury is alleged to a senior appropriator. Injury from an enlargement occurs if the enlargement takes priority over a senior water right.

The Supreme Court determined that if there are no mitigation provisions that assure there will be no injury to the junior appropriator, the new right for the enlarged use must be

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I.C. § 42-1425(2) provides for remand to the Director "for future hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right." All parties, including The Association, waived the remand provision of the section.

advanced to a date one day later than the priority date for the junior water right injured by the enlargement. *Id* at 461. The reasoning applies equally when analyzing injury to a **senior appropriator**. If no mitigation provisions assure there will be no injury to the senior appropriator, the new right for the enlarged use must be junior in priority to the senior right.

Under Idaho Code § 42-1426, a person who has filed a claim in the SRBA does not have to petition IDWR to oppose an enlargement. The Director will determine whether the enlargement should be allowed. The determination may disallow the enlargement or allow the enlargement subject to conditions that will mitigate any injury. If mitigation is not possible, the enlarged right may be advanced to a date one day later than the junior water right that would otherwise be injured. *Id.*, 129 Idaho at 462. "Either party who asserts injury, whether that be the applicant for an enlargement or the person who claims injury by the enlargement, has the burden of establishing the claim in the general adjudication." *Id.*

D. MANDATORY PERMIT AND LICENSE STATUTES

Water rights developed after 1971 must comply with the application, permitting, and licensing requirements of I.C. §§ 42-202 and 42-204. Under those statutes, development of a permit is limited to a period of five years, and that time period may be extended by IDWR on a showing of good cause and a request for extension of time filed prior to the date that proof of beneficial use is due. I.C. § 42-204. Water rights developed under these statutes must comply with the mandatory permitting and licensing statutes and must, therefore, be limited to the quantity and points of diversion which were developed during the development period.

III. FINDINGS OF FACT

These water rights owned by Mitchell Sorensen are used for irrigation in the Big Lost River Basin. (Exhibit 1c, the *Director's Report*; Exhibit A, an illustrative map showing the place of use.) The recommendations for these water rights as set forth in the *Director's Report* represents the best efforts of IDWR to determine each element. (Testimony of Carter Fritschle.)

Some rights were transferred to new places of use. Some rights changed from supplemental to primary. Some rights were allowed to be used in combination with other rights on a combined place of use retaining the original acreage limitation. And some rights have been

used on expanded acreage. The Association urged the court to disallow these changes alleging existing water rights were injured by the changes.

A. INTERCONNECTION BETWEEN GROUNDWATER AND SURFACE WATER IN THE BIG LOST RIVER BASIN.

There is a connection between surface water and groundwater sources in the Big Lost River Basin. (Testimony of Carter Fritschle.) IDWR has studied the interconnection between surface water and groundwater in the vicinity of the places of use for these water rights and has determined that there is a hydrological line above which the relationship between groundwater and surface water is different than below the line. This line is referred to as the "A-Line." Wells drilled north of the A-Line interfere with vicinity surface water rights, and wells drilled south of the A-Line do not interfere with the surface water rights in the area. The actual location of the A-Line varies with climatic and other conditions. (Testimony of Carter Fritschle.)

The Association objected to several of these water rights which have points of diversion north of the A-Line. The Association did not object, however, to rights owned by Dexter Douglas, Crater Farms, Leon Folkman, Doug Schureman, Jay Jensen, or Steven Aikele which are diverted north of the A-Line. (Testimony of Kurt Acor; Testimony of Lawrence Babcock.)

B. DEVELOPMENT AND IMPACT OF IRRIGATION WELLS

Prior to 1960, few irrigation wells had been drilled in the Big Lost River Valley. During the 1970s and 1980s wide-scale development of irrigation wells occurred in the Big Lost River Valley. Most of the new wells were drilled to supplement surface water irrigation rights. (Testimony of Lawrence Babcock.) The increased number of wells had a cumulative effect of lowering the water table. (Testimony of Juel Aikele; Testimony of Lawrence Babcock; Exhibit 2.)

