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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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: 36-00003A, 36-00003B,
	)	36-00003C, 36-00003D, 36-00003F,
Case No. 39576	)	36-00003J, 36-00003K, 36-00003L, and
	)	36-00003M
	)	
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW

I. PROCEDURAL BACKGROUND

This matter came before the court for trial involving various subcases claimed in Basin 36. The water rights that were tried before the court include 36-00003A, Edna Rea, claimant; 36-00003B and 36-00003K, Kingston Properties, claimant; 36-00003C and 36-00003L, Lynn and Kathy Babington, claimants; 36-00003D, Thomas and Terri Harbison, claimants; 36-00003F and 36-00003M, Doyt and Roxie Simcoe, claimants.¹ For each water right, the issues before the court are as follows:

1. **Edna Rea**

36-00003A Quantity - (irrigation) - claim = 1.6 cfs; IDWR = 0.45 cfs

Quantity - (stock) - claim = 0 .04 cfs; IDWR = 0.02 cfs

2. **Kingston Properties**

36-00003B Quantity - claim = 7.16 cfs; IDWR = 5.00 cfs

Purpose of Use - claim = irrigation, fish propagation, and stock;

IDWR = irrigation and stock

¹ Water rights 36-00003K, 36-00003L, and 36-00003M were all split from 36-00003J. Water right 36-00003J was claimed by Barbara Gardner for 4.0 cfs. The quantity claimed under the splits are as follows: 36-00003K, 0.92 cfs; 36-00003L, 1.32 cfs; and 36-00003M, 1.76 cfs. To date, no Notice of Administrative Proceeding (NCAP) has been completed changing the name for 36-00003K from Gardner to Kingston Properties. However, the evidence shows that Kingston Properties is the rightful owner of 36-00003K.

- 36-00003K Quantity - claim = 0.92 cfs; IDWR = 0.46 cfs
 Acres - claim = 10 acres; IDWR = 1 acre
3. **Lynn and Kathy Babington**
- 36-00003L Quantity - claim = 1.32; IDWR = 0.46 cfs
 Acres - claim = 27.5 acres; IDWR = 14 acres
4. **Thomas and Terri Harbison**
- 36-00003D Acres - claim = 10 acres; IDWR = 5 acres
5. **Doyt and Roxie Simcoe**
- 36-00003M All Elements - IDWR = disallowed

II. STANDARD OF REVIEW

The Director's Report constitutes *prima facie* evidence of the water right. I.C. § 42-1411(4). The objecting party has the burden of going forward with evidence to rebut the Director's Report as to all objections filed. I.C. § 42-1411(5). I.C. § 42-1411(5) is silent as to the quantum of proof necessary to overcome the presumption raised by the Director's Report. If a statute is silent as to the quantum of proof necessary to overcome a presumption, then the presumption is overcome when the "opponent introduces substantial evidence of the nonexistence of the fact." *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986), citing Committee Comment to I.R.E. 301. Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion: it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934 (1993). "When rebutted, the presumption disappears and the party with benefit of the presumption retains the burden of persuasion on the issue." *In Re SRBA Case No. 39576 (24 Hagerman Subcases)*, 130 Idaho 736, 746, 947 P.2d 409 (1997). If the presumption is overcome by the claimant, then the claimant has the "ultimate burden of persuasion for each element of a water right." I.C. § 42-1411(5).

III. GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. THE CLAIMS

All the rights before the court originated from water right 36-00003. That water right was originally decreed in *New International Mortgage Bank v. Idaho Power Company*, in Equity No.

1602 (S.D. Idaho, Mar. 22, 1932) (*International Mortgage Decree*). The total amount originally decreed under water right 36-00003 was 20 cfs. Exhibit 1. Subsequent to the *International Mortgage Decree*, water right 36-00003 was split because the original place of use for water right 36-00003 was subdivided. The quantity claimed for all the rights split from the original right was 26.70 cfs.² The issue before the court is whether the claimants are limited to the original quantity decreed under 36-00003.

