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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

) Subcases: 36-07071

Case No. 39576

) ORDER DENYING MOTION TO
) ALTER OR AMEND
)

I. PROCEDURAL BACKGROUND

A *Special Master's Report and Recommendation* was issued for this water right May 19, 1998. A *Motion to Alter or Amend* was filed by North Snake Ground Water District (NSGWD) on June 26, 1998. NSGWD simultaneously filed *Affidavit of David B. Shaw* and *Affidavit of Brett Rowley*. NSGWD's *Motion to Alter or Amend* requests the court amend its Findings and Conclusions to: 1) include a facility volume limitation; or 2) decrease the quantity element based on beneficial use or partial forfeiture.

The claimant John Jones, Jr., filed a *Motion to Dismiss North Snake Ground Water District's Motion to Alter or Amend* and a *Motion to Vacate Evidentiary Hearing*. A hearing on the *Motion to Dismiss* and the *Motion to Vacate Evidentiary Hearing* was held July 16, 1998.

A. STANDING

Jones filed a *Motion to Dismiss North Snake Ground Water District's Motion to Alter or Amend* asserting that NSGWD lacked standing. The *Motion to Dismiss* was denied, and the court deemed the *Motion to Alter or Amend* to have been filed by May Farms, Ltd., Faulkner Land & Livestock, and Sand Springs Ranch (Movants).

B. MOTION TO VACATE EVIDENTIARY HEARING

Jones filed a *Motion to Vacate Evidentiary Hearing on the Motion to Alter or Amend*. At hearing, the court granted the *Motion to Vacate*. The court held that while *Motions to Alter or Amend* may in some instances warrant evidentiary hearings, a showing of good cause is required before a movant may offer new evidence. The issues of facility volume and quantity were raised by the pleadings at the outset of this subcase. Movants did not show good cause for the untimeliness of their participation in this subcase. Therefore, the court held the *Motion to Alter or Amend* would proceed on the record as it existed at the time the *Special Master's Report and Recommendation* issued.

C. RULINGS ON MOTIONS TO STRIKE AND OFFER OF PROOF

Movants filed an *Affidavit of David B. Shaw* and an *Affidavit of Brett Rowley* with their *Motion to Alter or Amend*. Jones moved to strike the affidavits of Shaw and Rowley. The *Affidavit of David B. Shaw* describes Shaw's review of data relating to the quantity element for this right. The *Affidavit of Brett Rowley* sets forth Rowley's opinion regarding the relationship between facility volume and quantity. The court granted the *Motion to Strike* consistent with its earlier order that the *Motion to Alter or Amend* would proceed without additional evidence. A hearing on the *Motion to Alter or Amend* was held July 17, 1998. Movants made an offer of proof of evidence they sought to add to the record. The court did not restrict Movants to merely presenting a summary of the evidence. However, Movants declined to call witnesses as part of the offer of proof and offered a summary.

II. MOTION TO ALTER OR AMEND

The *Motion to Alter or Amend* requests that the court alter or amend the *Special Master's Report and Recommendation* as to the quantity element. Movants' primary dispute is that the *Special Master's Report* did not include a facility volume limitation on the quantity element. Movants secondary dispute is that quantity should be reduced if there is no facility volume limitation.

A. STANDARD OF REVIEW

1. New Evidence on Quantity

SRBA Administrative Order 1 (Oct. 16, 1997) (*AOI*) provides for *Motions to Alter or Amend*, but does not set forth a standard for reviewing such motions. This Special Master has previously applied the criteria of I.R.C.P. 55(c) where the *Motion to Alter or Amend* raises matters which could have been raised in an objection. *Order Granting Motion to Alter or Amend* (Subcase 34-00470A, Oct. 10, 1997). Where Movants seek to supplement the record on quantity which could have been raised in an objection, Movants must show both good cause for untimeliness and the existence of a meritorious position. I.R.C.P. 55 (c); *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981); *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (Ct. App. 1993). Movants did not show good cause for untimeliness.

2. Decisions on Existing Record

SRBA Administrative Order 1 (Oct. 16, 1997) provides for reviewing *Special Master's Reports and Recommendations* on challenge, but does not set a standard for *Motions to Alter or Amend*. *AOI* § 13(f) establishes that challenges of *Special Master's Reports and Recommendations* are reviewed under the standards of I.R.C.P. 53(e)(2). Special Master's findings of fact are accepted unless clearly erroneous. The trial court independently reviews the evidence to determine whether the findings were supported by substantial evidence. The Special Master's conclusions of law are freely reviewed.

This *Motion to Alter or Amend* is reviewed under the standards articulated in I.R.C.P. 53(e)(2). On a *Motion to Alter or Amend*, the findings of fact will be retained unless shown to be clearly erroneous.

B. QUANTITY

1. Quantity Was Uncontested

Movants argue that Jones has not met his burden of persuasion for quantity. This Special Master disagrees. The *Director's Report* recommended quantity as 73.05 cfs. No objection was filed to the quantity element. Movants argue the facility volume limitation modified the quantity element, and if the quantity of 73.05 cfs is decreed without the

limitation, the quantity element is inaccurate. Movants may have misread the *Director's Report*, because the facility volume limitation was not contained in the quantity element. A facility volume limitation was included in the remarks section. Claimant Jones objected to the remarks section and a full evidentiary trial was held on the facility volume issue. Movants did not participate.

2. *Prima Facie Weight of Director's Report*

Movants argue that Jones failed to meet his burden of persuasion because he did not offer evidence at trial as to whether his right had been partially forfeited. A careful reading of recent Supreme Court decisions on the burden of persuasion and the *prima facie* weight of *Director's Reports* mandate a different conclusion.