The Association's expert witness testified that when the groundwater table declines and loses contact with the surface plate and matrix soils, these soils dry out and crack. Consequently, water applied to the surface goes through the soil faster than if the groundwater is in contact with the base. As a result, the amount of water usually sufficient to irrigate cannot go as far down the field as when the water table is higher. When the water table is in contact with the surface soil, a stream of water which would normally be sufficient to irrigate a field does not reach the end of the field. (Testimony of Larry Reynolds.)

C. THE DROUGHT OF THE LATE 1980S TO EARLY 1990S

During the late 1980s to early 1990s, the Big Lost River Valley experienced a significant, lengthy drought which caused surface water sources to dry up. (Testimony of Gerald Stewart; Testimony of Larman Anderson; Testimony of Charles Huggins; Testimony of James Braswell; Testimony of Lewis Rothwell; Testimony of Lawrence Babcock.) Several senior water users received less than their full amount of water. At the same time, groundwater rights with junior priorities continued to be used for irrigation pumping. (Testimony of Gerald Stewart; Testimony of Charles Huggins; Testimony of Lawrence Babcock; Testimony of Ray Boyack.) Consequently, several senior water users lost crops (Testimony of Larman Anderson; Testimony of Lawrence Babcock), lucrative agricultural contracts (Testimony of Gerald Stewart), or trees and willows which protected livestock. (Testimony of Lewis Rothwell; Testimony of Larman Anderson; Exhibits 5, 47, 48, 49, 50, and 51.)

Earlier droughts in the 1930s and 1960s in the Big Lost River Valley also caused surface water sources to dry up. (Testimony of Herman Aikele; Testimony of Lewis Rothwell; Testimony of Lawrence Babcock.) Surface water sources were not as dry during these previous droughts as they were in the drought of the 1980s to 1990s. (Testimony of Lewis Rothwell.)

The water table in the Big Lost River Valley dropped during these drought years. (Testimony of Larry Reynolds.) Many domestic wells had to be deepened during the drought of the 1980s and 1990s. (Testimony of Larman Anderson; Testimony of Ray Boyack; Testimony of Glen Guthrie; Testimony of Larry Reynolds.) Between 1989 and 1994, the water table was lower in the Big Lost River Valley, and as a result, about 400 new wells had to be drilled below the Moore Diversion. (Testimony of Glen Guthrie; Exhibit 3.)

D. CHANGES TO WATER RIGHTS

The Association objected to multiple changes to the water rights including changes in place of use, changes from supplemental to primary, changes allowing combined usage, and increases in acreage.

1. Transfer of Place of Use to Era Flat

In the late 1970s to early 1980s, some water rights diverted from irrigation wells located north of the A-Line were transferred to lands in an area known as Era Flat. The transfer of multiple rights to Era Flat sometimes caused insufficient water pressure through the remaining

system. The insufficient water pressure in turn resulted in problems getting the remaining water rights to the headgates. (Testimony of Lawrence Babcock.)

2. Changes From Supplemental to Primary

As irrigation wells were developed in the Big Lost River Valley, many farmers drilled wells to use on the same land on which they had surface rights. The wells provided a reliable supply of water to supplement those surface rights which were only available intermittently. These irrigation wells were supplemental to the earlier surface water rights on the same land. (Testimony of Carter Fritschle.)

Some water users transferred primary rights to a new place of use and changed the use of the supplemental rights to primary rights. The change from supplemental to primary use is an enlargement. IDWR recognized this change as an enlargement and adopted a policy of mitigation to prevent injury to existing rights. (Testimony of Carter Fritschle; Exhibit 7.) IDWR advanced the priority date of the supplemental rights to the date of the change to prevent injury. (Testimony of Carter Fritschle.)

3. Changes Allowing Combined Use

The *Director's Report* recommended that several water rights be allowed for use on a combined place of use. These recommendations allowed such combined use where all rights were owned by a single water user and retained the original acreage limitation. (Testimony of Carter Fritschle.)

4. Expansions in Acreage

Several subcases involved recommendations in the *Director's Report* allowing an increase or expansion in acreage. These recommendations allowed the expansion in acreage, but involved no increase in volume or diversion rate. IDWR correctly analyzed these expansions pursuant to I.C. § 42-1426 and considered the issue of injury to other water rights. (Testimony of Carter Fritschle.)

