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 DEPT. OF WATER SUPPLY
 TWIN FALLS, 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	)	Subcases: 34-00060, 34-00259F,
	)	34-00738E, 34-02412C, and 34-13562
Case No. 39576	)	
	)	FINDINGS OF FACT AND ORDER
_____	)	

I. PROCEDURAL BACKGROUND

Water rights 34-00060, 34-00259F, 34-00738E, 34-02412C, and 34-13562 were claimed in the Snake River Basin Adjudication by Larman Anderson. These water rights were recommended with the following quantities. Water right 34-00060 was recommended with quantity of 1.5 cfs; water right 34-00259F was recommended with quantity of .42 cfs; water right 34-00738E was recommended with quantity of .52 cfs; and water right 34-02412C was recommended with quantity of 3.52 cfs. The total of those combined quantities is 5.96 cfs. However, the *Director's Report* recommended these rights with a combined diversion limitation of 4.13 cfs which is less than the total combined flow rate of these water rights. Anderson filed a timely objection to the combined diversion rate limitation.¹

A trial was held April 4, 1997. IDWR was called as a witness pursuant to I.R.E. 614 and testified regarding the basis for the combined diversion limitation. Claimant Larman Anderson testified regarding his historical water use and maintained that there should not be a combined diversion limitation.

¹ There was one additional disputed element for water right 34-13562: priority date. The claimant and IDWR stipulated at trial to change the priority date for 34-13562 to May 1, 1928.

II. STANDARD OF REVIEW

A. AMENDED DIRECTOR'S REPORT

The trial focused on whether these water rights should be subject to a combined diversion limitation of 4.13 cfs as recommended in the *Amended Director's Report*. The "prima facie" status accorded the *Director's Report* in I.C. § 42-1411(4) is a rebuttable evidentiary presumption. *In re SRBA Case No. 39576*, 128 Idaho 246, 255-56, 912 P.2d 614, 623-24 (1995); *see also Fremont-Madison Irr. Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996) ("The determination of facts by the Director is presumptively correct.") Giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *Prima facie* proof does not shift the burden of persuasion on an issue. *Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956); D. CRAIG LEWIS, *Idaho Trial Handbook* §§ 1.4 - 12.7 (1995).

The evidentiary presumption which arises through the *Director's Report* shifts only the burden of production. "When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue." *State v. Hagerman Water Right Owners, Inc.*, 1997 WL 564393 at 9. The *Director's Report* is *prima facie* evidence, and the facts contained therein are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption. While evidence presented by the claimant may dispel the presumed "correctness" of the facts contained in the *Director's Report*, the facts contained in the *Director's Report* still exist. Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant. *Id.* at 9.

B. REDUCTION OF WATER RIGHTS

IDWR does not dispute that Anderson has continuously used the full quantity of his vested rights. IDWR's conclusion in the *Director's Report* is not based on failure to use all or part of these rights. IDWR seeks to reduce these rights because it believes Anderson should farm more "efficiently." IDWR concluded that using the full quantity of Anderson's rights is not a "reasonable beneficial use." IDWR's recommendation is based on computer modeling, which calculates a theoretical quantity it believes is sufficient if Anderson improves his irrigation system.

The Idaho Supreme Court has not directly addressed whether water rights may be reduced under a "reasonable beneficial use" analysis. However, the Supreme Court recently addressed the reduction of water rights in *State v. Hagerman Water Right Owners, Inc.*, 1997 WL 564393. The Court listed the ways in which a decreed water right may be lost or reduced when re-examined:

[D]ecreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, abandoned, or lost through adverse possession. . . .

Id. at 4 (citations omitted). The Court appears to give a comprehensive list of the ways in which a vested water right may be lost. Reduction based on "reasonable beneficial use" was not recognized.

