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TWIN FALLS CO., IDAHO

**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: See Exhibit A
	)	
Case No. 39576	)	FINDINGS OF FACT
	)	AND CONCLUSIONS
	)	OF LAW (FACILITY VOLUME)
_____	)	

I. PROCEDURAL BACKGROUND

All water rights listed in Exhibit A are claimed by Clear Springs Foods, Inc. (Claimant) and are used for fish propagation. Numerous objections were filed. This matter relates to objections filed by Claimant to the remarks addressing facility volume. IDWR gave four reasons for including facility volume as a remark. Those four reasons were to administer water quality, define consumptive use, benefit the local public interest, and establish the extent of beneficial use. Claimant alleges that facility volume is not necessary to define or administer these water rights. The objections were tried before the court on February 8, 1998.

II. STANDARD FOR INCLUSION OF REMARK

The Director of the Idaho Department of Water Resources (IDWR) may include "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." I.C. § 42-1411(2)(k). The claimant bears the "burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in the director's report." I.C. § 42-1411(5).

III. FINDINGS OF FACT

1. David Tuthill, Jr., is the Adjudication Chief for IDWR. Mr. Tuthill has a bachelor of science degree in agricultural engineering and a master of science degree in civil engineering. Prior to becoming the Adjudication Chief, Mr. Tuthill was the supervisor with the Western Regional Office of IDWR.

2. Mr. Tuthill is familiar with the water rights before the court. On direct examination, Mr. Tuthill gave four reasons for the inclusion of facility volume as a remark: (1) to preserve water quality, (2) to measure consumptive use, (3) to protect the public interest, and (4) to define the extent of beneficial use (mitigation).

3. Claimant objected to all four reasons as being speculative, irrelevant, and lacking foundation. As to water quality, consumptive use, and public interest the objections were sustained. For water quality, Mr. Tuthill admitted that he had no expertise in the field of water quality. The objection to consumptive use was sustained for legal and factual reasons. As to the factual reason, Mr. Tuthill testified that there may be some consumptive use where ponds are constructed of dirt. In this case, the ponds are made of concrete and, consequently, consumptive use is virtually immeasurable. The objection relating to public interest was sustained for a purely legal reason.

4. Mr. Tuthill attempted to establish a foundation for facility volume as it related to defining the extent of beneficial use. According to Mr. Tuthill, facility volume defines the extent of beneficial use as it relates to fish production. Mr. Tuthill testified that defining the extent of fish production is important in the case of a call made by the Claimant. If fish production could be defined, in the case of a call made by Claimant, junior users could offer payment for lost fish production in lieu of delivering water. Claimant objected to any testimony on mitigation as being irrelevant and speculative. The objection was sustained for legal and factual reasons. As to the factual reason, Mr. Tuthill could not cite to any scientific or technical studies indicating that facility volume was related to production of fish. Furthermore, Mr. Tuthill conceded that IDWR did not have any legal authority to require mitigation.

5. Absent an increase in fish production, IDWR was not concerned with facility volume as it relates to water quantity. For example, if a user doubled facility volume and the increased volume was used solely to control effluence, then IDWR was not concerned with the increased volume of water.

6. On cross-examination, Mr. Tuthill conceded that IDWR's opinion and alleged need for facility volume as a remark has "matured" over time. Initially, IDWR included facility volume solely to control water quality. Later, other purposes were used to justify facility volume including defining nature of use, establishing consumptive use, and protecting the local public interest. Defining nature of use was not offered as a reason for including facility volume on direct examination.

7. IDWR offered Exhibits 2, 3, and 4 which are water licenses issued for water rights 36-07201, 36-07218, and 36-07568 respectively. The water licenses included facility volume for each right. The remarks read as follows: license 36-7201, "ponds (6) Volume = 5652 cubic feet"; license 36-7218, "Facility Volume = 335,504 cubic feet"; and license 36-7568, "Facility Volume is 9.9 acre feet." There is no additional language included in the licenses addressing whether these volumes are restrictions on any element of the license. Claimant did not appeal any of the licenses. Water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148 are all based on licenses which did not include any remark addressing facility volume. Water rights 36-04013A, 36-04013B, and 36-04013C are beneficial use claims.