E. WATER EXCHANGE BETWEEN JENSENS AND SORENSEN

The dispute between Mr. Sorensen and the Jensens evolves out of the interrelationship between Sorensen's groundwater rights (34-07096, 34-07097, and 34-07223) and those of Kirby and Doyle Jensen. Mr. Sorensen's predecessor in interest, Boyd Burnett, and the Jensens entered into an exchange agreement to allow the Jensens to use the three groundwater rights now owned

by Mr. Sorensen and to allow Mr. Sorensen to use the surface water rights owned by Kirby Jensen and Doyle Jensen. (Exhibits 26 and 27.) Under the exchange, Jensens are authorized to use Mr. Sorensen's groundwater rights 34-07096 and 34-07097 in exchange for Mr. Sorensen's use of Jensen's surface water right 34-10037.

Mr. Sorensen's predecessor, Boyd Burnett, applied for permits for water rights 34-07096 and 34-07097. The authorized development period for these two rights was 1975 to 1980. Mr. Burnett was the owner of these permits at the time that proof of beneficial use was due and submitted to IDWR. (Testimony of Boyd Burnett; Exhibits 8 and 9.) During this time period, Mr. Burnett developed water only from the well located on Kirby Jensen's property in section 17. Mr. Burnett did not develop water from the section 5 well located on Sorensen's property. (Testimony of Boyd Burnett.) Field exams for these two rights conducted in 1983 and 1987 found development of the well in section 17, but not from the well in section 5. (Exhibits 18 and 19; Testimony of Keith Wilson; Testimony of Eric Verner.) Mr. Sorensen did not claim the well in section 5 as a point of diversion for 34-07096 and 34-07097. (Exhibits 16 and 17.) The well located in section 5 was claimed by Mr. Sorensen as a point of diversion for 34-12372 and 34-10155. (Exhibits 16 and 17.) However, IDWR recommended 34-12372 and 34-10155 for disallowance. (Exhibits 22, 24, and 25.)

The well in section 17 has a capacity of 3.42 cfs. Mr. Sorensen has used an additional 2.7 cfs from the well in section 5 since about 1982. IDWR recommended a total quantity of 6.12 cfs (3.42 cfs + 2.7 cfs) and included the well in section 17 and the well in section 5 as points of diversion for water rights 34-07096 and 34-07097. (Testimony of Carter Fritschle; Testimony of Keith Wilson; Testimony of Eric Verner; Exhibits 7, 8, 18, 26, and 27.)

The additional capacity of Mr. Sorensen's well in section 5 is not covered by water right 34-02428. (Exhibits 12, 13 and 30.) However, a pending application for permit filed in 1980 under the number 34-07247 could recognize the additional capacity from the section 5 well. (Exhibit 35.) The application for permit has not yet been granted or denied for that right, but is still under consideration by the IDWR.

IV. CONCLUSIONS OF LAW

A. INJURY

The Association argues that the changes recommended for these water rights in the *Director's Report* constitute injury to existing water rights. The facts upon which The Association relies are: (1) surface water and groundwater rights in Basin 34 are interconnected; (2) there was significant development of groundwater during the 1970s and 1980s which lowered the water table; (3) a significant number of water rights were transferred to Era Flat, leaving less water in the remaining system to deliver; (4) a number of water rights were used in combination on a combined place of use; (5) a significant number of water rights changed from supplemental to primary, resulting in enlargements of those rights; (6) a number of water rights were expanded to additional acreage; (7) senior water users did not receive their water rights during the drought of the 1980s and early 1990s; and (8) during the drought, senior water users suffered crop loss, the loss of agricultural contracts, and loss of trees and willows which provided protection for livestock.

Where groundwater and surface water are significantly interconnected, the two resources should be treated as one supply and managed as a single integrated system. Douglas L. Grant, *THE COMPLEXITIES OF MANAGING HYDROLOGICALLY CONNECTED SURFACE WATER AND GROUNDWATER UNDER THE APPROPRIATION DOCTRINE*, 22 Land and Water Law Review 63 (1987). The significant interconnection between groundwater and surface water has been recognized in the SRBA and is law of the case. *In re SRBA, Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). Groundwater and surface water in the Big Lost River Valley are interconnected.

