

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 24 2004	
By _____	Clerk
Deputy Clerk	

**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 Case No. 39576 _____	) SPECIAL MASTER'S REPORT AND) RECOMMENDATION)) FINDINGS OF FACT AND) CONCLUSIONS OF LAW)) For Water Right: 65-02900) (Black Canyon Irr. Dist.)
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I.

FINDINGS OF FACT AND PROCEDURE

A. Water right 65-02900 is claimed in the SRBA by Black Canyon Irrigation District ("Black Canyon"). The water right is based on a license previously issued July 26, 1982. The license authorizes the irrigation of 51,332 acres; a diversion rate of 75.6 cfs with a volume limitation of 16344.8 afy; and a priority date of September 13, 1965. *See Exhibit C to Supplemental Director's Report Regarding Subcase 65-02900 (Feb. 3, 2003) ("Supplemental Director's Report")*. The total number of irrigated acres within the place of use is the only matter that is at issue in this subcase.

B. Although the water right is a previously licensed right, the SRBA claim filed by Black Canyon states that the right is based on a prior decree in the case of *State of Idaho v. A & C Corp Et Al*. However, the former decree was not made part of the record and the only reference in the record to that decree is in the claim.

C. The water right was also previously claimed in the Payette Adjudication but was never decreed. In February 2001, the Payette Adjudication was consolidated with the

SRBA. See *Order Consolidating the Payette Adjudication (Gem County Case No. 3667) with the SRBA, and Order Dismissing the Director (IDWR) as a Party* (Feb. 8, 2001).

According to the *Supplemental Director's Report*, the right was not decreed in the Payette Adjudication because it was still in the permit stage. The files from the Payette Adjudication are on file with the SRBA. A review of those files indicates that the right was claimed in the Payette but there is no record indicating that the right was decreed in the Payette nor was any decree made part of this record by either Black Canyon or IDWR. The claim filed in the Payette Adjudication was for the 53,200 irrigated acres.

D. On September 18, 2001, IDWR filed its recommendation for water right 65-02900 with the SRBA District Court. The *Director's Report* recommended the elements based on, and in accordance with, the license, including the irrigation of 51,332 acres within the place of use. The place of use recommendation states:

This right is limited to the irrigation of 51,332 acres within the boundaries of the Black Canyon Irrigation District in a single irrigation season. Use of this right with right no. 65-2433 is limited to the irrigation of a combined total of 53,200 acres in a single irrigation season.

E. On January 7, 2002, Black Canyon, through counsel, timely filed an objection to the recommended number of irrigated acres, asserting that the correct number should be 53,200 and that Black Canyon's delivery contract with the Bureau of Reclamation is for water to irrigate 53,200 acres. In a *Memorandum in Support of Objection to the Director's Report*, Black Canyon briefly explains that the 51,332 acre figure specified in the license is attributable to the license being issued at a time when some of Black Canyon's lands were condemned by the federal government for purposes of constructing Interstate 84. Black Canyon's then management estimated the loss of acreage attributable to the condemnation and arrived at the resulting figure of 51,332 remaining acres in the District that were being irrigated. Black Canyon contends this figure is in error. There is no evidence in the record to support this contention, nor is there any further explanation as to why the figure is allegedly in error.

F. A trial scheduling order was issued by this Special Master on December 3, 2002, which requested that IDWR submit the aforementioned *Supplemental Director's Report* detailing the basis for the original recommendation. The Supplemental Director's Report included as exhibits copies of the permit application and license. A trial on the matter was set to be heard February 26, 2003. At the time and place set for trial, counsel for Black Canyon failed to appear. This Special Master contacted counsel regarding same, at which time counsel responded that Black Canyon would "stand on the record."

G. For purposes of rendering a decision in this matter the only evidence in the record is the *prima facie* weight accorded the *Director's* and *Supplemental Director's Report*, both of which are based on the previously issued license.

II.

STANDARD OF REVIEW

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).

III.

CONCLUSIONS OF LAW

A. As a matter of law, this Special Master concludes that the number of irrigated acres should be decreed as recommended in the *Director's Report*. This Special Master arrives at this conclusion for two reasons, one procedural and the other substantive. Procedurally, because no evidence was introduced by Black Canyon, the only evidence in the record is the *prima facie* weight accorded the *Director's Report*. As such, by failing to introduce any evidence contrary to the recommended element, Black Canyon did not meet its burden in overcoming the presumption created by the *prima facie* weight of the *Director's Report*.

