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Department of Water Resources

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DISTRICT COURT - SRBA  
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

Case No. 39576

) FINDINGS OF FACT, CONCLUSIONS  
) OF LAW AND ORDER TO SUBMIT  
) SPECIAL MASTER'S  
) RECOMMENDATIONS

) Subcases: 36-04074, 36-04148A  
) and 36-04148B

I. PROCEDURAL AND FACTUAL BACKGROUND

This matter involves water right numbers 36-04074, 36-04148A, and 36-04148B which were claimed as follows:

Water Right

36-04074

36-04148A

36-04148B

Claimant

Clear Lake Country Club (Clear Lake Club)

Clear Lake Corporation and L&M, Inc. (L&M)

Clear Lake Country Club

The Director's Report did not recommend water right 36-04148A because IDWR believed that this right had been forfeited. Both L&M and Clear Lake Club filed Objections to 36-04148A. Water rights 36-04074 and 36-04148B were recommended in the Director's Report. Clear Lake Club filed Objections and L&M filed Responses to these two water rights.

On September 13, 1996, *Standard Form 5s* ("SF-5s") were filed between L&M and Clear Lake Club resolving all Objections between the two parties. IDWR did not concur with the settlements contained in the SF-5s. IDWR's position relative to each proposed SF-5 was contained in reports filed in each subcase entitled, "*IDWR Report RE: Review of Standard Form 5*" (lodged Sept. 26, 1996). Because of IDWR's failure to concur with the SF-5s, the court set all the claims for trial.

On December 19, 1996, the parties and IDWR filed a *Stipulation of Facts No. 1* with the court. The *Stipulation of Facts No. 1* addressed all elements for all rights at issue. In a nutshell, the agreement set forth how the water rights had been used from the time the rights were perfected to the current date. Between the parties and IDWR, there was no disagreement as to ownership, source of water, priority date, point of diversion, purpose of use, or period of use. The only material dispute involved quantity and acreage.

On December 20, 1996, the court addressed the *Stipulation of Facts No. 1* and the disputed elements at the Pre-trial Conference. IDWR asserted that any reductions from the elements claimed to the elements reported were based on the parties' actual and beneficial use of water subsequent to the time the rights were originally perfected and vested. IDWR conceded that partial forfeiture was not a basis for their recommendations for any of the rights at issue. (Dec. 20, 1996, Tr., p. 26, Ll. 17-21).<sup>1</sup> There being no legal basis to reduce the water rights from the claimant elements and consistent with the court's *Second Amended Order on Summary Judgment* (Sept. 13, 1996, 36-00003A *et. seq.*) (hereinafter "*Second Amended Order*"), the court held that the *Stipulation of Facts No. 1* settled the dispute as a matter of fact and law.

The only remaining issue for trial involved where the agreed upon 133 irrigated would be allotted within each quarter-quarter section. By way of a *Stipulation of Facts No. 1A*, the parties agreed to the specific allocation of acres within each quarter-quarter section. IDWR did not concur with the parties' allocation of acres. Nevertheless, based on the testimony of George Brush and the information contained in Exhibits 1-4, the court found that there was a factual basis to accept the *Stipulation of Facts No. 1A*. IDWR was not called to present any evidence on this issue because it admittedly had no historical information as to the appropriate acreage within each quarter-quarter section. (Jan. 14, 1997, Tr., p. 19, Ll. 3-5).

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<sup>1</sup>

Although IDWR admitted that partial forfeiture was not a basis for the reductions in these subcases, this court remains perplexed as to the basis of IDWR's recommendations. Having admitted that the recommendations in the Director's Report were not based on partial forfeiture, IDWR's stated criteria in reducing these rights resemble a partial forfeiture theory. When asked to list every objective standard it applied in reducing these rights from what was claimed, IDWR stated that they looked at the five-year period prior to the evaluation period to determine actual and reasonable use during that time period. If the actual and reasonable use of water during that time period is different than that contained in the claim, IDWR recommends a reduction in the water right. Of course, a five-year period is relevant to forfeiture. *See*, I.C. § 42-222(1). This looks like a partial forfeiture theory. No party has claimed a reduction in these rights based on partial forfeiture, and IDWR has not recommended a reduction in these rights based on partial forfeiture. The only issue in these cases remains whether the rights can be reduced based on a party's reasonable and actual beneficial use of water during a given time period.