Under the appropriation doctrine, priority in time gives priority in right. Priority affects the exercise of existing rights and is an important protection for senior water users. "The exercise of existing rights is curtailed in inverse order of priority if drought or seasonal fluctuation makes the supply insufficient for all, that is, junior appropriators are shut off completely to supply fully those with more senior priorities." Douglas L. Grant, *THE COMPLEXITIES OF MANAGING HYDROLOGICALLY CONNECTED SURFACE WATER AND GROUNDWATER UNDER THE APPROPRIATION DOCTRINE*, 22 Land and Water Law Review 63, 65 (1987); *Beecher v. Cassia Creek Irrigation Co.*, 66 Idaho 1, 9, 154 P.2d 507, 510 (1944).

The operation of the prior appropriation doctrine in a conjunctive management system is critical to the subcases before the court. Senior rights are protected during shortages, such as the drought in the Big Lost River Valley, because junior rights are shut off to supply senior rights. Compliance with the prior appropriation doctrine protects seniors from injury by junior users, because their first-in-time priority is first in right during a drought.

This court holds that use of water by a junior appropriator does not become adverse to or injure a senior appropriator *until* it results in a deprivation of his allotted amount. *See, State Ex Rel. Cary v. Cochran*, 138 Neb.163, 292 N.W. 239 (1940).

The proper application of the prior appropriation doctrine should protect the senior water rights in the Big Lost River Valley. Consequently, the injury alleged by The Association is not the kind of injury which should defeat the changes in use which occurred, since senior users could enforce the prior appropriation doctrine.

During the Big Lost River Valley drought of the 1980s and 1990s, however, senior water users failed to receive their rights. Apparently water rights in the Big Lost River Valley were not managed conjunctively or were not managed according to the prior appropriation doctrine. The problems in water delivery of which The Association complains occurred prior to the Idaho Supreme Court decision in *In re SRBA, Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). The *Musser* decision clarified the requirement to administer and deliver water in accordance with the Constitution of the State of Idaho and the doctrine of prior appropriation. *Id.*

The court finds the injury of which The Association complains did not result from allowing changes to these water rights. Instead, the harm occurred as a result of noncompliance with the prior appropriation doctrine. Under the doctrine of prior appropriation, these senior rights are superior in times of shortage to the rights to which The Association objected. The court presumes that the junior rights could be shut off in times of drought. Therefore, it follows that no injury has occurred.

B. RIGHTS TRANSFERRED TO ERA FLAT

The Association objected to many rights for which the accomplished transfer was changing the place of use from the original decreed land to land in Era Flat. I.C. § 42-1425 permits such accomplished transfers as long as no other "water rights existing on the date of the change were injured" or such transfers resulted in an "enlargement of the original right." I.C. § 42-1425(2).

For those water rights which involved a change in place of use, The Association must show that the change resulted in injury to water rights existing at the time of the change. There is insufficient evidence to show these changes in place of use to Era Flat resulted in injury of existing rights.

C. SUPPLEMENTAL RIGHTS WHICH CHANGED TO PRIMARY RIGHTS

As irrigation wells were drilled in the Big Lost River Valley, it became common for farmers to have a groundwater right which supplemented their surface water rights. The surface water right was the primary right, and the groundwater right was supplemental because it was secondary to an existing surface water right.

Later, some water users transferred the primary water right to a new place of use and changed the supplemental right to a primary right. IDWR recognized this change as an expansion. However, IDWR referred to I.C. § 42-1425 in its recommendation for these changes from supplemental to primary.

IDWR recommended changing several rights from supplemental to primary. IDWR has determined that a change from supplemental to primary is an enlargement.

When primary rights are taken off the land leaving the supplemental rights as the only source of water for that land, an enlargement in the number of acres occurs and that may cause injury to other appropriators if the priority date is not advanced to the date the primary rights are transferred off the land.

(Testimony of Carter Fritschle, Exhibit 7.)

The *Director's Reports* recommended changes from supplemental to primary and referred to I.C. § 42-1425 which does not allow for enlargements. However, IDWR conducted the necessary analysis under I.C. § 42-1426 which does provide for enlargements. Although the *Director's Report* erroneously refers to I.C. § 42-1425, it appears that IDWR actually conducted its analysis under I.C. § 42-1426. IDWR understood the change involved an expansion and advanced the priority date of all such rights to the date of change from supplemental to primary. IDWR's analysis is strikingly similar to the analysis advanced for expansions in *In re SRBA Case No. 39576, Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996). The Supreme Court analyzed advancing priority dates in enlargements under I.C. § 42-1426.