The claimants allege that the amount claimed for the split rights does not exceed the original quantity decreed because IDWR never considered other water rights which were decreed to the places of use owned by the parties designated under the splits for 36-00003. As correctly pointed out by the claimants, water right 36-00005 was originally decreed to the place of use now owned by Harbison, Kingston, Simcoe, and Babington. The amount decreed under 36-00005 was 3.0 cfs. Exhibit 1. Water right 36-00019 was decreed to the place of use claimed by Buckeye Farms. The decreed amount for 36-00019 was 2.16 cfs.

IDWR should have considered water rights 36-00005 and 36-00019 in determining whether there was enough water to satisfy the entire claimed amount for all rights split from 36-00003. Had these rights been considered, there was substantially enough water originally decreed to cover all the claims before the court. Any argument that the claimants are limited by the water decreed under 36-00003 is placing form over substance. All the rights share the same place of use and priority date. There is absolutely no prejudice to consider the water decreed under 36-00005 and 36-00019 because neither one of these rights was claimed or assigned to any party.

Furthermore, absent any consideration of 36-00005 or 36-00019, the court is cognizant of the fact that not all the rights split from the original 36-00003 right are before the court. Some of the splits from the original 36-00003 right were previously tried or settled. Those rights include 36-00003E, Edith Vernon, claimant; 36-00003G, Cleave Lloyd, claimant; and 36-00003H, Buckeye Farms, claimant. Since all the rights split from the original 36-00003 water right were not before the court, there is no way to determine each claimant's entitlement under the original decreed right. Because of this impossibility, every claimant should be entitled to prove their share of the previously decreed water rights independent of the settlements in 36-00003E, 36-00003G, and 36-00003H.

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This quantity claimed includes the splits that were previously recommended. Those rights include 36-00003E, 36-00003G, and 36-00003H.

B. STANDARD TO APPLY TO EXPERT TESTIMONY

The standard for considering expert testimony was recently stated by the Idaho Supreme Court in *State v. Merwin*, 98.14 ISCR 588 (July 1, 1998). In that case, the defendant argued that the court did not properly evaluate the expert testimony being offered by the State under the test announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In dismissing the defendant's argument, the Idaho Supreme Court stated "that the appropriate test for measuring reliability of evidence in this state is I.R.E. 702." *Id.* at 589, citing *Walker v. American Cyanamid Co.*, 130 Idaho 824, 832, 948 P.2d 1123, 1131 (1997). I.R.E. 702 reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In evaluating the disputed expert opinion before the court in *Merwin*, the Idaho Supreme Court's inquiry on the reliability question was whether the evidence offered by the expert "possessed sufficient indicia of reliability to meet the I.R.E. 702 requirements." *Id.* (emphasis added). In determining whether evidence possesses the required "indica of reliability," there are a number of factors to consider. The factors a court could consider are those factors outlined under *Daubert* and its companion cases. For example, in *Merwin* the Idaho Supreme Court relied upon various factors specifically outlined in *Daubert* in upholding the trial court's admission of the disputed expert testimony. *See also, State v. Parkinson*, 128 Idaho 29, 34, 909 P.2d 647, 652 (1996). "Although our Supreme Court has held that [I.R.E. 702] presents the appropriate test for measuring scientific reliability, that Court has not had occasion to articulate the inquiry envisioned by Rule 702. Therefore, for guidance we look to *Daubert*." *Id.* at 34.³

In this case, both IDWR and the claimants offered expert testimony as to whether the claimed quantity constituted a reasonable or beneficial use of water. The question an expert must answer is whether the claimed quantity of water is a sufficient amount of water to grow a crop in the field during the entire growing season. Of course, the opinion must be based on sound scientific methodology. If an expert cannot provide a quantity of water that is verifiable (i.e. actually works)

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"The trial court has broad discretion in admitting expert evidence, and its judgment will only be disturbed on appeal when there has been a clear abuse of discretion." *Walker v. American Cyanamid Co.* at 832.

and is sufficient to grow a crop during the entire growing season, then the opinion is not helpful to the trial court and, therefore, is not reliable under I.R.E. 702 or relevant under I.R.E. 401.