B. Substantively, it is well established in the SRBA that it is *res judicata* to collaterally attack a previously issued license in the SRBA proceedings. The proper remedy for addressing issues pertaining to elements of a licensed right was through the appropriate administrative permit and licensing proceedings and the Administrative Procedures Act.¹ See *Order on Challenge (Consolidated Issues of "Facility Volume" Issue and "Additional Evidence" Issue, subcases 36-02707 et al.* (Dec. 29, 1999); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984) (A.P.A. is exclusive remedy for appealing from administrative decision.). In this case it wasn't only the license that was issued for 51,332 acres but the permit application also specifies 51,322 irrigated acres. The permit application was filed by Black Canyon on September 13, 1965, and the license was not issued by IDWR until July 26, 1982. Presumably, any alleged discrepancy in the place of use element relative to the number of irrigated acreage could have been timely addressed in the approximately 17 years between the filing of the permit application and the issuing of the license.

C. Finally, Black Canyon asserts that it would be impossible to administer the reduced number of irrigated acres as recommended. This argument is without merit.

¹ This rule does not stand for the proposition that a license is per se evidence of a water right as a licensed right can be subsequently reduced by operation of law such as through forfeiture or abandonment. However, that situation does not constitute a collateral attack on the license because the change in the right is for circumstances occurring after the license was issued.

First, IDWR did not mention any difficulty in the *Director's* or *Supplemental Director's Report* regarding any potential problems in administering the right as recommended. IDWR is charged with the duty of administering water rights as well as the Court's independent expert. Next, other than a conclusory argument raised by Black Canyon regarding a potential problem, there is no evidence in the record regarding potential problems with administering the right as recommended. Again all evidence is to the contrary. Lastly, this Special Master is not convinced, nor does the Claimant cite any authority in support of, that an alleged difficulty in administering a water right is necessarily a valid argument. The SRBA Court has decreed a number of rights where administration will pose difficult challenges. The relationship between ground and surface water is one such an example.

IV.

RECOMMENDATION

Based on the foregoing reasons and record herein IT IS RECOMMENDED that water right **65-02900** be decreed with the elements as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*.

V.

RECOMMENDATION FOR PLACE OF USE DESCRIPTION USING DIGITAL BOUNDARY

Effective July 1, 2002, the Idaho Legislature approved the use of a Geographic Information System (GIS) for describing the place of use (digital boundary) for water rights meeting certain criteria. See I.C. §§ 42-219(2) and 42-1411(2)(h). The GIS mapping technology allows the geographic area encompassing the place of use for a water right to be particularly identified and visually displayed in a map overlay format through the aid of computer technology.

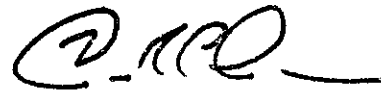
Water rights that are for an irrigation purpose of use and also meet one of the following criteria: (1) used in conjunction with an irrigation project where the canals constructed cover an area of twenty-five thousand (25,000) acres or more; (2) the place of use for the water rights is located within an irrigation district organized pursuant to the

laws of the state of Idaho; or (3) the water rights are for an irrigation project developed by an association, company, corporation or the United States to divert and deliver or distribute surface water under any annual charge or rental for beneficial use by more than five (5) water users in an area less than twenty-five thousand (25,000) acres.

Water right 65-02900 meets one of the above-stated criteria.² Therefore IT IS FURTHER RECOMMENDED that water right 65-02900 be decreed using a digital boundary with the partial decree containing the following additional language as set forth in the attached *Recommendation for Partial Decree Pursuant to I.R.C.P. 54(b)*:

The boundary encompassing the place of use for this water right is described with a digital boundary as defined by I.C. § 42-202B(2)(2003) and authorized pursuant to I.C. § 42-1411(2)(h)(2003). The data comprising the digital boundary are incorporated herein by reference and are stored on a CD-ROM disk issued in duplicate originals on file with the SRBA District Court and the Idaho Department of Water Resources. A map depicting the place of use is attached hereto to illustrate the place of use described by the digital boundary.

Dated March 24, 2004



THOMAS R CUSHMAN
Special Master
Snake River Basin Adjudication

² In incorporating a digital boundary into a partial decree, the electronic or digital data is what is actually decreed as opposed to the visually displayed map ultimately generated from the data. The data is stored on a CD-ROM. The data on the CD-ROM is incorporated by reference into the partial decree. Duplicate originals of the CD-ROM will be issued. The SRBA District Court retains one original together with the original partial decree, and the Idaho Department of Water Resources (IDWR) retains the other original. Upon request, the claimant can obtain a copy of the CD-ROM from IDWR at no cost, although GIS software will still be required to access the data. Subsequent administrative changes to the place of use will also be stored in a digital format and kept on file and maintained by IDWR. IDWR will maintain all computer software and/or hardware necessary for reducing the data to a usable format that is accessible to the general public, including access through the IDWR Internet website (www.idwr.state.id.us) or its successor Uniform Resource Locator (URL)>.