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.

Id. (emphasis added). The Court explained the need to mitigate potential injury by advancing the priority date of such enlargements.

The issue of mitigation cannot be decided in a vacuum. but it 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.

Id. (emphasis added).

The analysis conducted by IDWR recognizing that an expansion occurred, together with the advancement of priority recommended, convinces the court that IDWR conducted a proper analysis of these rights under I.C. § 42-1426. The Association has the burden of proving that existing rights were injured by the change from supplemental to primary in light of the advancement of priority. The court finds there was insufficient evidence to show that the change from supplemental to primary caused injury to senior rights since the priority was advanced.

D. CHANGE ALLOWING COMBINED USE

The Association objected to many rights for which the accomplished change in use allows a claimant to use multiple water rights on his entire place of use, while retaining the original acreage limitation. For example, if Farmer Jones owns water right A limited to 60 acres and water right B limited to 50 acres, IDWR recommended an accomplished change so right A is limited to 60 acres within the total of 110 acres (60 + 50), and right B is limited to 50 acres within the total of 110 acres (60 + 50).

IDWR adopted a policy allowing this simple combination of rights unless "other water rights existing on the date of the change were injured" or such a change resulted in "an enlargement of the original right." I.C. § 42-1425(2).

I.C. § 42-1425 permits changes such as the combined use as long as the changes do not constitute an enlargement of the water right or otherwise injure water rights existing on the date of the change. IDWR recommended allowing these rights to be used in combination with other

rights on a combined place of use, but retained the original acreage limitation. Because the acreage limitation did not change, there was no expansion in allowing the combined use. The Association has the burden of showing that the change resulted in injury to water rights existing at the time of the change. The court finds further that there was no showing of injury as a result of the combined use.

E. EXPANSION TO ADDITIONAL ACREAGE

IDWR recommended several rights with expanded acreage pursuant to I.C. § 42-1426. Expansions are allowed under this section subject to two limitations. The rate of diversion may not exceed the rate of diversion originally authorized and the enlargement may not injure existing water rights. None of the recommendations for expanded acreage involved an increase in the diversion rate. The Association has the burden of showing the expansion to additional acreage injured senior water rights. The court finds there was insufficient evidence to show that the increase in acreage resulted in injury to senior water rights which are fully protected by the prior appropriation doctrine.

F. EXTRA CAPACITY OF WATER AND SECTION 5 WELL

The issue before the court is whether the additional 2.7 cfs Mr. Sorensen developed from the well in section 5 can be recognized under water rights 34-07096 and 34-07097. The court finds that the additional capacity is not authorized under those rights.

Water rights developed after 1971 must comply with the application, permitting, and licensing requirements of I.C. §§ 42-202 and 42-204. Development of a permit is limited to a period of five years, and that time period may be extended by IDWR only upon a showing of good cause and a request for extension of time filed prior to the date proof of beneficial use is due. I.C. § 42-204.

The two permits for 34-07096 and 34-07097 were approved in 1975 and proof of beneficial use was due in 1980. During the development period between 1975 and 1980, Mr. Burnett did not develop the additional capacity from the well in section 5. No extension of time was requested or granted by IDWR.

Mr. Sorensen did not begin using the additional capacity until 1982. The authorized period of development under water rights 34-07096 and 34-07097 expired in 1980, two years before the first use of the extra water. Since the additional capacity of the well in section 5 was

not developed under the permits for these rights, the development of this water is not authorized under water rights 34-07096 and 34-07097.

G. WATER RIGHTS OF MITCHELL SORENSEN

1. 34-00496A. The *Director's Report* recommended changes to this water right pursuant to I.C. §§ 42-1425 & 42-1426. IDWR allowed this right to be used on a combined acreage, but retained the original acreage limitation. IDWR rejected expansion of this right to additional acreage. IDWR also allowed the place of use for this right to be transferred to an area known as Era Flat. (Testimony of Carter Fritschle.)