C. BURDEN OF PERSUASION

Anderson has the burden of persuasion as to whether these rights are subject to a combined right limitation of 4.13 cfs. In the absence of special considerations, the preponderance of evidence standard controls in civil cases. The burden of proof falls on the party who is asserting the claim or relying on an affirmative defense. Anderson asserted a claim to these water rights and contested the *Director's Report*. Anderson must prove by a preponderance of evidence that these rights should not be subject to the combined right limitation of 4.13 cfs.

III. FINDINGS OF FACT

The land to which water rights 34-00060, 00259F, 34-00738E, 34-02412C, and 34-13562 are appurtenant is owned by Larman Anderson. Anderson has irrigated his farm using a border irrigation system for more than 60 years. (Testimony of Larman Anderson.)

A border system uses surface water applied by gravity. Borders of earth are built up at intervals to guide water down the field. The borders in Anderson's field are about 60 feet apart. (Testimony of Larman Anderson.) Using the full quantity and additional water in rotation, Anderson can irrigate in about two hours. The Anderson field cannot be adequately irrigated using the current border system with the limitation of 4.13 cfs recommended in the *Director's Report*. With the proposed limitation of 4.13 cfs, it would take much longer and possibly the water would not reach the end of the field for as long as 10 days. (Testimony of Larman Anderson.)

IDWR's recommendation of a combined diversion rate of 4.13 cfs was calculated by IDWR engineer Jeff Peppersack. Mr. Peppersack calculated the combined diversion limitation using a scientific methodology known as the "Hubble Analysis." The Hubble Analysis generates a theoretical quantity of water needed on a farm. (Testimony of Jeff Peppersack; Exhibit 1.)

The Hubble Analysis accounts for multiple variables which could affect water requirements including: type of irrigation system, type of soil, type of crops, root depth, field length, "set times" (the period of time for irrigating), conveyance losses (losses incurred in getting the water from the point of diversion to the farm), and evapotranspiration rates (the amount the plant uses plus the amount which evaporates from the soil surface). (Testimony of Jeff Peppersack.)

Peppersack integrated the variables using a computer program designed to calculate field application efficiency. The program, however, was not designed for border irrigation systems. (Testimony of Jeff Peppersack.) A program exists for border systems, but IDWR did not use it because it concluded that border systems are inefficient. Instead, a program for furrow irrigation systems was substituted. (Testimony of Jeff Peppersack.) IDWR maintains that a furrow system is fairly similar to a border system and is a more efficient way to irrigate. After performing calculations based on the Hubble Analysis, Mr. Peppersack formed the opinion that the amount of water which can be beneficially used on the Anderson farm is 4.13 cfs. (Testimony of Jeff Peppersack.)

The Hubble methodology, however, has changed several times since *Director's Reports* have been submitted in the test basins. Prior to reaching the calculation of 4.13 cfs, Peppersack calculated the reasonable beneficial use at Anderson's farm at a higher diversion rate of 4.64 cfs. (Testimony of Peppersack; Exhibit A.)

Mr. Peppersack has never been to Anderson's farm nor observed the irrigation system from which Anderson irrigates. He did not consider the historical use of water at the Anderson farm and did not compare historical use to his recommendation. IDWR believes Anderson's farm should be irrigated more efficiently by splitting the field in half or thirds by introducing cross ditches or another pipeline. (Testimony of Jeff Peppersack.)

Anderson maintains his historic irrigation system is efficient and that a furrow system is less efficient. Anderson considered changing from borders to a corrugation or furrow system, but rejected both alternatives due to economic factors. With a border system, the land between borders is smooth.

With furrows or corrugates, land is broken and uneven. Some crop loss occurs on corrugated land due to matting down of hay in the furrows which is not picked up by farm equipment. There is an 8 or 10 bushel-per-acre loss in grain fields due to furrows. Furrows and corrugates cause expensive wear and tear on equipment which does not occur with a border system. In addition, if the farm were corrugated, it would take about one-third longer to irrigate. (Testimony of Larman Anderson.)

Anderson stays up all night when irrigating so that he does not "pond" or waste water. He has always carefully monitored his irrigation to avoid waste, and he has not wasted water. (Testimony of Larman Anderson.)