8. Claimant called Terry Huddleston. Mr Huddleston is employed by Claimant as the farm operations manager. Mr. Huddleston has been employed by Claimant for 21 years. Mr. Huddleston has a bachelor of science degree in zoology and a master of science degree in fish culture and disease.

9. Mr. Huddleston testified that the water quality of the fish propagation ponds is regulated by the Department of Environmental Quality (DEQ) and the Environmental Protection Agency (EPA). Mr. Huddleston was one of the primary authors of the waste management guidelines for aquaculture which have been adopted by DEQ. The guidelines are used to determine whether a facility is in compliance with DEQ regulations. Claimant has a National Pollution Discharge Elimination System (NPDES) permit, issued by the EPA, to operate its facility. The Idaho State Department of Environmental Quality contracts with EPA to ensure compliance.

10. Mr. Huddleston opined that facility volume has little, if any, affect on water quality. According to Mr. Huddleston, water quality is affected mostly by the type of fish produced, the feed delivery systems, the ability to re-oxygenate water, and the management of the particular facility. To illustrate the lack of correlation between facility volume and fish production as both relate to

water quality, Mr. Huddleston testified that in one instance fish production increased from 1 million pounds to 2.7 million pounds. At the same time, facility volume decreased by 50 percent. The amount of water used decreased from 114 cfs to 100 cfs. Although production increased, water quality improved in that there was a 74 percent reduction in total suspended solids.

11. Mr. Huddleston testified that a restriction in facility volume could hamper fish production without any benefit to improving water quality. For example, Mr. Huddleston explained that there is a growing market for the production of sturgeon. To produce sturgeon, facility volume would have to be increased. This could be accomplished without any affect on water quality.

12. On December 17, 1996, Mr. Huddleston met with Mr. Tuthill and other representatives from IDWR regarding facility volume. At that time, the regulation of water quality was the only reason given for the inclusion of facility volume remarks. Mr. Huddleston first became aware of IDWR's reason to include facility volume to define the extent of fish production in January of 1998.

IV. CONCLUSIONS OF LAW

A. Water Quality

There are numerous reasons why facility volume shall not be included for purposes of regulating water quality. The primary reason is that IDWR is not in the business of regulating water quality. IDWR's duty with respect to water quality was outlined by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). In that case, the Court held that the primary function of "policing water quality" rests with the Department of Health and Welfare [now DEQ and EPA], not with IDWR. *Id.* at 341. The court held that "Water Resources should condition the issuance of a permit on a showing by the applicant that a proposed facility will meet the mandatory water quality standards." *Id.*

However, once the facility is complete, "later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare." *Id.* In this case, the water rights are not in the permit stage. All the water rights have ripened into licenses. Since the water rights have vested and the structures are complete, it is not the current function of IDWR to police water quality. Water quality is policed by DEQ and EPA.

Furthermore, even if IDWR could regulate water quality, there is no showing that facility volume is rationally related to water quality. Mr. Tuthill admitted that he is not an expert in water

quality, and he could not cite to any scientific or technical studies indicating a nexus between facility volume and water quality. Therefore, to the extent that Mr. Tuthill's opinion called for a scientific conclusion that water quality is related to facility volume, that opinion was inadmissible.

The admissibility of expert opinion testimony depends on the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion. Thus, the key to admission of the opinion is the validity of the expert's reasoning and methodology. In resolving these issues, the trial court should not substitute its judgment for that of the relevant scientific community. The court's function is to distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific terminology to present unsubstantiated personal beliefs.

Ryan v. Beisner, 123 Idaho 42, 46, 844 P.2d 24 (Ct. App. 1992), citing *Landrigan v. Celotex Corp.*, 127 N.J. 404, 605 A.2d 1079, 1084 (1992); see also, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).¹

On the other hand, Claimant presented concrete evidence that fish production and facility volume are not, in any way, related to water quality. Claimant established that fish production could be increased in smaller facilities while using less water. Although fish production increased, water quality improved.

For these reasons, the court finds that facility volume is not required to regulate water quality.

B. Consumptive Use

At the start of the SRBA, consumptive use was an element of a water right. I.C. § 42-1411(2)(I) (1986). In 1997, consumptive use was removed as an element of a water right for purposes of the SRBA. See, 1997 Sess. Law, ch. 374, § 4, p. 1192. Even if consumptive use was an element, there is no showing that fish propagation ponds involve any consumptive use. All the ponds at issue are concrete facilities. For these type of facilities, there is no measuring device available that can measure any amount of water that may theoretically be consumed by fish propagation.