The Idaho Supreme Court held in *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997) that water claimants bear the burden of production and the ultimate burden of persuasion for each element of a water right. *Id.*, 130 Idaho at 742. The Supreme Court explained in detail how those burdens work in relation to the *Director's Report*.

The legislature has already weighed any "unfairness" which might result from requiring the claimant to come forward with evidence after a water right owner objects to the Director's report: "Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5). That statute makes it clear that the claimant bears both the burden of production as well as the burden of proof as to each element of a claimed water right.

130 Idaho at 742.

Nothing in the decision requires claimants to go to trial over elements of their water rights which are consistent with the *Director's Report*. To the contrary, the Court clearly held that *Director's Reports* carry *prima facie* weight. If unrebutted and uncontested, the *Director's Report* satisfies the claimant's burden of production as well as the burden of proof for that element.

Here, the Director's Report is *prima facie* evidence and the facts contained therein are presumed to be correct until such time as a

water claimant produces sufficient evidence to rebut that presumption.

Id. at 746.

The *Director's Report* concluded that quantity for this water right was 73.05 cfs. There was no objection to that element. *Prima facie* weight attached to the *Director's Report*, and until such time as a party produced sufficient evidence to rebut that presumption, those facts are presumed to be correct. The *Director's Report* provided Jones with adequate evidence to meet his burden of production and burden of proof for elements which received no objections. Movants attempt to offer evidence and overturn the results of a full evidentiary trial are too late.

3. Partial Forfeiture

Movants assert that the *prima facie* weight which attaches to the *Director's Report* is invalid for this water right because there may have been a partial forfeiture of this right after the *Director's Report* issued in 1992. Presumably IDWR has an ongoing duty to supplement the *Director's Reports* where such evidence is uncovered. Throughout the test basin process, IDWR has diligently reported new information which has occurred since 1992 and information it had not obtained before 1992. No such information was presented for this subcase.

Furthermore, the information contained in the *Affidavit of David B. Shaw*, even if it were admitted and weighed, falls short of making a *prima facie* case for partial forfeiture. The affidavit states that Shaw reviewed documents from the Idaho Department of Health and Welfare, Division of Environmental Quality (DEQ) called Discharge Monitoring Reports. Shaw states that these reports show the quantity of discharged water for 36-07071. Shaw further states that the amount of water discharged generally equals the amount of water diverted into the facility. Shaw examined reports for the period of 1994 through March 1998 for this water right. For that period, Shaw states the quantity of discharged water was less than 73.05 cfs.

Critically, the period which Shaw reviewed is less than five years. The Idaho Supreme Court held that a water right may not be statutorily lost or reduced based on

current non-application to beneficial use for a period less than that set forth in I.C. § 42-222(2).

[T]he Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights. On the contrary, the legislature has enacted a specific statute which provides for the loss of water rights for failure to apply the water to a beneficial use.

130 Idaho at 743. Shaw's affidavit does not address a period lasting a full five years.

C. Facility Volume was the Primary Issue at Trial

The elements of this right were recommended after a trial in which the court called the Idaho Department of Water Resources to testify regarding the basis of IDWR's recommendation on facility volume limitation. Jones put on his case regarding the facility volume limitation, calling witnesses and offering exhibits for the record. Jones argued that this water right should not be limited by facility volume.

D. EVIDENCE ON FACILITY VOLUME WAS REQUIRED TO BE PRESENTED AT TRIAL

Parties to the SRBA could have anticipated that there were two possible outcomes in this subcase. Either the court would recommend the water right with or without a facility volume limitation. The entire trial focused on whether to eliminate the facility volume limitation. IDWR did not seek to present any testimony nor did it present any testimony regarding a reduction in quantity in the event the facility volume was not recommended. IDWR performed its duty at the trial for this subcase by providing all information necessary to the facility volume issue. If Movants had evidence to present relating to facility volume or quantity, they could have and should have presented it at trial.

III. CONCLUSION

Movants concede that *prima facie* weight attaches to the *Director's Report* and further admit that there was no objection to the quantity of 73.05 cfs. In addition, Movants agree that the record contains nothing to dispute the 73.05 cfs for quantity.

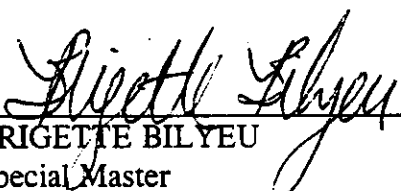
Movants failed to show good cause for the untimeliness of their objection to the facility volume question or the quantity element. Movants could have filed timely objections to the quantity element and could have participated on the issue of remarks such as facility volume.

Movants' failure to participate on a timely basis cannot be corrected after trial where all issues were raised by the *Director's Report* and objections.

Movants' allegation of partial forfeiture allegedly occurring after the *Director's Report* is insufficient to overturn the *Special Master's Report*, where the allegations are for a period less than five years. Based on the record for this subcase, there is substantial evidence supporting the finding of 73.05 cfs for the quantity element.

Movants argue that the court should reverse its previous ruling and include facility volume as a limitation on this right. Movants' argument has been considered and carefully reviewed. Upon reconsideration of the question, there is no reason to modify the *Special Master's Report and Recommendation* regarding facility volume and this Order incorporates that decision as if set forth here in its entirety.

DATED September 11, 1998.



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

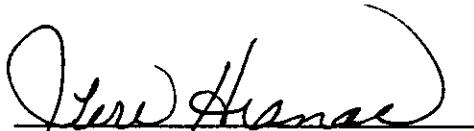
I certify that a true and correct copy of ORDER RE: MOTIONS TO ALTER OR AMEND was mailed on September 11, 1998, with sufficient first-class postage prepaid to the following:

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