



1998 JUN 19 AM 9:02

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

Subcase: 36-00064B

RECEIVED

Case No. 39576

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

JUN 23 1998

Department of Water Resources
Adjudication Bureau

I. PROCEDURAL BACKGROUND

The water right before the court is 36-00064B claimed by Michael and Paul Fleming (Claimants). Quantity and number of irrigated acres are in dispute. The Claimants allege a quantity of 4.52 cfs and 51 acres of irrigated land. The Idaho Department of Water Resources (IDWR) recommended a quantity of 0.72 cfs and 19 acres of irrigated land.

II. FINDINGS OF FACT

1. The Claimants purchased the property where water right 36-00064B is used in 1971. Prior to purchasing the property, Michael Fleming worked and irrigated the land from 1956 to 1971. From 1971 to date, Michael Fleming conceded that only 22 acres of land have been irrigated.

2. IDWR originally recommend 0.56 cfs for water right 36-00064B. 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.

3. 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 36-00064B, is that the MAD analysis used weather data taken from the Hagerman area where the water right at issue is actually used. Under this approach, IDWR's recommendation for water right

36-00064B increased to 0.72 cfs (0.038 multiplied by 19 acres). 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 is more probative and reliable than the Hubble analysis.¹

4. Water right 36-00064B is diverted out of Billingsley Creek and into the Buckeye Ditch. The irrigated land consists of two irrigated parcels. See Trial Exhibit 2, Attachment B (GIS for 36-00064B). Since the late 1970s, the land has been irrigated using both gravity (wild flood) and sprinkler irrigation. The larger parcel on the north has been sprinkler irrigated. The smaller parcel to the south has been gravity irrigated. The parcel is irrigated out of two headgates. The first headgate serves the larger parcel on the north and is located 9,900 feet from the point of diversion on Billingsley Creek. The second headgate serves the smaller parcel to the south and is located 15,400 feet from the point of diversion located on Billingsley Creek. The total conveyance loss to deliver both portions of this water right to its place of use is 6.09 cfs. The same conveyance loss is shared and used in combination with other water rights delivered out of the Buckeye Ditch.

5. The water right before the court was originally decreed as water right 36-00064 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 Subcase)*, 130 Idaho 736, 741, 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, there is insufficient evidence before the court to determine what, if any, portion of the original decreed right is appurtenant to the parcel that is currently before the court. Therefore, the court finds that the *International Mortgage Decree* is not probative of the quantity claimed for water right 36-00064B.

¹ 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).

III. CONCLUSIONS OF LAW

1. Acreage

There is no dispute that the place of use contains two irrigated parcels. There is no dispute that the parcel located on the northern section consists of 13 acres. The only disputed acreage involves the parcel located to the south. IDWR recommended 6 acres for this parcel. In addition to the 6 acres, Michael Fleming testified that he irrigates 3 additional acres located on the eastern half of the southern parcel between the irrigated land and the ditch. Based on this credible testimony, the court finds a total of 22 acres of irrigated land.

2. 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. As to the first component, IDWR recommended 0.038 inches per acre under the MAD approach. The MAD method used weather data taken from the Hagerman area where the water right is actually used as opposed to the Hubble method which used weather data from the Bliss weather station. Therefore, the quantity determined under the MAD approach is more reliable and probative than the Hubble method. The court having determined that 22 acres have been irrigated, the total quantity used to carry out the purpose of use is 0.836 cfs (22 acres multiplied by 0.038 inches per acre).

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.² 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 on the ditch. Notwithstanding this fact, all rights on the ditch will have a fixed conveyance loss

²

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

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.

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.

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.*, 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. The right holder's 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. In this case, there is no dispute that it takes a combined 6.09 cfs to deliver the water down the Buckeye Ditch to the second headgate. That amount is then added to the quantity

necessary to fulfill the purpose of use which, as previously stated, is 0.83 cfs. Adding the two quantities together, the total quantity is 6.93 cfs.³ Quantity should be reported as follows:

Quantity: 6.93 cfs

Of the total quantity, 6.09 cfs is for conveyance loss. The same conveyance loss is shared and used in combination with all other water rights diverted out of the Buckeye Ditch.

