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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	**Subcases: 36-00039C, 36-00039J, and 36-00039P** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. PROCEDURAL BACKGROUND

The water rights before the court are as follows: 36-00039C, Dick and Sigrid Veenendaal, claimants; 36-00039J, Mark and Susan Potter, claimants; and 36-00039P, Bruce and Mary Bothwell, claimants. The disputed elements for each of the water rights are as follows:

36-00039C - quantity; 0.28 cfs claimed; 0.03 recommended

36-00039J - quantity; 0.28 claimed; 0.03 recommended
purpose of use; stock water, irrigation, domestic, and aesthetic (all on 2 acres) claimed; only domestic recommended

36-00039P - quantity; 0.14 claimed; 0.03 recommended
purpose of use; irrigation, stock water, and aesthetic (all on 1 acre) claimed; only domestic recommended.

II. FINDINGS OF FACT

1. The water rights are located in the Hagerman Valley. All the claimants own property in Willowbrook Subdivision (Subdivision). The Subdivision was built prior to 1987. The land for the Subdivision was once an irrigated field. The water right on that irrigated field is a decreed right under the *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (*International Mortgage Decree*). The original decreed right was assigned water right number 36-00039. The amount decreed to the land was 2.4 cfs. Eleven rights were split

from the original right. The total amount claimed under the 11 rights is 2.02 cfs. Therefore, the total amount claimed does not exceed the total amount decreed for the same place of use.

2. The water for all the rights at issue is diverted out of Billingsley Creek. It then runs 1,400 feet down the Buckeye Ditch. The conveyance loss for water running down the Buckeye Ditch is 0.35 cfs. The water is then diverted out of the Buckeye Ditch into Willowbrook Creek. The conveyance loss in this ditch is unknown. The Idaho Department of Water Resources (IDWR) did not factor into its recommendations any measurable conveyance loss. Generally, IDWR uses a pro rata method to determine conveyance loss. *See e.g.*, ***Findings of Fact and Conclusions of Law*** (Subcase 36-00064B, June 1, 1998)

3. Willowbrook Creek is rock lined. Numerous trees grow along the ditch. The combination of the ditch and the trees which grow along the ditch serve as an important part of the landscaping for the Subdivision.

4. The soil located on the places of use is very sandy. Furthermore, all the rights are located in the Hagerman Valley which has a hot climate compared to the rest of the State.

5. (Finding for water right 36-00039J). Mr. Potter testified that his place of use is 2 acres. As of 1987, Mr. Potter testified that numerous uses were in place including irrigation and stock watering. Another purpose served by the water in 1987 was the furtherance of aesthetic values as evidenced by a pond located on the place of use where fish are raised. The water also serves a heat pump for a domestic use.

6. (Finding for water right 36-00039P). Mr. Bothwell is the owner of the property where 36-00039P is used. He has been familiar with the property as early as 1986. Mr. Bothwell testified that the ditch and the trees, nourished by the water from the ditch, add value to his property. He concedes that he does not use his property for stock purposes. The property, consisting of 1 acre, is irrigated using siphon tubes.

7. Enhancing aesthetic values is a beneficial use of water. IDWR has issued at least 114 licenses which include "aesthetic" or "aesthetic storage" as a purpose of use. *See, Affidavit of Donald V. Shaff.*

III. CONCLUSIONS OF LAW

A. QUANTITY

Quantity was in dispute for all the water rights. 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.

In this case, the only evidence for the on-field requirement was that contained in the Director's Report. Since IDWR did not include any conveyance loss for these water rights, the court presumes that IDWR's entire recommendation was dedicated to on-field water requirements. For these rights, IDWR reported 1.5 inches (0.03 cfs) per acre as the on-field requirement for these rights. The claimants did not present any evidence of the proper on-field requirements for their rights.

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.[1] 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

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

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. 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 did not factor in any conveyance loss for these water rights, it would be impossible for water to be delivered to its place of use. 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. In this case, there is no dispute that it takes 0.35 cfs of conveyance loss to deliver all the water rights down the Buckeye Ditch to the headgate of Willowbrook Creek.[2] The

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[2] There is no evidence on the conveyance loss of Willowbrook Creek.

total quantity for the water rights shall be the conveyance loss plus the on-field requirements of 0.03 cfs per acre.[3] The quantity for these rights should be reported as follows:

36-00039C **Quantity: 0.41 cfs.**

Of the total quantity, 0.35 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.