In 1980, Sorensen filed an application to transfer this right to the land in Era Flat. Nine years later, IDWR issued a cease and desist order ordering Mr. Sorensen to stop irrigation of land outside the licensed place of use for those rights. IDWR issued a proposed Memorandum Decision and Order denying the application to transfer these water rights to a new place of use. The proposed decision concluded that the change would result in enlargement of the rights which would injure junior water users due to an increase in irrigated acres. At the time IDWR issued a *Director's Report* for this right, it concluded the transfer was permissible and recommended the change pursuant to new enacted statutes I.C. §§ 42-1425 & 1426. (Testimony of Carter Fritschle; Testimony of Mitchell Sorensen; Exhibit 7.)

I.C. § 42-1425 allows for transfers, and I.C. § 42-1426 permits expansions. IDWR analyzed this right under those statutes and allowed both the changes in place of use and the combined use. *Prima facie* weight attaches to the *Director's Report*. The court finds insufficient evidence to rebut the *Director's Report*, and this right is recommended as set forth in the *Director's Report*.

2. 34-00692D. The *Director's Report* recommended changes to this water right pursuant to I.C. §§ 42-1425 & 42-1426. IDWR allowed this right to be used on a combined acreage, but retained the original acreage limitation. IDWR rejected expansion of this right to additional acreage. IDWR also allowed the place of use for this right to be transferred to an area known as Era Flat.

In 1980, Mr. Sorensen filed an application to transfer this right to land in Era Flat. Nine years later, IDWR issued a cease and desist order ordering Mr. Sorensen to stop irrigation of land outside the licensed place of use for those rights. IDWR issued a proposed Memorandum

Decision and Order denying the application to transfer these water rights to a new place of use. The proposed decision concluded that the change would result in enlargement of the rights which would injure junior water users due to an increase in irrigated acres. At the time IDWR issued a *Director's Report* for this right, it concluded the transfer was permissible and recommended the change pursuant to new enacted statutes I.C. §§ 42-1425 & 1426. (Testimony of Carter Fritschle; Testimony of Mitchell Sorensen, Exhibit 7; Exhibit 29, proposed Memorandum and Order denying transfer.)

I.C. § 42-1425 allows for transfers, and I.C. § 42-1426 permits expansions. IDWR analyzed this right under those statutes and allowed both the change in place of use and the combined use. *Prima Facie* weight attaches to the *Director's Report*. The court finds there is insufficient evidence to rebut the *Director's Report*, and this right is recommended as set forth in the *Director's Report*.

3. 34-07096, 34-07097, and 34-07223. The *Director's Report* recommended additional quantity and an additional point of diversion for these rights. The extra capacity of 2.7 cfs was developed beginning in 1982. The additional quantity is from a well in section 5. The additional point of diversion is also located in section 5.

These water rights involve the exchange agreements between Mitchell Sorensen and Kirby and Doyle Jensen. (Exhibit 26; Exhibit 27.) The Jensens' decreed water rights are used on Sorensen's land in Era Flat. Mr. Sorensen's three groundwater rights 34-07096, 34-07097, and 34-07223 are used by Jensens on the Jensens' land. The exchange agreements cover only the well in section 17. The well in section 5 is not covered.

IDWR recommended a combined quantity of 6.12 cfs under rights 34-07096 and 34-07097. The combined quantity includes 2.7 cfs of additional water which Mr. Sorensen developed for the well in section 5, and 3.42 cfs which is the capacity of the section 17 well. IDWR split these rights into an A portion for the water from the section 17 well and a B portion for the water from the section 5 well.

The additional quantity from the well in section 5 cannot be recommended under these rights. The previous owner of 34-07096 and 34-07097 was Boyd Burnett. Mr. Burnett owned these water rights during the permitting process and at the time that proof of beneficial use was required to be submitted to IDWR. Mr. Burnett developed water only from the well located

in section 17 and not from section 5. There were no extensions of time for the period of showing beneficial use. (Testimony of Mr. Burnett; Exhibits 18 & 19.)

Development of a permit is limited to a period of five years, and this time period may be extended by IDWR only upon a showing of good cause and a request for extension of time filed prior to the date that proof of beneficial use is due. I.C. § 42-204. These permits were approved in 1975, and proof of beneficial use was due in 1980. Mr. Sorensen did not develop the additional water from the section 5 well until 1982, after the development period was over. (Testimony of Mitchell Sorensen.)