Although the court finds that water right 36-00064B should be reported for a total quantity of 6.93 cfs, the court notes that the amount claimed is only 4.52 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 this water right. If the claim is not amended by **July 31, 1998 by 5 p.m.**, the court will recommend water right 36-00064B with the full amount of quantity necessary for the purpose of use with an amount of conveyance loss less than necessary to deliver the single right to its place of use:

Quantity: 4.52 CFS

Of the total quantity, 3.69 cfs is for conveyance loss. The same conveyance loss is shared and used in combination with all other water rights diverted out of the Buckeye Ditch.

3. Effect of Prior Decree

This right was decreed in a private adjudication under the *International Mortgage Decree*. In this case, applying the facts as presented by IDWR to the law that water rights be measured from the point of diversion not place of use, the amount recommended herein exceeds the original decreed amount. Accordingly, the issues are the extent to which **this court** is bound by a prior decree entered in a private adjudication and whether IDWR may recommend a water right in excess of that decreed in a private adjudication.⁴

³ 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."

⁴ Decrees entered in general adjudications "shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420; *24 Hagerman Subcases* at fn. 2.

The effect of prior decrees was discussed by the Idaho Supreme Court in *In Re SRBA Case No. 39576 (24 Hagerman Subcases)*, 130 Idaho 736, 947 P.2d 409 (1997). In that case, the court held that “[a] decree issued in a private water adjudication binds only those parties to the decree.” *Id.* at 742.⁵ Thus, non-parties to the prior decree and IDWR are not bound by the prior decree. *Id.* Given this holding, the Supreme Court went on to outline the duties of both IDWR and the court with respect to prior decrees entered in private adjudications. The court held that a prior decree entered in a private adjudication is “evidence” of a water right which is considered along with all other evidence, including evidence collected by IDWR.

While a decree issued in a private adjudication is evidence of a legal right, the Director is not obligated to accept the decree as conclusive proof of the extent and the nature of the water right In one-party cases, where a party alleges facts differently from that contained in the Director’s Report, an evidentiary hearing must be conducted. The district court should weigh the Director’s Report, as well as reports submitted by the Director as an independent expert, with other relevant facts.

Id. at 746.

The previously mentioned holding is not a unilateral restriction. The ruling does not state that IDWR is bound by the limits of a decree, but can reduce a right if its investigation establishes something different than the decreed amount. The ruling contemplates that IDWR performs a neutral and unbiased investigation of each water right claimed under state law.

In this adjudication, the Director is “an independent expert and technical assistant [who] assure[s] that claims to water rights acquired under state law are accurately reported The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law.” I.C. § 42-1401B(1).

. . . . Although a decree evidences a legal right to the use of water, *see* I.C. § 42-230(e), it does not obligate the Director to make a recommendation contrary to his findings.

Id. at 741.

If IDWR performs a neutral and unbiased investigation of the SRBA stream system, it is possible that some investigations will reveal that some decreed water rights should be reported in excess of the original decreed right. In fact, if IDWR were to limit its findings to the limit and extent

⁵

The prior decree also binds those parties in privity with original parties to a decree issued in a private adjudication. *Mays v. District Court of Sixth Judicial District*, 34 Idaho 200, 200 P. 115 (1921).

of a previously decreed right in light of contrary evidence that the right should be reported in excess of the original decreed amount, then IDWR would be breaching its duty to investigate water rights to the extent of beneficial use under I.C. § 42-1401B(1).

Since IDWR is not bound by a prior decree entered in a private adjudication, neither is this court. The prior decree is simply evidence. If the evidence shows that a previously decreed right entered in a private adjudication should be reduced, then the court will reduce the right. On the other hand, if the evidence presented shows that the right should be increased, then the court will increase the water right. By increasing a previously decreed right entered in a private adjudication, this court is not expanding the original decreed right. Rather, the court is making a correct determination of the original beneficial use of water after considering all the evidence.

