

RECEIVED

OCT 09 1998

10-7

Department of Water Resources

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

1998 OCT 17 PM 2:56

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED 12

In Re SRBA

Subcases: See Exhibit A

Case No. 39576

ORDER DENYING MOTION
TO ALTER OR AMEND
(FACILITY VOLUME)

36-02048
36-02703
36-04013A
36-04013B
36-04013C
36-07040
36-07148
36-07568

I. PROCEDURAL BACKGROUND

This matter is before the court on a *Motion to Alter or Amend* filed by the North Snake Ground Water District (NSGWD). The claims were filed by Clear Springs Foods, Inc. (Clear Springs). These water rights involve fish propagation facilities. The objections to these rights were filed by Clear Springs. There were no other objections or responses filed by any other party. The objections were to remarks. Quantity for these rights was never in dispute. The objections relating to combined use remarks were settled by stipulation between Clear Springs and the Idaho Department of Water Resources (IDWR). The only contested matter dealt with a remark addressing facility volume. IDWR inserted fish facility volume provisions in order to regulate water quality and to regulate fish production. In terms of water quantity, facility volume was not at issue. See *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* (July 31, 1998).

At the time the issue of facility volume was tried before the court, NSGWD never sought to intervene. NSGWD did not file any objections, responses, or motions to participate. After the trial was concluded and the court entered its recommendation, it was discovered that Dave Tuthill's testimony was not recorded. Because NSGWD would not accept the court's findings as to Mr. Tuthill's testimony, the court ordered the retaking of his testimony. It was then that NSGWD sought to file a *Motion to Participate*. That motion was denied because NSGWD never sought to intervene when the testimony was originally taken, and it would have been unfair to allow another party into these cases after the trial had been concluded.

NSGWD now attempts to insert issues into these subcases which were never addressed by Clear Springs or IDWR. In its *Motion to Alter or Amend*, NSGWD raises the following issues:

1. Whether the Special Master erred in deleting facility volume remarks from some of the Director's Reports and, when facility volume was included, whether it was error to include qualifying remarks to facility volume; and
2. Whether it was error not to consider actual beneficial use, partial forfeiture, abandonment, adverse possession, estoppel, seasonal use fluctuations, and other legal principles as those principles relate to the quantity element for the water rights; and
3. Whether it was error to delete combined use and diverted volume remarks without an evidentiary hearing; and
4. Whether diverted volume remarks should indicate the rights actual beneficial use of water.

II. STANDARD OF REVIEW

A motion to alter or amend is treated as a motion under I.R.C.P. 59(e). The purpose of a motion to alter or amend is "correct errors both of fact and law that occurred in its proceedings." *First Security Bank of Idaho, N.A., v. Webster*, 119 Idaho 262, 266, 805 P.2d 468 (1991), citing *First Sec. Bank v. Neibur*, 98 Idaho 598, 603, 570 P.2d 276 (1977). "[M]otions must be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based." *Id.* citing *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 800 P.2d 1026 (1990).

III. DECISION

A. AFFIDAVITS OF DAVID SHAW AND BRETT ROWLEY

As previously mentioned, the purpose of a motion to alter or amend is to correct errors of law or fact that occurred in the proceedings. *Id.* In deciding whether an error of law or fact occurred, the court will evaluate the status of the case as it existed at the time judgment was entered. *Id.* In this regard, parties cannot inject new evidence into the case which was never part of the case when judgment was entered. *Id.* Because the affidavits of David Shaw and Brett Rowley introduce new evidence on new issues, the court **STRIKES** the affidavits.

B. ACTUAL BENEFICIAL USE - FORFEITURE, ABANDONMENT, ADVERSE POSSESSION, ESTOPPEL, AND WAIVER

In this case, NSGWD attempts to inject new issues which were never directly or indirectly issues at the subcase level. Quantity was never in dispute for any of these rights. Nevertheless, NSGWD now attempts to argue that the Clear Springs has the burden to prove their actual beneficial use in order to disprove that all or any portion of their rights have been forfeited,¹ abandoned, or adversely possessed or that the full extent of the right could not be claimed under an estoppel or waiver theory. These allegations are procedurally defective.

As previously mentioned, the quantity element was never in dispute for these rights. In fact, for all the rights except for 36-04013A, 36-04013B, and 36-04013C which are beneficial use claims, the extent of beneficial use for the rights had been confirmed during the licensing process. I.C. §§ 42-217, 219.² Because quantity was not in dispute, Clear Springs did not have the burden of proof on that element.

Since the director's report is prima facie evidence of the nature and extent of the water rights acquired under state law, a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is **in addition to or inconsistent** with the description in a director's report.

