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**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: 36-00110C and 36-00111C

Case No. 39576

**FINDINGS OF FACT AND
 CONCLUSIONS OF LAW**

I. PROCEDURAL BACKGROUND

The water rights before the court were originally claimed and designated as 36-00110A and 36-00111A. Subsequently, these water rights were split into 36-00110C and 36-00110D and 36-00111C and 36-00111D. Water rights 36-00110C and 36-00111C are currently before the court.¹ Both water rights are claimed by William Flint (Claimant). Quantity is the only disputed element for water right 36-00110C. For water right 36-00110C, 0.17 cfs was claimed; the Idaho Department of Water Resources (IDWR) recommended 0.06 cfs. Water right 36-00111C was recommended as disallowed because the same use was recommended under water right 36-00110C. The Claimant alleges that 36-00111C should be recommended as claimed.

II. FINDINGS OF FACT

1. The Claimant admits that he owns 3 acres of land. The Claimant introduced a quitclaim deed, dated July 23, 1992, purporting to be evidence of the water rights for that 3 acres. The deed purports to convey "water rights consisting of 2 second feet of water from Billingsley Creek" for 33 acres. Exhibit 1 at 3. The deed does not pertain to the 3 acres currently owned by the Claimant.

2. The 3 acres of land in use have been continuously irrigated since 1964. The method of irrigation has been, at all times, gravity (furrow) irrigation. Sprinklers have never been used to

¹ Water rights 36-00110D and 36-00111D are claimed by JSG Holding.

irrigate the land. IDWR conceded that the irrigation method actually used by the Claimant is a reasonable use.

3. The Claimant never actually measured the use of his water and, therefore, could not verify his claim to 0.17 cfs of water.

4. IDWR originally recommend 0.06 cfs for water right 36-00110C. IDWR used a technique of measurement know as the "Hubble" analysis to arrive at this recommendation. Under this analysis, a number of different variables including weather data, soil type, type of crop irrigated, and method of irrigation are considered. The weather data used for the Hubble analysis was taken from the Bliss weather station.

5. IDWR conducted a second analysis under a different technique known as the "Marginal Allowed Deficit" (MAD) analysis. The variables used under MAD are similar to those in Hubble. IDWR testified that the only material difference between the two methods, as applied to water right 36-00110C, is that the MAD analysis used weather data taken from the Hageman area where the water right at issue is actually used. Under this approach, IDWR's recommendation for water right 36-00110C increased to 0.11 cfs. IDWR concedes that the weather data used under the MAD analysis is more reliable because it utilizes weather data from the actual place of use. For this reason, the court finds that the MAD analysis and the recommendation of 0.11 cfs is more probative and reliable than the Hubble analysis and the recommendation of 0.06 cfs.²

6. IDWR testified that the 0.11 cfs did not take into account a measurable amount of water used to convey the water right from the point where the water is diverted to where the water right is used. IDWR conceded that the *de minimis* amount of conveyance loss which was factored into the recommendation would not deliver water right 36-00110C from the point of diversion to its place of use, assuming water right 36-00110C was the only right along the ditch.

7. Water right 36-00110C is diverted out of Billingsley Creek and into the Sands Ditch. It then runs 1,100 feet to a headgate where it is again diverted from the Sands Ditch to its place of

² IDWR's conclusions under the Hubble and MAD methods of determining quantity are admissible in these subcases. However, the court is making no determination whether IDWR's conclusions would be admissible when those opinions are subjected to cross-examination or scrutiny. IDWR's conclusions under both the Hubble and MAD methods are the type of scientific or technical evidence that is subject to the test of admissibility announced in *Ryan v. Beisner*, 123 Idaho 42, 46, 844 P.2d 24 (Ct. App. 1992), citing *Landrigan v. Celotex Corp.*, 605 A.2d 1079, 1084 (N.J. 1992). See also, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993).

use. IDWR conceded that the conveyance necessary to deliver water right 36-00110C is 0.28 cfs. The same conveyance loss also delivers certain other rights located between the headgate for water right 36-00110C and the point of diversion out of Billingsley Creek. Water rights 36-00036, 36-00110B, and 36-00110D share a portion of the conveyance loss of 0.28 cfs.