As to consumptive use, the parties were aware that the issue of whether the court has jurisdiction to decree consumptive use was pending in another set of cases. The parties agreed that a resolution of the issue in those cases would be binding on them in these subcases. Subsequently, the court issued its *Order on Summary Judgment (Consumptive Use)* (Jan. 21, 1997, 36-00003A *et. seq.*) In that decision, the court held that it does not have jurisdiction to decree a rebuttable presumption. Consequently, the court will not recommend that consumptive use be decreed in these subcases.

## II. ISSUE PRESENTED

Whether the actual and beneficial use of water subsequent to a water right being perfected and vested can be considered and used to reduce a water right where there is no evidence or claim of forfeiture or abandonment.

## III. CONCLUSION OF LAW

The elements that are in dispute are quantity and the number of irrigated acres. IDWR is not disputing these elements as they existed at the time the rights were originally perfected. Rather, IDWR claims that the parties' actual and beneficial use of water subsequent to the time the rights were perfected defines these elements. The parties allege that fluctuations in beneficial use after these elements were perfected cannot be used to further limit or define the elements absent a claim of forfeiture or abandonment.

This issue was decided by this court in the *Second Amended Order*. In that decision, the court held as follows:

To summarize, the priority date and amount of water one is entitled to use vests at the time an appropriation is complete. The vested right may be used up to the limits of the appropriation. A vested water right constitutes a real property right. I.C. § 55-101(1). Absent a claim of forfeiture, abandonment, adverse possession, or estoppel, a reduction in beneficial use after a water right vests is not a basis upon which a water right may be lost or reduced.

*Id.* at 8.<sup>2</sup>

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<sup>2</sup> The ability of a right holder to use any amount of water within the limit of the original appropriation is always subject to the principle that water may not be wasted. "Although the person has a right to use water up to the limits of the appropriation, the user may not waste water. In this regard, the State is correct in that every water right is always limited by the amount of water which may be beneficially used. *See e.g., Rominiecki v. McIntyre Livestock Corporation*, 633 P.2d 1064, 1067 (Colo. 1981) (An implied limitation is read into every decree adjudicating a water right that diversions are limited to an amount of water sufficient for the purpose for which the appropriation was made, even though such limitation may be less than the decreed rate of diversion)." *Second Amended Order* at 7.

The previously mentioned holding is nothing more than a restatement of traditional western water law on the subject of how a water right is perfected and how that water may be used subsequent to the original appropriation. Long ago, the Idaho Supreme Court held that "so long as the appropriator of water applies the same to a beneficial purpose, he is the judge, within the limits of the appropriation, of the times when and the place where the same shall be used." *McGinness v. Stanfield*, 6 Idaho 372, 375, 55 P. 1020 (1898). This rule is well accepted in every other prior appropriation state. "Until affirmative action is taken to change the water right, the decreed amount continues to quantify the water right despite the likelihood that the user may never actually divert that amount." *Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District*, 717 P.2d 955, 958 (Colo. 1986). "After successfully appropriating a specific amount of water, the appropriator is entitled to a water right, a full and permanent property right in that quantity of water." *Tulkisarmute Native Community Council v. Heinze*, 898 P.2d 935, 941 (Alaska 1995). "An appropriated water right is limited by the time and the volume of the original beneficial use." *Neubert v. Yakima-Tieton Irrigation District*, 814 P.2d 199, 202 (Wash. 1991). See also, *McDonald v. State*, 722 P.2d 598 (Mont. 1986).