36-00039J **Quantity: 0.41 cfs.**

Of the total quantity, 0.35 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.

36-00039P **Quantity: 0.38 cfs.**

Of the total quantity, 0.35 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.

All the amounts determined by the court exceed the amount claimed. If the claimants accept these quantities, they will be required to amend their claims. If the claims are amended, the court will allow further objection and response periods. In lieu of accepting the full amount of conveyance loss, the claimants have the option of accepting the full on-field requirements with less conveyance loss. Under this scenario, the quantities would be reported as follows:

36-00039C **Quantity: 0.28 cfs.**

Of the total quantity, 0.22 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.

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3 For example, the quantity for 36-00039C is calculated by adding the conveyance loss of 0.35 cfs to the on-field requirement of 0.06 cfs (2 acres x 0.03 cfs per acre) which equals 0.41 cfs.

36-00039J **Quantity: 0.28 cfs.**

Of the total quantity, 0.22 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.

36-00039P **Quantity: 0.14 cfs.**

Of the total quantity, 0.11 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.

If the claimants accept these quantities up the limit of the current claims, the water rights may proceed to recommendations once season of use is determined.

B. QUANTITY IN EXCESS OF 0.02 CFS PER ACRE - I.C. § 42-220

Each of the rights at issue, as recommended, exceed one inch per acre (0.02 cfs). The court is required to make findings if an amount exceeds one inch per acre.

> [N]o license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water . . . unless it can be shown to the satisfaction of the department of water resources in granting such licenses, and to the court in making such decree, that a greater amount is necessary.

I.C. § 42-220.

Under I.C. § 42-1411(5), the Director's Report is *prima facie* evidence of the water right. The term "*prima facie*" means that there is sufficient evidence before the court "to justify a finding of the matter in question by the trier of fact." D. Craig Lewis, IDAHO TRIAL HANDBOOK, § 10.2, at 102 (1st ed). "The determination of facts by the Director is presumptively correct." *In Re SRBA Case 39576* (Enlargement), 129 Idaho 454, 462, 926 P.2d 1301 (1996); *see also, In Re SRBA Case 39576* (24 Hagerman Subcases) at 418. What this means is that the court can conclude from the Director's Report that any water recommended by the Director in excess of one inch per acre (0.02 cfs) is a beneficial use of water.

In addition to the Director's Report, it is clear that more than 0.02 cfs is required for these rights. The soil introduced by the claimants is very sandy. In fact, the soil appears to be beach sand.

Because of the nature of the soil and the fact that the climate in the Hagerman Valley is generally hotter than the rest of the State, more than 0.02 cfs is necessary to irrigate the land at issue.

For these reasons, the court finds that the water rights which exceed one inch per acre (0.02 cfs) do constitute a beneficial use of water.

C. PURPOSE OF USE AND NUMBER OF IRRIGATED ACRES

All the water rights arise from water right 36-00039 which was decreed in 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 claimed purposes of use, which were not contained in the Director's Report, 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."[4] The SRBA was commenced on November 19, 1987. Consistent with the uses in place as of this day, the court finds as follows:

36-00039J 2 acres; stock water, irrigation, domestic, and aesthetic. *See Findings of Fact*, ¶ 5.

36-00039P 1 acre; irrigation, domestic, and aesthetic. *See Findings of Fact*, ¶ 6.

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. Furthermore, 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." In evaluating prior decrees and undefined elements of

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[4] 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 decree 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."

prior decrees, IDWR seemingly ignores conditions which existed as of the commencement date, November 19, 1987. The statutory directive of I.C. § 42-1427(1)(a) is clear: If a water right is based on a prior decree and the prior decree has undefined elements, IDWR must look at conditions which existed on a particular place of use as the commencement date of the SRBA, November 19, 1987, in order to determine the undefined elements.

Therefore, IT IS RECOMMENDED that these rights be decreed with the elements as set forth herein.

DATED October 16, 1998.

Fritz X. Haemmerle, Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed October 16, 1998, with sufficient first-class postage to the following:

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