8. Water right 36-00111C was recommended as disallowed because it represents a use identical to water right 36-00110C which was recommended.

9. The water rights before the court were originally decreed as water rights 36-00110 and 36-00111 in *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (International Mortgage Decree). That case was a private adjudication. A prior decree entered in a private adjudication "evidences a legal right to the use of water." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), __ Idaho __, 947 P.2d 409, 414 (1997). However, a prior decree entered in a private adjudication is not conclusive as to that right. *Id.* In this case, the original rights were appurtenant to 78 acres of land. There is insufficient evidence before the court to determine what, if any, portion of the original 78 acres of decreed rights applied to the 3 acres claimed. Therefore, the court finds that the *International Mortgage Decree* is not probative of the quantities claimed for water rights 36-00110C and 36-00111C.

III. CONCLUSIONS OF LAW

1. 36-00110C

The only element in dispute for water right 36-00110C is quantity. In measuring quantity, the rule is "waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use." *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029 (1972); *see also, Hidden Springs Trout Ranch v. Hagerman Water Right Users, Inc.*, 101 Idaho, 677, 681, 619 P.2d 1130 (1980). Since the right is measured from the point of diversion, the quantity decreed must include two distinct components. The first component is the amount of water necessary for the purpose of use. For irrigation purposes, this amount is the quantity necessary to actually grow crops. The second component is called conveyance loss, which is the amount of water necessary to deliver the right from the point of diversion to the place of use.

There is no dispute as to the amount of water necessary to irrigate the 3 acres. IDWR originally recommended 0.06 cfs using the Hubble method of quantification. That method used less precise weather data taken from the Bliss weather station. The MAD method used weather data

taken from the Hagerman area where the water right is actually used. Under the MAD method, the quantity necessary to irrigate the 3 acres was 0.11 cfs. IDWR concedes that a recommendation of 0.11 cfs more correctly describes the amount of water necessary to irrigate for this water right. Therefore, the court finds that the amount necessary to irrigate the 3 acres is 0.11 cfs.

The only real dispute is the amount of water necessary to convey the water right from the point of diversion to the place of use. IDWR employs a so-called weighted pro rata method of determining conveyance loss in the Hagerman area.³ On any ditch, there may be a number of rights. For any water right along the ditch, that water right must share a portion of the total conveyance loss with other rights "up ditch." Notwithstanding this fact, all rights on the ditch will have a fixed conveyance loss necessary to deliver a single right, independent of other rights along the ditch. For example, assuming that the last water right on a ditch required a conveyance loss of 1.00 cfs, this loss would be the amount necessary to deliver that water right without regard to any other rights existing on the ditch. IDWR, employing the weighted pro rata method, would distribute the 1.00 cfs conveyance loss required for the last water right and assign a portion of the 1.00 cfs to all water rights on the ditch.

In this case, there is no dispute that it takes 0.28 cfs of conveyance loss to deliver water rights 36-00110C and 36-00110D down the Sands Ditch to the headgate where both rights are diverted to their place of use. Water right 36-00110D allegedly irrigates 30 acres of land. Water right 36-00110C, the right currently before the court, irrigates 3 acres of land. Using the weighted pro rata method to allocate conveyance loss, 0.24 cfs would be assigned to water right 36-00110D and 0.04 cfs would be assigned to 36-00110C. Even under this method, IDWR did not, as previously stated, factor any conveyance loss into water right 36-00110C.

The result of the weighted pro rata method is that the recommendation for each right along the ditch includes a conveyance loss less than the amount of water actually necessary to deliver each particular water right on the ditch. One problem with IDWR's method is that it requires that all rights along a ditch are fully used and never abandoned or forfeited. If any single right along the ditch is not in use or is abandoned or forfeited, then there will not be enough conveyance loss in the ditch system to deliver all the rights.

³

The court is not aware if IDWR employs the weighted pro rata method of allocating conveyance loss in other parts of the state.