Regardless, IDWR continues to advance a theory that it can evaluate a "snap-shot" in time and determine all the elements of a water right. This theory ignores how water is used given ever changing variables such as weather and economic conditions. As this court previously stated:

There are numerous reasons why a water right may not be used to the full extent of an appropriation. Economic realities may change the amount or type of crop planted. Water delivery methods may change. Weather conditions may change altering the demand for water. Any or all of these factors will necessarily change the amount of water actually and beneficially used when compared to the amount of the original appropriation. The Ninth Circuit Court of Appeals in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), best characterized beneficial use as a "dynamic concept, 'which is variable according to conditions,' and therefore over time."

#### ***Second Amended Order at 7.***

With IDWR's admission that partial forfeiture was not a basis to reduce any of these water rights, it is fair to assume that IDWR's reduction of the water rights from what was claimed is premised strictly on the nonuse of water. Without regard to the extent of the original appropriation, IDWR reduces a right if it determines that a use of water is not reasonable during

a random time period in which IDWR chooses to evaluate a water right. As to this theory, the rule in Idaho has long been that the mere nonuse of water, outside a claim of forfeiture or abandonment, is not a basis to reduce a vested water right. *Jenkins v. Department of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

In support of its theory that only current use is relevant in evaluating a beneficial use claim, IDWR cites I.C. § 42-1401B which states that the Director has a duty to "make recommendations as to the extent of beneficial use and administration of each water right under state law. . . ." To clarify the Director's duty with respect to I.C. § 42-1401B, the "extent of beneficial use" relevant when deciding a beneficial use claim is the use at the time the right was perfected. Current use or use at a given period of time may very well be probative and helpful to define a right particularly where there is no historical evidence regarding the water right. However, where there is historical, relevant, and reliable evidence of the water right at the time the water right was alleged to have been perfected, current use or use at a particular "snap-shot" in time, absent any claim of forfeiture and abandonment, is less probative.

Under a constitutional claim, once the limit and extent of the original appropriation is determined, that limit establishes and describes a property right. IDAHO CONST. art. XV, § 3; I.C. § 55-101(1). Absent a claim of forfeiture or abandonment, any state imposed reduction of a previously vested right would amount to a taking of private property. "It is too well settled to require citation of authority, that neither the district, the state, nor the United States can take an existing vested right without payment of just compensation therefor." *In Re Wilder Irrigation District*, 64 Idaho 538, 551, 136 P.2d 461 (1943). A water right is not a license subject to constant reevaluation when there is no dispute as to the extent of the original appropriation.

For these claims, there is no disagreement as to quantity of water that was used at the time the rights were perfected. IDWR acknowledged that "the quantity of water reasonably beneficially used pursuant to water right nos. 36-04074 and 36-04148 was 4.70 cfs. from September 19, 1912 through December 31, 1952." *Stipulation of Facts No. 1* at 3. A total of 4.4 cfs was claimed for these rights. Since the claimants are claiming an amount of water less than IDWR agreed was originally put to a beneficial use, there is no material dispute as to the quantity element for these rights. Following the claimed quantity, the court finds a total of 4.4 cfs for these water rights.

The parties and IDWR also agree that at the time the rights were perfected, 133 acres were flood irrigated within a particular place of use. *Stipulation of Facts No. 1* at 4. As previously stated, the parties and IDWR disagreed as to the particular acreage allotted for each quarter-quarter section within the agreed upon original place of use. IDWR did not concur with the *Stipulation of Facts No. 1A* because, in part, it believed that an accomplished transfer had taken place at some point after the rights had been perfected. (Jan. 14, 1997, Tr., p. 15, L. 17- p. 16, L. 2).

An accomplished transfer occurs under the following circumstances:

[When] persons entitled to use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.

I.C. § 42-1425.