I.C. § 42-1411(5) (emphasis added). It is a novel and procedurally flawed notion to suggest that parties have to come forward with evidence where there is no dispute between the Director's Report and claim for a particular element.

For all these reasons, the court will not consider forfeiture, abandonment, estoppel, or adverse possession.

¹ Furthermore, a party alleging forfeiture must prove nonuse of water over a five year period and that water was available to satisfy the entire right. Forfeiture never occurs when circumstances exist, such as a shortage of water, which prevents the full use of the water right. "There can be no abandonment or forfeiture if the non-user is prevented from exercising his right to the water by circumstances over which he has no control. . . ." *Hodges v. Trail Creek Irrigation, Co.*, 78 Idaho 10, 297 P.2d 524 (1956). Here, NSGWD, in its offer of proof and based on its own admission, cannot establish that water was available to satisfy the extent of the rights before the court.

² Some members of the NSGWD had water rights at the time the Clear Springs' licenses were confirmed to be beneficial uses of water. Members of the NSGWD could have contested the licenses and the extent of actual beneficial use at the time the licenses were issued. I.C. § 42-224. Because the issue was not raised, the court will not address whether or not licenses can be contested in the SRBA when licenses could have, but were not, contested during the licensing process.

C. DELETION OF COMBINED USE REMARKS

The Director's Reports for these rights originally contained combined use remarks. The combined use remarks were deleted because IDWR and Clear Springs entered a written stipulation to delete the remarks. Although the remarks were deleted by stipulation, NSGWD alleges that the court should have conducted an evidentiary hearing to determine the validity of the remarks. NSGWD seems to miss the purpose of the legal process. When there is a dispute between parties (In the case of the SRBA, a dispute between a party and IDWR), the ideal situation is for the parties to reach a mutual agreement short of litigating the case. Requiring an evidentiary hearing in cases where settlements are reached would be expensive, time consuming, and result in a complete chill on the settlement process. This is particularly true since the party requesting the hearing, in this case NSGWD, did not file a timely objection or response.

This Special Master will not force parties to present evidence where the party has settled the case with IDWR.³

D. ISSUES NOT RAISED IN THE MOTION TO ALTER OR AMEND

Motions to alter or amend must contain a statement of the issues raised in the motion, *Administrative Order 1*, Section 13(3). Here, NSGWD's *Motion to Alter or Amend* does not raise the issue of whether the court erred in admitting evidence or whether certain claims had to be amended. Because these issues were not properly raised, they will not be considered.

IV. CONCLUSION

NSGWD's strategy in these cases is troublesome. At no time did NSGWD file a timely objection or response to these water rights when the Director's Report was originally filed. NSGWD had a second chance to file objections or responses as a matter of right when IDWR was removed as a party. Regardless, NSGWD made a strategic decision not to become involved. Therefore, the water rights proceeded to trial on the issues that were timely raised by Clear Springs. After the trial was completed and the court had entered its findings, NSGWD now attempts to inject issues into the case which were never directly or indirectly raised. Parties who are concerned about other water rights must file timely objections or responses. The whole objection and response procedures are designed so that parties may fairly become involved in subcases and raise issues that concern them.

³

The risk of entering into so-called "sweatheart deals" is prevented because all settlements must be endorsed by IDWR, as the independent expert.

It is entirely unfair for a party to make an election not to become involved during the trial phase of a case, sit back and see how a case develops, and then intervene in a motion to alter or amend only if the outcome of the trial or settlement process does not suit that party. If parties do not become involved in the subcase, they take the case as it stands at the time judgment was entered. *First Security Bank of Idaho, N.A., v. Webster*, 119 Idaho 262, 266, 805 P.2d 468 (1991).

NSGWD's *Motion to Alter or Amend* is **DENIED**.

IT IS SO ORDERED.

DATED this 7 day of October, 1998.



FRITZ X. HAEMMERLE, Special Master
Snake River Basin Adjudication

EXHIBIT A

36-02048
36-02703
36-04013A
36-04013B
36-04013C
36-07040
36-07148
36-07568

CERTIFICATE OF MAILING

I certify that a true and correct copy of **ORDER DENYING MOTION TO ALTER OR AMEND (FACILITY VOLUME)** was mailed 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

Josephine Beeman
Dana Hofstetter
PO Box 1427
Boise, ID 83701-1427

Patrick Brown
812 Shoshone St. East
Twin Falls, ID 83301

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

John Hepworth
Hepworth, Lezamiz & Hohnhorst
P O Box 389
Twin Falls, Idaho 83303-0389

Daniel V. Steenson
P O Box 2773
Boise, Idaho 83701


Deputy Clerk