C. IDWR'S OPINION REGARDING QUANTITY.

Steve Clelland, Senior Water Agent for IDWR, testified regarding IDWR's recommendations concerning quantity for the water rights at issue. Mr. Clelland offered his opinion for quantity under IDWR's "Hubble" method for determining quantity. Prior to Mr. Clelland giving any opinion, the claimants objected to the testimony as lacking any foundation.

The testimony offered by IDWR was both scientific and technical in nature. Therefore, prior to giving any opinion on quantity, IDWR first had to establish that the testimony was scientifically and technically reliable under I.R.E. 702. Mr. Clelland testified that his job in making the recommendations for these water rights was to calculate numerous variables related to a particular water right and input them into the Hubble model. However, Mr. Clelland could not testify as to the scientific or technical reliability of the Hubble model. Stated differently, Mr. Clelland could not verify that the quantity recommended by IDWR was sufficient. Therefore, the court could not evaluate the scientific reliability of the Hubble method as to these water rights, and the court did not allow Mr. Clelland to venture an opinion as to the quantity for these rights.

The employee from IDWR who may have been able to provide an opinion on IDWR's Hubble methodology was Jeff Peppersack. Prior to trial, the claimants filed a *Motion In Limine* to exclude his testimony. The basis of the motion was that Mr. Peppersack could not lay the proper foundation under I.R.E. 702 as a prerequisite to the admission of any opinion based on the Hubble method. Subsequently, the claimants withdrew their motion based on two considerations. First, as previously indicated, Mr. Clelland could not testify as to any foundation for the Hubble model. Second, although IDWR was given an opportunity to call Mr. Peppersack to qualify an opinion under the Hubble model, IDWR requested that Mr. Peppersack not testify in this trial. At IDWR's request, Mr. Peppersack was not called as a witness.⁴

⁴ For these water rights, IDWR filed a report indicating that "[IDWR's] methodology incorporates both technical procedures and policies to establish the extent of beneficial use of water for irrigation by determining amounts reasonably necessary using acceptable irrigation practices." However, the deposition of Jeff Peppersack indicates that IDWR did not do any field testing to compare the recommendation with acceptable irrigation practices (Deposition of Jeff Peppersack (Tr. pp. 53-54, 60-67, 110, 118-119, 122)), or that IDWR was aware of what constituted "an acceptable irrigation practice." Deposition of Jeff Peppersack (Tr., p. 68, l. 5). See *Motion in Limine*. Without knowing the claimants' actual irrigation practices or having performed any field testing, it is difficult to assess whether or not the Hubble method is verifiable and, therefore, based on sound scientific practices.

D. CLAIMANT'S EXPERT - DR. CHARLES BROCKWAY, JR.

The claimants called Dr. Charles Brockway, Jr. Dr. Brockway rendered an opinion as to whether the claimed quantities constituted a reasonable use of water. The court finds that the model and methods used by Dr. Brockway in rendering his opinion satisfy the standards of admissibility outlined under I.R.E. 702. The model used is based on reliable and sound scientific methodology. Most importantly, the model is reliable because it is verifiable and predicts quantities of water that are sufficient (i.e. actually work) for the water rights at issue. For these reasons, the court found that the methodology of Dr. Brockway was both relevant and reliable and, therefore, any opinion offered by Dr. Brockway was admissible opinion testimony for the quantities claimed for these water rights.

Dr. Brockway performed an "excess flow sensitivity analysis" to determine the diversion rate for each water right before the court. Dr. Brockway described the analysis as follows:

The excess flow analysis is an analysis that is designed to determine how much water an irrigator needs to put on a field to grow a particular crop. The reason it's called excess flow is because it may or may not come out in excess of the typically allowed value of 1 inch, 1 miners inch per acre.

The sensitivity part comes in because the inputs are somewhat uncertain. Some are more certain than others, but they are somewhat uncertain. So the sensitivity analysis was performed to see how the amount of water needed changes with changes in inputs.