Furthermore, the court is concerned about the accuracy of any decree entered in the SRBA if a water right along a ditch is abandoned or forfeited. If one right is abandoned or forfeited on a ditch system, then the total conveyance loss in a ditch will not be sufficient to deliver the remaining water rights. Under these circumstances, the court would have to continuously update its decree to ensure that conveyance loss is accurately reflected and sufficient for any given ditch system. Determining and including the conveyance loss for each single right in a ditch system cures the problem. Using this method, any rights that remain in a ditch system after one or more rights are abandoned or forfeited will always reflect the correct conveyance loss independent of other rights.

Another problem with IDWR's method of allocating conveyance loss is the potential result in case of a call made on water. In times of scarcity, water rights are delivered "first in time, first in right." IDAHO CONST., art XV, § 3. Since the quantity of the water right is measured from the "point of diversion, not place of use," *Glenn Dale Ranches, Inc. v. Shaub*, any user making a call has a right to that amount of water necessary to deliver the right from the point of diversion to the place of use. Because IDWR does not factor in a full conveyance loss for every single right on a ditch, a user making a call may not be able to deliver the right to its place of use.⁴ The right holders' ability to make an effective call would require all rights up ditch being in use and valid.

For these reasons, the court finds that the full conveyance loss should be included in the quantity for any given right. The quantity element shall include a remark indicating the total amount of conveyance loss and the rights which share in the conveyance loss. In this case, the quantity used for irrigation is 0.11 cfs. The conveyance loss is 0.28 cfs. The total quantity for this right should be 0.39 cfs. Quantity for water right 36-00110C should be reported as follows

Quantity: 0.39 cfs

Of the total quantity, 0.28 cfs is for conveyance loss. The same conveyance loss is shared and used in combination with water rights 36-00036, 36-00110B, and 36-00110D.

⁴

To be sure, "the public policy against wasting water prohibits . . . unreasonable [conveyance] loss." *Glenn Dale Ranches, Inc. v. Shaub* at 588. Taking this principle into consideration, a conveyance loss shared between a number of different rights may constitute a reasonable use of water. However, a single right being diverted down a ditch may constitute an unreasonable loss of water when that conveyance loss exceeds a certain percentage of the water actually used to carry out the purpose of use for that single water right. In this case, IDWR considers a conveyance loss of over 50 percent to be an unreasonable loss of water. According to IDWR, this is a "rule of thumb."

Although the court finds that water right 36-00110C should be reported for a total quantity of 0.39 cfs, the court notes that the amount claimed is only 0.17 cfs. Before the court enters a recommendation for this right, the Claimant will have an opportunity to amend his claim. If the claim is amended, the court will allow an additional objection period for water right 36-00110C. If the claim is not amended by June 30, 1998 by 5 p.m., the court will recommend water right 36-00110C as follows:

Quantity: 0.17 CFS

Of the total quantity, 0.06 cfs is for conveyance loss. The same conveyance loss is shared and used in combination with water rights 36-00036, 36-00110B, and 36-00110D.

2. 36-00111C

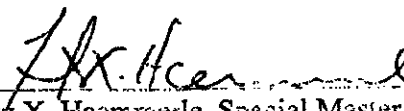
Water right 36-00111C was recommended as disallowed. IDWR's recommendation constitutes *prima facie* evidence of the water right. I.C. § 42-1411(4). The Claimant has the burden of moving forward with evidence if the claim is different than IDWR's recommendation. I.C. § 42-1411(5). In this case, the Claimant did not present any evidence why 36-00111C was required. Therefore, 36-00111C will be recommended "disallowed."

IV. CONCLUSION

In reviewing these subcases, it is clear that IDWR is not following the rule that "waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use." *Glenn Dale Ranches, Inc. v. Shaub* at 588. Each water right shall describe the full conveyance loss for that particular right irrespective of whether other rights are diverted down a ditch.

IT IS SO RECOMMENDED.

DATED this 13 day of May, 1998.


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 AND CONCLUSIONS OF LAW was mailed on May 13, 1998, with sufficient first-class postage to the following:

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