The *Director's Report* is afforded *prima facie* weight. However, the Jensens have met the burden of going forward with sufficient evidence to burst the evidentiary bubble pursuant to I.C. § 42-1411(5). The court holds that since the additional capacity of the well in section 5 was not developed under the permits for these rights, 34-07096B and 34-07097B should be decreed as disallowed. The court holds that 34-07096A, 34-07097A, and 34-07223 should be decreed as set forth in *Director's Report*, except that the combined quantity, volume, and diversion rates are changed to reflect the disallowance of 34-07096B and 34-07097B.

4. 34-02428. The *Director's Report* recommended changes to this water right. (Exhibit 14.) IDWR allowed a change in the place of use of a portion of this right to be transferred to Era Flat. IDWR allowed the remaining portion of this right to be changed from supplemental to primary. IDWR rejected expansion of acreage for this right. IDWR advanced the priority date to the date of change from supplemental to primary. (Testimony of Carter Fritschle; Exhibit 14; Exhibit 1c.)

Exhibit 1c indicates IDWR analyzed the change from supplemental to primary under I.C. § 42-1425. However, the testimony of Carter Fritschle and the recommendation in the *Director's Report* convinces the court that IDWR also analyzed this right under I.C. § 42-1426. IDWR recognized that the change from supplemental to primary was an expansion and moved the priority date to a date junior to the senior rights of members of The Association. The court holds IDWR conducted an I.C. § 42-1426 analysis by allowing the enlargement subject to conditions (advancing priority) that would mitigate injury. Under I.C. § 42-1426, The Association has the burden of showing that the advancement in priority did not mitigate any injury. The court finds there is insufficient evidence to show that the advancement in priority did not mitigate any injury.

Mr. Sorensen asks the court to change the priority date allowing two priorities for this right. He urges the priority should be April 1, 1979, when the right is used as a primary right; but when the original surface water rights are unavailable, this right should have the date of the original license.

The court is not persuaded that the priority date should be bifurcated as urged by Mr. Sorensen. When a water right is substantially changed, as this one has been, it seems appropriate to advance the priority date for the entire right. Since this right is no longer supplemental to surface water rights, Mr. Sorensen may not rely on the original licensed priority date when the water rights to which this right was originally supplemental are unavailable.

Prima facie weight attaches to the *Director's Report*. The court finds insufficient evidence to rebut the *Director's Report*, and this right is recommended as set forth in the *Director's Report*, except that the combined quantity, volume, and diversion rates changed in accordance with the changes to water rights 34-07096 and 34-07097.

5. 34-12416. The *Director's Report* recommended this right as an expansion pursuant to I.C. § 42-1426. Sorensen's objection to this right was withdrawn. IDWR allowed this right to be used on 365 acres not previously permitted or licensed. (Exhibit 1c.) IDWR rejected the use of additional quantity of water, but allowed irrigation of additional acres. (Testimony of Carter Fritschle; Testimony of Mitchell Sorensen; Exhibit 7.)

Prima facie weight attaches to the *Director's Report*. The court finds insufficient evidence to rebut the *Director's Report*, and this right is recommended as set forth in the *Director's Report*, except that the combined quantity, volume, and diversion rates change in accordance with the changes to water rights 34-07096 and 34-07097.

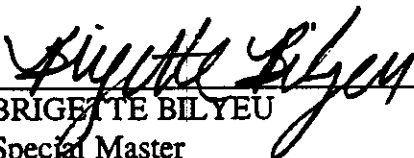
6. PENDING APPLICATION

This decision is not intended to resolve the validity of claim no. 34-07247. It is recommended that a *Director's Report* for 34-07247 should be filed by August 1, 1999 and an objection and response deadline set forth in order to resolve this claim.

Therefore, based on the files and record herein, IT IS RECOMMENDED that water rights 34-00496, 34-00692D, 34-02428, 34-07096A, 34-07097A, 34-07223, and 34-12416 be decreed as set forth in the attached *Partial Decrees Pursuant to I.R.C.P. 54(b)*. IT IS FURTHER

RECOMMENDED that water rights 34-07096, 34-07096B, 34-07097, 34-07097B not be confirmed in any partial or final decrees.