(Tr., p. 35, ll. 15-25.)

The excess flow analysis is used to determine how much water must be diverted to satisfy a crop's evapotranspiration requirements. "Evapotranspiration" is a term used to describe a crop's water requirements. Dr. Brockway described the term as follows:

Evapotranspiration is a term used to described how much water a crop or plant uses. The use of water by a plant is, has two components. Evaporation, which is simply the crop using water from its roots and releasing that water through the air, it evaporates into the air.

The second component is the crop utilizing the water in conjunction with other nutrients to make food for itself. And that process is called transpiration. So in combination we call it evapotranspiration.

(Tr., p. 12, ll. 18-25; p. 13, ll. 1-2.)

For these rights, the analysis assumed a furrow irrigation system. All the rights were perfected around 1900. At that time, there was no electric power, and therefore, sprinkler systems were not in use. The most common method of irrigation at the time these rights were perfected was wild flooding, although some furrow irrigations systems were used. (Tr., p. 31, ll. 2-14.) Since a right is determined by the first beneficial use of water, *Malad Valley Irrigating Company v. Campbell*, 2 Idaho 411, 18 P. 52 (1888), determining quantity assuming a furrow system is appropriate for these rights.

Accepting furrow irrigation as the method of irrigation, Dr. Brockway developed a model to determine whether these claimants were using too much or too little water. The variables used include "soil types, size of the fields, length of fields, slope of fields, and farm management practices." (Tr., p. 33, ll. 23-25.) Under Dr. Brockway's analysis, each claimant's property was broken down by the number of fields per claim. Each field was then assigned a soil type. The soil type was identified by the Soil Conservation Service (SCS) or Natural Resources Conservation Service (NRCS). (Tr., p. 48, ll. 4-6.) Once each field was identified, the size, slope, and run length for each field was determined. Dr. Brockway determined these factors from field examinations and by viewing aerial photography maps. (Tr., p. 52, ll. 18-20; p. 53, ll. 19-22.)

One of the most important variables is "set time." "Set time" is defined as the length of time that water is allowed to be diverted to the field so that water runs the entire length of the field. (Tr., p. 54, ll. 23-25; p. 55, ll. 1-15.) The designated set time has a great effect on the range of diversion rates under the excess flow analysis. Dr. Brockway testified that it is important to make sure the set time is long enough so that water does run from one length of the field to the other. To determine this, Dr. Brockway considered historical information provided to him by the irrigators themselves to determine what set time was used for each field. "The historical information, in my opinion, is the best estimate of the set time based on the irrigator's knowledge of how long it takes in practical terms for the water to get across and sufficiently irrigate the field." (Tr., p. 56, ll. 23-25; p. 57, ll. 1-2.) Obviously, if the set time is too low, water will not reach the end of the field, and the farmer will not be able to irrigate the entire field. Here, the irrigators informed Dr. Brockway that they use 24-hour set times; and therefore, Dr. Brockway properly considered 24-hour set times in his opinion.

The most uncertain variable is "furrow flow." "Furrow flow" is defined as the amount of flow directed to each individual furrow. . . ." (Tr., p. 58, ll. 13-14.) Numerous systems are

employed to create a furrow flow including cutouts, gated pipes, and siphon tubes. When these rights were perfected, gated pipes and siphon tubes did not exist. The only method of delivery was cutouts. (Tr., p. 63, ll. 4-8.) Dr. Brockway testified that of all the variables, furrow flow is the most uncertain because it is impossible to know how much water is being delivered into any furrow during a given time period. Because of this uncertainty, Dr. Brockway applied his best engineering judgment to arrive at furrow flows of between 3-, 5-, and 7-gallon-per-minute flows.

The furrow flow as an input to the model is an uncertain parameter because we don't know exactly how much is spurting out of the pipe or exactly how much is going through the siphon tube. Those furrow flows are based on best engineering judgment about how long a field is, what type of soil it is, and historical or known practices that work.