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

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 24 2004	
By _____	 Clerk
Deputy Clerk	

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 65-02900

NAME AND ADDRESS: BLACK CANYON IRRIGATION DISTRI
PO BOX 226
NOTUS, ID 83656

SOURCE: TUNNEL NO 2 DRAIN TRIBUTARY: TUNNEL NO 7 WASTEWAY

QUANTITY: 75.60 CFS
16344.80 AFY

THIS RIGHT WHEN COMBINED WITH ALL OTHER RIGHTS SHALL PROVIDE
NO MORE THAN .02 CFS PER ACRE.

PRIORITY DATE: 09/13/1965

POINT OF DIVERSION: T06N R02W S20 NENE Within Gem County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	05-15 TO 09-01	75.60 CFS 16344.80 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS
EARLY AS MARCH 15 AND MAY CONTINUE TO AS LATE AS NOVEMBER 15,
PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE
OF WATER BEFORE MAY 15 AND AFTER SEPTEMBER 1 UNDER THIS REMARK
IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY
OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE
A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE:

THIS RIGHT IS LIMITED TO THE IRRIGATION OF 51,332 ACRES
WITHIN THE BOUNDARIES OF THE BLACK CANYON IRRIGATION DISTRICT IN
A SINGLE IRRIGATION SEASON.

USE OF THIS RIGHT WITH RIGHT NO. 65-2433 IS LIMITED TO THE
IRRIGATION OF A COMBINED TOTAL OF 53,200 ACRES IN A SINGLE
IRRIGATION SEASON.

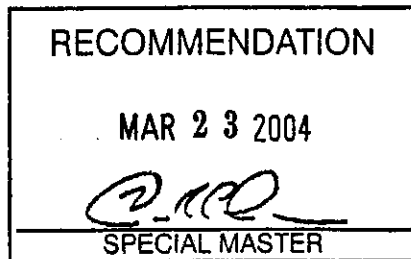
The boundary encompassing the place of use for this water right
is described with a digital boundary as defined by I.C. Section
42-202B(2)(2003) and authorized pursuant to I.C. Section 42-1411
(2)(h)(2003). The data comprising the digital boundary are
incorporated herein by reference and are stored on a cd-rom disk
issued in duplicate originals on file with the SRBA District
Court and the Idaho Department of Water Resources. A map
depicting the place of use is attached hereto to illustrate the
place of use described by the digital boundary.

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

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

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

MAR 24 2004

By _____ Clerk
Deputy Clerk

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)
Case No. 39576)
_____)

CERTIFICATE OF MAILING

Water Right(s): 65-02900

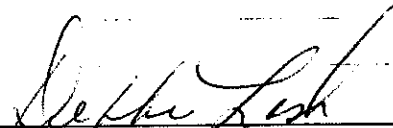
CERTIFICATE OF MAILING

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 March 24, 2004, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

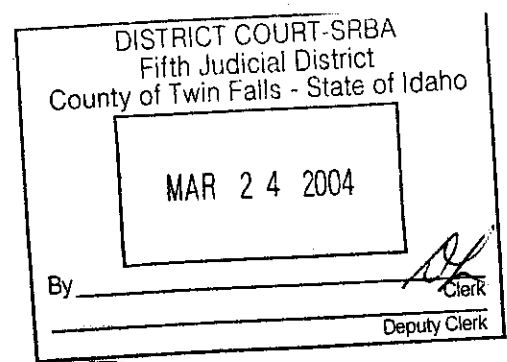
CHAS F MCDEVITT
MCDEVITT & MILLER LLP
PO BOX 2564
BOISE, ID 83701
Phone: 208-343-7500

BLACK CANYON IRRIGATION DISTRI
PO BOX 226
NOTUS, ID 83656


DEBBIE LASH
Deputy Clerk

CERTIFICATE OF MAILING

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03/24/04



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)
Case No. 39576)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

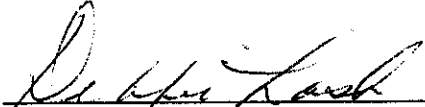
Water Right(s): 65-02900

On March 24, 2004, Special Master THOMAS R CUSHMAN issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED March 24, 2004.


DEBBIE LASH
Deputy Clerk

Black Canyon Irrigation District
United States of America Acting Through

- Boundary
- Townships
- Sections
- Quarter/Quarters

2 0 2 4 Miles