Subsequent to the time the rights were perfected and within the original place of use, the use of water and number of irrigated acres within each quarter-quarter section have fluctuated. *See, Stipulation of Facts No. 1*. However, the fact that the number of irrigated acres within the original place of use has fluctuated does not mean that an accomplished transfer has taken place. Again, once a water right is perfected, the water right holder "is the judge, within the limits of the appropriation, of the times when and the place where the same shall be used." *McGinness v. Stanfield*. If the use of water is at all times within the original place of use, the fact that water may have been used at different places or times within the original place of use is irrelevant. An accomplished transfer results only if the place of use is different than the place of use at the time of the original appropriation. In this case, no accomplished has taken place because the claimed irrigated acres are all within the agreed upon original place of use.

Finally, a quantity of 4.4 cfs spread over 133 acres equates to 1.66 inches per acre. This court cannot decree an amount in excess of one (1) inch per acre (.02 cfs) "unless it can be shown . . . to the court in making such decree, that a greater amount is necessary." I.C. § 42-220. Here, IDWR, the court's independent expert, agreed that an amount in excess of 1.66 inches was "reasonably beneficially used" at the time the rights were originally perfected. Relying on

the expertise of IDWR, the court finds that an amount of 1.66 inches per acre is reasonably necessary to irrigate the property at issue.

IT IS ORDERED that IDWR prepare and submit to the Court, Special Master Recommendations for water rights 36-04074, 36-04148A and 36-04148B pursuant to the draft recommendations attached hereto as Exhibit A (36-04074), Exhibit B (36-04148A), and Exhibit C (36-04148B) on or before February 26, 1997.

DATED February 12, 1997.

  
\_\_\_\_\_  
FRITZ X. HAEMMERLE  
Special Master  
Snake River Basin Adjudication

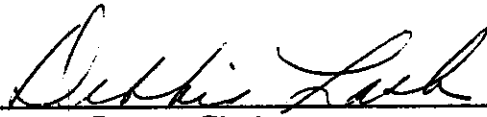
## CERTIFICATE OF MAILING

I certify that a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER TO SUBMIT SPECIAL MASTER'S RECOMMENDATIONS** was mailed on February 12, 1997, with sufficient first-class postage prepaid to the following:

Director of IDWR  
P.O. Box 83720  
Boise, ID 83720-0098

Norman Semanko  
Rosholt, Robertson & Tucker  
P.O. Box 1906  
Twin Falls, ID 83303-1906

Patrick D. Brown  
Hepworth, Lezamiz & Hohnhorst  
P.O. Box 389  
Twin Falls, ID 83303-0389

  
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

RECOMMENDATION FOR  
PARTIAL DECREE

Water Right 36-04074

NAME & ADDRESS: CLEAR LAKE COUNTRY CLUB  
RT. 4, BOX 225  
BUHL ID 83316

SOURCE: CLEAR LAKE STREAM      TRIBUTARY: SNAKE RIVER

QUANTITY: 14 CFS

PRIORITY DATE: 09/19/1912

POINT OF DIVERSION: T09S R14E S02      (LOT 7) NESWSE      Within GOODING County

| PURPOSE AND<br>PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE     | QUANTITY |
|-------------------------------|----------------|-------------------|----------|
|                               | IRRIGATION     | Irrigation Season | 14 CFS   |

| PLACE OF USE: | IRRIGATION     | Within GOODING County                                                              |
|---------------|----------------|------------------------------------------------------------------------------------|
|               | T09S R 14E S01 | SENE (Lot 6) 0.6<br>NESW (Lot 13) 23.0<br>NWSW (Lot 12) 10.6<br>SWSW (Lot 15) 15.6 |
|               | S02            | SESE (Lot 9) 23.4<br>NESE (Lot 8) 1.9<br>SWSE (Lot 7) 1.8                          |
|               | S11            | NENE (Lot 5) 8.8<br>NWNE (Lot 6) 4.3                                               |

90.0 ACRES TOTAL

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO THE  
IRRIGATION OF A COMBINED TOTAL OF 133 ACRES. COMBINED RIGHT  
NOS.: 36-04148A & 36-04148B

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

NONE.