Though IDWR is not conclusively bound by a decree entered in a private adjudication, the type of evidence submitted as to a water right claimed under a prior decree may be relevant in different legal contexts. For example, assuming a water right was claimed with a priority date of 1900, the only relevant evidence to prove establishment of that water right would be the use of the right in 1900. "[T]he law of this territory is that the **first appropriation** of water for a useful or beneficial purpose gives the better right thereto. . . ." *Malad Valley Irrigating Company v. Campbell*, 2 Idaho 411, 18 P. 52 (1888) (emphasis added); *McGinness v. Stanfield*, 6 Idaho 372, 55 P. 1020 (1898). If a court in a private adjudication decreed the same 1900 water right, presumably the court determined the extent of beneficial use for that water right in 1900. See e.g., *Clear v. Marvin*, 86 Idaho 87, 92, 383 P.2d 346 (1963) (A final judgment entered by a court of competent jurisdiction is presumed valid).⁶

Under this example and assuming IDWR does not challenge the decreed priority date, IDWR could make a recommendation which differs from the prior decree in one of two ways. First, IDWR could challenge the determination of a prior court as to the amount of beneficial use. Under this scenario, IDWR would be required to present evidence that in 1900, the beneficial use of water was something different than that determined by the prior court. Evidence of current beneficial use could be relevant to the extent and establishment of the right if it can be shown that the current use is the

6

The *International Mortgage Decree* is the product of a stipulated settlement between the parties. Because of this, some have suggested that the decree is not entitled to any weight. Those who continue to assert that stipulated judgments carry no weight should direct their attention to the Idaho Supreme Court's decision in *Western Industrial and Environmental Services, Inc. v. Kaldveer Associates, Inc.*, 126 Idaho 541, 544, 887 P.2d 1048 (1994) (holding that stipulated arbitration settlements are entitled to be enforced under principles of *res judicata* and collateral estoppel).

same or similar as it was when the right was established. In such a case, the party or IDWR offering the evidence would be required to lay a foundation tying current use to use of the right in 1900.

Second, IDWR could base its recommendation on the use of the water right after 1900. Under this scenario, again assuming the decreed priority date was not challenged by any party or IDWR, evidence of water usage after the decreed priority date of 1900 would be relevant only as to a claim that the right has been abandoned, forfeited, or adversely possessed. "A water right may not be statutorily lost or reduced based on current non-application to beneficial use for a lesser duration than that specified in I.C. § 42-222(2)." 24 *Hagerman Subcases* at 743. Stated differently, use of a right after the claimed and undisputed priority date is irrelevant to the extent or establishment of the right unless, as previously stated, a foundation is laid showing that the current use is the same or similar to the use of the right on the establishment date.⁷

In this case, the facts as presented by IDWR show that water right 36-00064B should be decreed for a quantity of 6.93 cfs. The only difference between the court's findings and IDWR's recommendation, as previously indicated, is that this court holds that conveyance loss should not be allocated between rights in a ditch. As a result of this legal conclusion, the total quantity found for this water right exceeds that amount originally decreed in the *International Mortgage Decree*.

IV. CONCLUSION

In reviewing this subcase, 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.* 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. Furthermore, the court holds that neither this court nor IDWR is bound by private decrees entered in a private

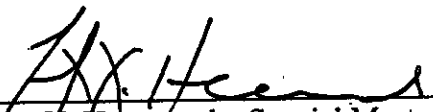
7

With respect to prior decrees or licenses, the legislature declared that current evidence of beneficial use is relevant as to prior decrees or licenses which did not define elements required to be decreed in the SRBA. I.C. § 42-1427(1)(b). To the extent that determining relevance is a court function under the Idaho Rules of Evidence, there is some question whether the legislature has the authority to declare matters relevant when the matter before the court would not otherwise be relevant. "Statutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect." I.R.E. 1102; *State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861 (1992).

adjudication if the facts presented by IDWR to the SRBA court establish something different than the original decreed amount.

IT IS SO RECOMMENDED.

DATED this 17 day of June, 1998.


Fritz X. Haemmerle, Special Master
Snake River Basin Adjudication

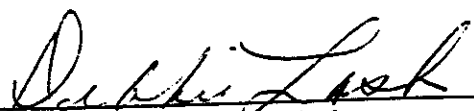
CERTIFICATE OF MAILING

I certify that a true and correct copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed on June 17, 1998, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
P O Box 44449
Boise, Idaho 83711-4449