For these reasons, facility volume is not necessary to quantify consumptive use.

¹ The court assumes that IDWR's scientific opinions shall be subjected to the same criteria for admissibility as the scientific opinions rendered by any other party in any other civil or criminal court case and that there are no special rules for admissibility of evidence offered by IDWR.

C. Public Trust

For those licenses which did not include facility volume at the time they were issued, facility volume cannot be included as a remark. First, the SRBA Court has no jurisdiction to consider the public trust. *In Re SRBA Case No. 39576*, 128 Idaho 155, 911 P.2d 748 (1995). "The district court correctly concluded that the public trust is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants." *Id.* at 156. Second, even if IDWR could inject the local public interest into the SRBA, IDWR cannot reevaluate a vested water right under the local public interest, absent the right being voluntarily submitted in a transfer proceeding. I.C. § 42-222.

The parameters of IDWR's ability to evaluate water rights under the local public trust was addressed in *Matter of Hidden Springs Trout Ranch, Inc., v. Alred*, 102 Idaho 623, 636 P.2d 745 (1981). In that case, the applicant had applied for a water permit. While the application was pending, the Idaho Legislature adopted I.C. § 42-203(5), the provision addressing the local public interest. Before the permit was issued, IDWR reopened the permit for public input as to whether the application satisfied the local public interest. The applicant appealed the decision of IDWR.

The decision of IDWR to reopen public comment on the application was upheld. Distinguishing between a fully vested licensed right from a permitted and inchoate right, the Idaho Supreme Court held that the permit could be evaluated according to the local public interest standards set forth under I.C. § 42-203(5). However, the Court held that the public interest could not be considered with respect to "a right arising to any vested level."

Initially, it is important to note that we do not discuss the status of one who has acquired an adjudicated right, a licensed right or an unadjudicated "constitutional" right to water as defined in Idaho statutes or the Idaho Constitution . . .

A permit applicant applying to appropriate water has no prior individually vested right to the water at the time of application; the applicant does not already own the water. The applicant's status is therefore not analogous for example to that of a landowner who has a vested right to put the land he owns to whatever use is permitted by the zoning ordinances in effect at the time the landowner makes application for a building permit .

....

... [The filing of an application] ... is not therefore a right arising to any vested level which would preclude application of the [the local public interest].

Id. at 624-625 (emphasis added).

In this case, water rights 36-07201, 36-07218, and 36-07568 had facility volume remarks inserted at the time the licenses were issued. The legality of the remarks for these rights is addressed *infra* § IV(F). The remaining water rights including 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148, 36-04013A, 36-04013B, and 36-04013C are either licenses which did not have facility volume inserted at the time the licenses were issued, or the rights are claimed through beneficial use. Because these rights vested prior to insertion of the facility volume remarks, Claimant is entitled to use these rights under the conditions which existed when the water rights vested. Any attempt to condition vested water rights under the public trust would be analogous to newly enacted zoning ordinances applying retroactively to preexisting land uses.

For these reasons, the facility volume remarks cannot be considered under the local public interest.

D. Beneficial Use - Mitigation

The stated purpose of including facility volume was to define the extent of beneficial use in terms of fish production. IDWR believed this to be important for purposes of mitigation. In other words, if the Claimant made a call on junior water users, the junior users could offer money for lost fish production instead of delivering water. There is no question that water users may engage in mitigation between themselves in lieu of a formal call on water being made. However, IDWR admits that it cannot force mitigation in lieu of performing its duty to deliver water should a senior user make a call. The right of water users to have water delivered "first in time, first in right" is constitutionally guaranteed. IDAHO CONS., art. VX, § 3; *In Re SRBA Case No. 39576*, 125 Idaho 392, 871 P.2d 809 (1994). Since IDWR has no authority to force mitigation, it is not necessary to include facility volume for purpose of water administration. Even if IDWR could force mitigation, as previously indicated, there is no rational relationship between facility volume and fish production. *See infra*, § III(B).

For these reasons, facility volume is not necessary for purposes of mitigation.