In other words, we know that one gallon per minute won't get [water] across the field. We know that nine gallons per minute is too much. So we have a range, and we use engineering judgment to define the input to the model.

(Tr., p. 63, ll. 12-23.)

Using all these variables, Dr. Brockway determined diversion rates required using the different furrow flows for alfalfa, dry beans, and pasture. These crops were selected because the claimants have historically grown these crops and the crops represent a wide range evapotranspiration requirements based on plant physiology. (Tr., p. 39, ll. 19-25; p. 40, ll 1-3.) The diversion rates represent the diversion required during peak period consumption. "Peak period consumptive use" is the amount of water required for a plant during the hottest time of the growing season. (Tr., p. 37, ll. 22-24.) Identifying a water quantity for the peak period of a crop's growth cycle is critical because if a plant does not have enough water during this period, it will die.

Because the inputs are variable, Dr. Brockway testified that he could not arrive at one single number and identify that number as the duty of water for a particular water right. (Tr., p. 72, ll. 5-9.) Rather, by varying the inputs under a sensitivity analysis, a number of different diversion rates were determined. In determining whether the claimed diversion rate for each water right was reasonable, Dr. Brockway determined whether the claimed rate was within reasonable limits of the computed range.

What I'm looking for is we have this range. It's a very wide range. Given the [claimed] number, how does it fit within that range? If it fits toward the upper end,

I would say it's more likely that it's an unreasonable number. If it's right toward the middle, I can say with reasonable confidence that it's a good number.

(Tr., p. 105, ll. 15-21.)

For example, the claimed quantity for water right 36-00003A is 1.6 cfs. The range of diversion rates needed to satisfy a crop's consumptive use during peak flow for water right 36-00003A is 0.25 cfs (0.98 in/ac) to 3.27 cfs (12.76 in/ac). Exhibit 32. The claim of 1.6 cfs falls nearly mid-range for the predicted diversion rates necessary to keep the plants alive during the peak period of consumptive use. Therefore, Dr. Brockway opined that the diversion rate of 1.6 cfs for water right 36-00003A was a reasonable rate. (Tr., p. 104, ll. 10-11.) The analysis discussed by Dr. Brockway is applicable to all the rights currently before the court. For each particular right, the court will discuss the range of predicted diversion rates and whether the claimed rate falls reasonably within the predicted quantities.

The diversion rate used under each variable represents an instantaneous flow rate. (Tr., p. 86, l. 14.) However, since an irrigator generally does not have enough water to irrigate an entire field all at once, the irrigator is required to constantly move his/her sets at all times. Consequently, the diversion rate identified by Dr. Brockway is required 7 days a week, 24 hours a day during peak period use. (Tr., p. 89, ll. 8-25; p. 90, ll. 1-14.)

Finally, some of the rights exceed 1 inch (0.02 cfs) per acre. Under I.C. § 42-220, the court is required to make findings any time a claim exceeds 0.02 cfs per acre. Dr. Brockway testified that water rights in the Hagerman Valley require more than 0.02 cfs per acre for a couple of reasons. First, the evaptrasportation rate in the Hagerman Valley is higher than most of the state. Second, the soil in the Hagerman Valley is very sandy. Dr. Brockway opined that these reasons "add up to a lot of water needed to grow crops in that area." (Tr., p. 118, ll. 16-25; p. 119, ll. 1-9.) Therefore, the court finds good cause for the rights to exceed 1 inch (0.02 cfs) per acre.

In conclusion, it is obvious that a set diversion rate cannot be determined for an entire geographic area. The variables unique to each circumstance vary widely depending on a farmers irrigation practices, the length and width of a field, and the soil type unique to each field. Because Dr. Brockway considered the variables unique to each field and the irrigation practices that actually work for those fields, the court finds that the diversion rates found by Dr. Brockway are based on

sound scientific methods. Consequently, the court is confident that diversion rates found represent a quantity of water that will actually grow crops on the fields at issue.