DATED:

FRITZ X. HAEMMERLE  
Special Master  
Snake River Basin Adjudication

EXHIBIT

A

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 )  
\_\_\_\_\_ )

RECOMMENDATION FOR  
PARTIAL DECREE

Water Right 36-04148A

NAME & ADDRESS: CLEAR LAKE CORPORATION AND L & M, INC.  
307 CLEAR LAKE LANE  
BUHL ID 83316

SOURCE: CLEAR SPRINGS TRIBUTARY: CLEAR LAKE

QUANTITY: 1.5 CFS

PRIORITY DATE: 09/19/1912

POINT OF DIVERSION: T09S R14E S02 (LOT 5) SESENE Within GOODING County

| PURPOSE AND<br>PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE     | QUANTITY |
|-------------------------------|----------------|-------------------|----------|
|                               | IRRIGATION     | Irrigation Season | 1.5 CFS  |

| PLACE OF USE: | IRRIGATION     | Within GOODING County                                                                                  |
|---------------|----------------|--------------------------------------------------------------------------------------------------------|
|               | T09S R 14E S01 | SWNW (Lot 5) 0.3<br>SENW (Lot 6) 0.8<br>NESW (Lot 13) 33.6<br>NWSW (Lot 12) 21.6<br>SWSW (Lot 15) 21.1 |
|               | S02            | SESE (Lot 9) 38.5<br>NESE (Lot 8) 1.9<br>SWSE (Lot 7) 1.8                                              |
|               | S11            | NENE (Lot 5) 9.1<br>NWNE (Lot 6) 4.3                                                                   |

133.0 ACRES TOTAL

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO THE  
IRRIGATION OF A COMBINED TOTAL OF 133 ACRES. COMBINED RIGHT  
NOS.: 36-04148B & 36-04074

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

NONE.

DATED:

FRITZ X. HAEMMERLE  
Special Master  
Snake River Basin Adjudication

RECOMMENDATION FOR PARTIAL DECREE - 1

EXHIBIT

B

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 )  
\_\_\_\_\_ )

RECOMMENDATION FOR  
PARTIAL DECREE

Water Right 36-04148B

NAME & ADDRESS: CLEAR LAKE COUNTRY CLUB  
RT. 4, BOX 225  
BUHL ID 83316

SOURCE: CLEAR SPRINGS TRIBUTARY: CLEAR LAKE

QUANTITY: 1.5 CFS

PRIORITY DATE: 09/19/1912

POINT OF DIVERSION: T09S R14E S02 (LOT 5) SESENE Within GOODING County

PURPOSE AND PERIOD OF USE:

| PURPOSE OF USE | PERIOD OF USE     | QUANTITY |
|----------------|-------------------|----------|
| IRRIGATION     | Irrigation Season | 1.5 CFS  |

PLACE OF USE:

| IRRIGATION     | Within GOODING County |      |
|----------------|-----------------------|------|
| T09S R 14E S01 | SENE (Lot 6)          | 0.6  |
|                | NESW (Lot 13)         | 23.0 |
|                | NWSW (Lot 12)         | 10.6 |
|                | SWSW (Lot 15)         | 15.6 |
| S02            | SESE (Lot 9)          | 23.4 |
|                | NESE (Lot 8)          | 1.9  |
|                | SWSE (Lot 7)          | 1.8  |
| S11            | NENE (Lot 5)          | 8.8  |
|                | NWNE (Lot 6)          | 4.3  |

90.0 ACRES TOTAL

USE OF THIS RIGHT WITH RIGHTS LISTED BELOW IS LIMITED TO THE  
IRRIGATION OF A COMBINED TOTAL OF 133 ACRES. COMBINED RIGHT  
NOS.: 36-04148A & 36-04074

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

NONE

DATED:

\_\_\_\_\_  
FRITZ X. HAEMMERLE  
Special Master  
Snake River Basin Adjudication

RECOMMENDATION FOR PARTIAL DECREE - 1

EXHIBIT

C