E. Nature of Use

IDWR did not offer nature of use as a reason for including facility volume on direct examination. However, on cross-examination, IDWR stated that nature of use has been used in the past as a reason to include facility volume. The rationale is that IDWR would consider an increase in facility volume as being a change in nature of use requiring a transfer under I.C. § 42-222. A change in facility volume is not the type of change contemplated under I.C. § 42-222. A change in nature or purpose of use occurs when, for example, a user changes from an irrigation use to a domestic use, a change from an irrigation use to a manufacturing use, or a change from a domestic use to a municipal use, etc. Going from a fish propagation use to a fish propagation use is not a change in nature of use contemplated under I.C. § 42-222.

F. The Licenses

As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director's Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.

The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right." I.C. § 42-220.² As applied, IDWR is part of the "state" as the word is used in I.C. § 42-220.³ As between the two statutes, there is a conflict only when a remark redefines the use of a licensed water right. Under these circumstances, the question is which statute controls.

² *In Re SRBA Case No. 39576 (24 Hagerman Subcases)*, __ Id. __, 947 P.2d 409 (1997), the Idaho Supreme Court held that "[n]owhere in Title 42 is the Director 'obligated to accept a prior decree' issued in a private adjudication 'as being conclusive proof of the nature of a water right.'" *Id.* at P.2d 414. Unlike prior decrees, Title 42 does require the state to accept license as conclusive proof of a user's right to use water as stated in the license. I.C. § 42-220.

³ For purposes of the adjudication of water right under Title 42, Chapter 14, Idaho Code. IDWR has been separated from other state agencies. I.C. § 42-1401B. Under the adjudication statutes, however, the Director's role is to report "claims to water rights acquired under state law." I.C. § 42-1401B. Here, the licenses were acquired and perfected under state law. These licenses are binding on the state and constitute *prima facie* evidence of the water right and should be reported accordingly. I.C. § 42-220.

The inquiry involves principles of statutory construction. "It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), __ Idaho __, 947 P.2d 409, 416 (1997). "[T]o the extent that two statutes conflict, the more specific governs over the more general." *Id.* Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state.⁴ Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license.

A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), 1998 WL 1811 (Idaho). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property." *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be "tantamount" to altering a real property right.

In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alfred.*

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative and then, if necessary, a judicial review of the license. I.C. §§

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There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste. Also, a license is subject to review in a transfer proceeding. I.C. § 42-222.

42-1701(A) and 67-5270. If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license.⁵ See e.g., *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). In this case, Claimant did not appeal the remarks addressing facility volume for water rights 36-07201, 36-07218, and 36-07568. Therefore, Claimant is bound by the licenses for these rights.

In evaluating the licenses where facility volume was included when the licenses were issued, the court notes that there is no express provision in the licenses indicating the relevance of the remarks. As previously indicated, the court cannot find any rational reason why the remarks exist. When confronted with an ambiguous element contained in a prior decree or license, the court may clarify the ambiguous element or provision. I.C. § 42-1427(b). Therefore, to clarify this ambiguity, the court will recommend that facility volume be included for water right numbers 36-07201, 36-07218, and 36-07568 with the following additional language: "The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."

For these reasons, the licenses at issue are final and binding on both the Claimant and IDWR.

V. CONCLUSION - ORDER

As a matter of law, Claimant has met its burden in establishing that facility volume is not necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the Director. Independent of these legal reasons and with the exception of the public trust, Claimant has also established, as a matter of fact, that facility volume is not necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the Director.

Consistent with these findings, the court orders as follows:

1. For water rights 36-07201, 36-07218, and 36-07568, facility volume remarks shall be included with the following additional language: "The remark addressing facility

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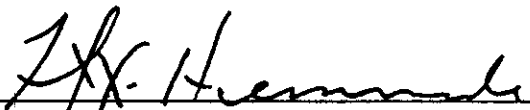
The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.

volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."

2. For water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, 36-07148, 36-04013A, 36-04013B, and 36-04013C the facility volume remarks shall be not be decreed.

IT IS SO RECOMMENDED.

DATED February 24, 1998.



Fritz X. Haemmerle, Special Master

Exhibit A

1. 36-07201
2. 36-07218
3. 36-07568
4. 36-02048
5. 36-02703
6. 36-02708
7. 36-07040
8. 36-07083
9. 36-07148
10. 36-04013A
11. 36-04013B
12. 36-04013C