E. CONVEYANCE LOSS

Recently, this Special Master, citing the Idaho Supreme Court, held 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*, 94 Idaho 585, 588, 494 P.2d 1029 (1972). In this case, the opinion of Dr. Brockway did not take into account any conveyance loss. During trial, it was agreed that IDWR would calculate the proper conveyance loss for these water rights once the court determined the proper field requirements. Prior to IDWR performing those calculations, the claimants are directed to notify the court, by motion, whether they intend to include conveyance loss for these water rights. If they do, then the claims will require an amendment as the quantities found for these water rights are at the limit of the current claims.

F. COMBINED USE - COMBINING WATER RIGHTS

Some of the claimants have two claims. IDWR alleges that the water for each water right can only be used on the acreage identified for each individual water right. The claimants allege that when an owner has two contingent parcels with two individual water rights, the water under each water right can be used on the acreage for either water right because the water for both rights was originally decreed to one place of use under the *International Mortgage Decree*. The court agrees with the claimants. Water right 36-00003 was decreed to a place of use. That place of use has not changed. The same water that was decreed under the *International Mortgage Decree* is still appurtenant to the claimed places of use for these water rights.

With this principle in mind, it is important to understand the development and use of all the water rights that were split from the original decreed water right, 36-00003. As previously indicated, as the land covered under the *International Mortgage Decree* was subdivided, 36-00003 was split into its various parcels. Over time, common owners then acquired a number of the separate, yet adjacent, parcels. Although there was a unity of ownership for some of the adjoining parcels, the water rights identified with each parcel remained separately described. The water rights remained separate even though the different parcels have historically been irrigated using one irrigation system, and consequently, the water for both rights have been used on the places of use described for both water rights.

For example, the Simcoes own water rights 36-00003F and 36-00003M. The places of use for each water right are contingent to one another. The property is being irrigated using one sprinkler system. Since the parcels are being irrigated using a common irrigation system and because of the unity in title for the two parcels, it makes sense to combine the two water rights. The same is true for water rights 36-00003C and 36-00003L owned by the Babingtons. The same is not true for water rights 36-00003B and 36-00003K owned by Kingston Properties because the rights are served under two irrigation systems and, therefore, combination of these rights may not be appropriate.

Simply stated, if the original 36-00003 water right can be split as land is subdivided, the separate portions of 36-00003 can be combined if the separate parcels come into a common ownership, the parcels are contingent to one another, the entire parcel is irrigated using a common irrigation system, and the point of diversion, place of use, and nature of the water right have always remained the same.⁵

The court will entertain a motion to combine the water rights consistent with this decision.

IV. SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. EDNA REA, 36-00003A

1. Stock Water Quantity - 0.02 cfs

The claimant and IDWR reached a stipulation as to the stock water quantity objection. The stipulation was for 0.02 cfs provided the 0.02 cfs is delivered anywhere on the place of use where the stock may water.

2. Irrigation Quantity - 1.6 cfs (13 acres)

The range of quantities required for this water right is 0.25 cfs to 3.27 cfs. Exhibit 32. Since the claimed quantity of 1.6 cfs is mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 1.6 cfs is a reasonable and beneficial quantity of water.

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If the point of diversion, place of use, and nature of use have always remained the same even, then I.C. § 42-222 is not implicated.

B. KINGSTON PROPERTIES, 36-00003B AND 36-00003K

**1. Quantity - 36-00003B (7.16 cfs) and 36-00003K
(0.92 cfs) for a total of 8.08 cfs (136 acres)**

The range of quantities required for these water rights is 1.37 cfs to 17.92 cfs. Exhibit 33. Since the claimed quantity of 8.08 cfs is mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 8.08 cfs is a reasonable and beneficial quantity of water.