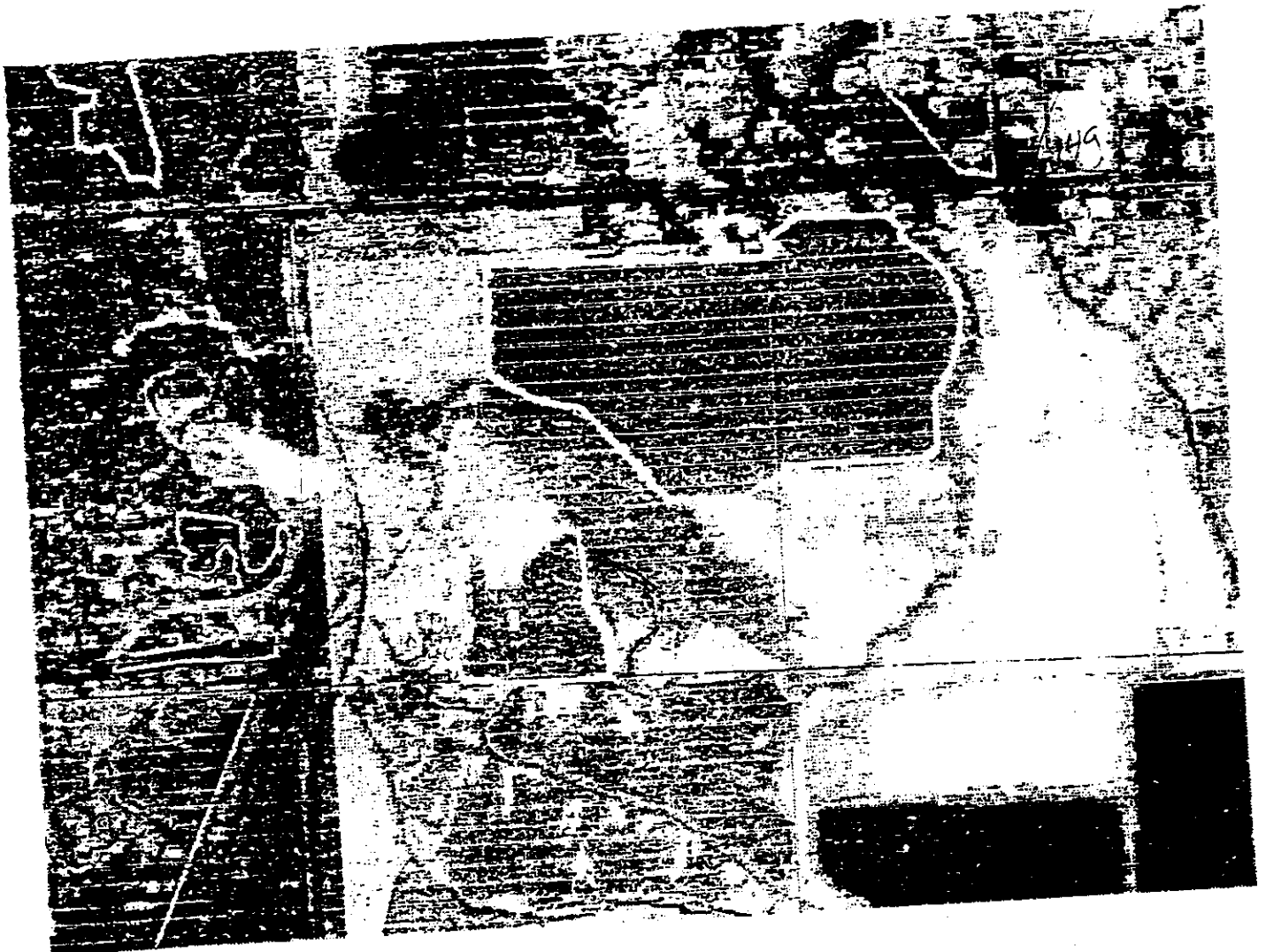
Director of IDWR
P O Box 83720
Boise, Idaho 83720-0098

Michael J. Fleming
Route 1, Box 7
Hagerman, Idaho 83332


Debbie Lash, Deputy Clerk

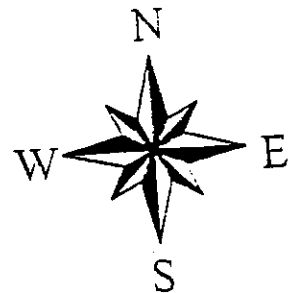
36-00064B
FLEMING

114g



660 0 660 Feet

TNS 7S. RNG 13E
SEC 23, NENW, NWNW



Recommended Point of Diversion

RECOMMENDED Place of use



Section lines



Quarter/Quarter Lines

GIS PLACE OF USE PRESENTATION
1987 and/or 1988 NAPP PHOTOGRAPHY
DATA ENTRY JANUARY 20, 1993
BY STEVE CLELLAND