DATED: February 25, 1999.



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

IN DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA
Case No. 39576

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 34-07096A

1999 FEB 25 PM 4:29
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

NAME AND ADDRESS: MITCHELL D. SORENSEN
RT 1 BOX 63-A
MOORE, ID 83255

SOURCE: GROUNDWATER

QUANTITY: 1.84 CFS

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO A
TOTAL COMBINED DIVERSION RATE OF 8.85 CFS AND TO A TOTAL
COMBINED ANNUAL DIVERSION VOLUME OF 3229.9 AF.
COMBINED RIGHT NOS.: 34-02428, 34-07097A, 34-07223 AND 34-12416.

PRIORITY DATE: 01/31/1975

POINT OF DIVERSION: T04N R26E S17 NWSNW Within Butte County

WATER DIVERTED UNDER THIS RIGHT IS EXCHANGED WITH WATER
DIVERTED FROM THE BIG LOST RIVER UNDER RIGHT 34-10037. WATER
DIVERTED UNDER THIS RIGHT IS USED FOR THE PURPOSE AND AT THE
PLACES OF USE DESCRIBED IN RIGHT 34-10037, AND WATER DIVERTED
FROM THE BIG LOST RIVER IS USED FOR THE PURPOSES AND AT
THE PLACES OF USE DESCRIBED IN THIS RIGHT.

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-15 TO 10-15	1.84 CFS

PLACE OF USE:	Irrigation	Within Butte County
	T03N R25E S02 LOT 03 (NENW)39.0	LOT 04 (NWNW)39.0
		SENE 40.0
	S03 LOT 01 (NENE)39.0	LOT 02 (NWNW)39.0
	T04N R25E S34	SENE 40.0
		NESE 40.0
		SWSE 40.0
		NENE 39.0
		SWNE 40.0
	S35	NWNW 38.0
		SENE 40.0
		NWSW 40.0
		SESE 40.0
		SESE 39.0
	828.0 Acres Total	

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO THE
IRRIGATION OF A COMBINED TOTAL OF 945 ACRES WITHIN THE PLACE OF
USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00496A, 34-006920, 34-02428, 34-07097A,
34-07223 AND 34-12416.

THIS RIGHT IS LIMITED TO THE IRRIGATION OF 92 ACRES WITHIN
THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS RIGHT IS CONDITIONED UPON COMPLETION OF THE APPROPRIATION
IN ACCORDANCE WITH THE STATUTORY PROCEDURE FOR APPROPRIATION
OF WATER RIGHTS. THIS RIGHT REMAINS SUBJECT TO ALL CONDITIONS
SET FORTH IN THE PERMIT UPON WHICH THIS RIGHT IS BASED, AND WILL
BE SUBJECT TO ALL CONDITIONS SET FORTH IN THE LICENSE ISSUED BY
IDWR UPON COMPLETION OF THE STATUTORY APPROPRIATION PROCESS.

1999 FEB 25 PM 4: 29
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	Water Rights: 34-00496A, 34-00692D,
	)	34-02428, 34-07096, 34-07096A,
Case No. 39576	)	34-07096B, 34-07097, 34-07097A,
	)	34-07097B, 34-07223, and 34-12416
_____	)	CERTIFICATE OF MAILING

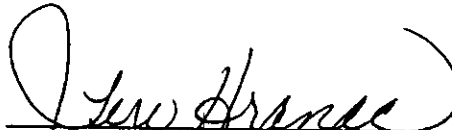
I certify that a true and correct copy of the *Special Master's Report, Special Master's Recommendation for Partial Decree and Notice of Issuance of Special Master's Report and Recommendation* were mailed on February 25, 1999, with sufficient first-class postage prepaid to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Kent Foster
PO Box 50130
Idaho Falls, ID 83406
Rep: Mitchell Sorensen

William Hollifield
PO Box 66
Twin Falls, ID 83303-0066
Rep: Big Lost River Water Users Asso.

Norman Semanko
PO Box 1906
Twin Falls, ID 83303-1906
Rep: Kirby & Doyle Jensen



Teri Hranac
Deputy Clerk