2. Purpose of use for 36-00003B - includes fish propagation

The claim included fish propagation as a purpose of use. IDWR did not recommend fish propagation as a purpose of use. The court notes that these claims are based on the *International Mortgage Decree*. The purposes of use under that decree included irrigation, domestic, and "other purposes thereon." Exhibit 1. The inquiry here is whether fish propagation may be considered an "other purpose" as described in the decree. Under I.C. § 42-1427(1)(a), undefined elements in prior decrees may be established "based on conditions existing on the date of the commencement of the adjudication."⁶ The SRBA was commenced on November 19, 1987. On or about that date, the evidence shows that there were ponds on the place of use for water right 36-00003B, and the evidence also shows that the ponds identified in Exhibits 17, 18, and 19 have been used to raise fish. Prior to the *International Mortgage Decree*, the evidence further shows that the place of use claimed for water right 36-00003B was historically used for fish propagation. Therefore, the court finds that fish propagation is a purpose of use for 36-00003B.

3. Acres for 36-00003K - 7 acres

The area claimed under 36-00003K is highlighted in brown in Exhibit 12. Verl Bell testified that since 1940 he has been familiar with the land owned by

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I.C. § 42-1427(1)(b), in its entirety, reads as follows: "Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon the historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right."

Kingston Properties under 36-00003K. Bell testified that the highlighted area has been historically irrigated. The acreage within the highlighted area is identified as having at least 6 acres; although, it is clear that the highlighted area in Exhibit 12 has more than 6 acres. However, there is no evidence before the court as to exactly how many more acres are included. In reviewing the scale of Exhibit 12, the court can safely identify at least 7 acres. Therefore, the court finds that the place of use for water right 36-00003K is 7 acres.

4. Ownership, 36-00003K - Kingston Properties

The evidence establishes that Kingston Properties is the owner of water right 36-00003K.

C. Lynn and Kathy Babington, 36-00003C and 36-00003L

1. Quantity, 36-00003C (0.30 cfs) and 36-00003L (1.32cfs) for a total of 1.62 cfs (24 acres)⁷

The range of quantities required for these water rights is 0.60 cfs to 7.56 cfs. Exhibit 34. Since the claimed quantity of 1.62 cfs is well below the mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 1.62 cfs is a reasonable and beneficial quantity of water.

2. Acres for 36-00003L - 14 acres

IDWR recommended 14 acres for this water right. The claimant alleges 27.5 acres. The claimant did not contest IDWR's recommendation. Therefore, the acres for this water right comprise 14 acres.

D. Thomas and Terri Harbison, 36-00003D

Acres for 36-00003D - 8.4 acres

The only dispute for this right was acreage. IDWR recommended 5 acres to the west of the Buckeye Ditch. Harbison calculated 4.5 acres for this area. Exhibits 13 and 14. For the area to the west of the Buckeye Ditch, the court finds 4.5 acres. IDWR did not recommend any area to the east of the Buckeye Ditch because it was unaware that Harbison owned that property. It is not in dispute that Harbison owns

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The quantity for 36-00003C is not at issue. However, since the quantities for both 36-00003C and 36-00003L are used in combination, the excess flow analysis considers both quantities together in determining the required diversion rate.

property to the east of the Buckeye Ditch. For this portion, Harbison calculated the area to be 3.9 acres. The evidence is not in dispute that the entire portion claimed by Harbison is irrigated. Therefore, the court finds a total of 8.4 acres.

E. Doyt and Roxie Simcoe, 36-00003F and 36-00003M.

1. Quantity for 36-00003F (0.80 cfs) and 36-00003M (1.76 cfs) for a total of 2.56 cfs (58 acres)⁸

The range of quantities required for these water rights is 1.01 cfs to 14.58 cfs. Exhibit 35. Since the claimed quantity of 2.56 cfs is well below the mid-range of the predicted quantities determined by Dr. Brockway, the court finds that 2.56 cfs is a reasonable and beneficial quantity of water.

2. Elements for 36-00003M.

a. Owner - Doyt and Roxie Simcoe.

The evidence establishes that Doyt and Roxie Simcoe own the right claimed.

b. Source - Billingsley Creek.

The evidence establishes that the source for this water right is Billingsley Creek and that right is diverted into the Buckeye Ditch.

c. Quantity - 1.76 cfs.

The evidence establishes that the quantity for this right is 1.76 cfs and that the use of that amount of water is reasonable and beneficial. *See infra*, § IV(E)(1).

d. Priority date - September 10, 1884.

The right originated from 36-00003 decreed under the *International Mortgage Decree*. Water right 36-00003 was decreed with a priority date of September 10, 1884. "A decree issued in a private adjudication is evidence of a legal right." *In Re SRBA Case No. 39576 (24 Hagerman Subcases)*, 130 Idaho 736, 746, 947 P.2d 409 (1997). Water right 36-00003M was split from 36-00003. Therefore, the priority date for water right 36-00003M is September 10, 1884.

⁸

The quantity for 36-00003F is not at issue. However, since the quantities for both 36-00003F and 36-00003M are used in combination, the excess flow analysis considers both quantities together in determining the required diversion rate.

e. Point of diversion - T07S R13E S11 SESENE Within Gooding County.

Water right 36-00003 was decreed with a point of diversion of T07S R13E S11 SESENE Within Gooding County. Water right 36-00003M was split from 36-00003. Therefore, the point of diversion for water right 36-00003M is T07S R13E S11 SESENE Within Gooding County.

f. Purpose of use - irrigation.

The evidence shows that the purpose of use for this claim is irrigation.

g. Place of Use - T07S R13E S27 NWSW 18 acres.

IDWR did not recommend water right 36-00003M because no irrigation was found on the place of use claimed. In reviewing the evidence, it is clear that the place of use claimed was irrigated. The area covered by the claim for water right 36-00003M is depicted in Exhibit 12 as the area highlighted in blue and marked with an "M." The ASCS map indicates that this area comprises 18 acres. The areas covered by water rights 36-00003F and 36-00003M are contingent properties and are both owned by the Simcoes. The areas are irrigated using one sprinkler system. At the time the Simcoes purchased the property in 1991, both areas were being irrigated. Prior to the Simcoes purchasing the property, the property had been owned by the Gardners. Dan McFadden testified that he irrigated the property owned by the Gardners from 1977 to 1987. He testified that all the property had been irrigated, including the property covered under 36-00003M. Therefore, the court finds 36-00003M comprises 18 acres. The 18 acres are located in T07S R13E S27 located in the NWSW of Gooding County. Exhibit 9.

V. CONCLUSION

Subject to any determination of conveyance loss and the possible combining of water rights, the court recommends the following as to the disputed elements:

Edna Rea

36-00003A Quantity - (irrigation) = 1.6 cfs

Quantity - (stock) = 0.02 cfs with a remark that the 0.02 cfs may be used anywhere on the place of use where stock are watered.

Kingston Properties

36-00003B Quantity = 7.16 cfs

Purpose of Use = irrigation, fish propagation, and
stock

36-00003K Quantity = 0.92 cfs

Acres = 7 acres

Owner = Kingston Properties

Lynn and Kathy Babington

36-00003L Quantity = 1.32

Acres = 14 acres

Thomas and Terri Harbison

36-00003D Acres = 8.4 acres

Doyt and Roxie Simcoe

36-00003M Owner = Doyt and Roxie Simcoe

Source = Billingsley Creek

Quantity = 1.76 cfs

Priority Date = September 10, 1884

Point of Diversion = T07S R13E S11 SESENE Gooding County

Purpose of Use = Irrigation

Place of Use = T07S R13E S27 NWSW 18 acres

Water Right 36-00003J - This water right was split into rights 36-00003K, 36-00003L, and 36-00003M. Therefore, water right 36-00003J is recommended as **disallowed**.

IT IS SO RECOMMENDED.

DATED this 27 day of July, 1998.



Fritz X. Haemmerle, Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

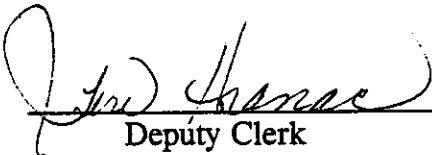
I certify that a true and correct copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed on July 29, 1998, with sufficient first-class postage prepaid to the following:

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