IV. CONCLUSIONS OF LAW

A. UNCHANGED ELEMENTS

All elements for these water rights are **unchanged** except for the description contained in the *Director's Report* which recommends a combined diversion rate restriction and the stipulated priority date of May 1, 1928 for 34-13562. No other elements were challenged.

1. Amended Director's Report

The conclusion contained in the *Amended Director's Report* that these water rights should be subject to a combined diversion limitation of 4.13 cfs was given "prima facie" weight. Anderson's testimony that 4.13 cfs was inadequate to irrigate his farm rebutted the presumption, and the presumption disappeared. *State v. Hagerman Water Right Owners, Inc.*, 1997 WL 564393 at 9. Although the *Amended Director's Report* contained only a bare conclusion leaving no facts to be weighed once the presumption disappeared, evidence supporting the *Director's Report* was introduced at trial and weighed by the court in reaching its conclusion.

2. Reduction of Water Rights

The Idaho Supreme Court has not directly addressed the question of whether vested water rights in Idaho may be reduced based on a reasonable beneficial use analysis of theoretical efficiency. The Idaho Supreme Court has limited ways in which a vested water right may be reduced to forfeiture, abandonment, and adverse possession. *State v. Hagerman Water Right Owners, Inc.*, 1997 WL 564393 at 4. No evidence of forfeiture, abandonment, or adverse possession are of record for these subcases. In fact, IDWR does not dispute that Anderson has historically used the full quantity of his rights

The Idaho Supreme Court has, like courts in other western states, prohibited water users from wasting water. *Blaine County Inv. Co. v. Mays*, 49 Idaho 766, 773 291 P. 1055 (1930) (Using water to flood fields to form ice to the depth of several feet for preservation of soil moisture is not a beneficial use.

However, the Hubble Analysis goes beyond traditional notions of prohibiting waste. The Hubble Analysis provides a theoretical calculation of the quantity a water user should need if he improves his historical irrigation system to comply with IDWR standards of "reasonable efficiency." The Hubble Analysis did not account for historic use and disregarded the type of irrigation system historically used. The policy of requiring "optimum efficiency" from water users has not been recognized by the legislature or the Idaho Supreme Court. This court declines to adopt this requirement as law where neither the legislature nor the Idaho Supreme Court has adopted the policy. Anderson did not waste water by using his full quantity. Anderson's right has not been reduced or lost due to abandonment, forfeiture, or adverse possession.

3. Burden of Persuasion

The claimant Larman Anderson has the burden of persuasion on the issue of whether these rights should be subject to a combined right limitation of 4.13 cfs. Even if water rights in Idaho can be reduced based on theoretical efficiency standards, the court is persuaded by a preponderance of evidence that the combined right limitation of 4.13 cfs should not apply to these rights. Despite the extensive list of variables IDWR integrated in the Hubble Analysis, the court was persuaded by evidence of the historic requirements for the Anderson farm over a 60-year period. Computer modeling and theoretical calculations can be important

scientific tools. Computer modeling is not infallible, and can be outweighed by observation.

Modern science relies heavily on computer-generated calculations, but the limitations of these calculations are widely known. For example, the science of meteorology currently employs detailed and complex inputs and uses powerful computers. Satellite photography and calculations using powerful computers have made weather prediction fairly reliable for some purposes; however, meteorologists still cannot always predict whether it will rain. That is because the slightest imprecision in the meteorologist's knowledge of the input data, such as winds and the position of clouds even a few hours earlier, can render a prediction of tomorrow's weather useless. MURRAY GELL-MANN, *The Quark and the Jaguar: Adventures in the Simple and the Complex* 26 (1995).

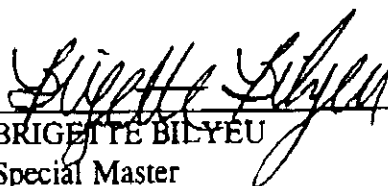
Scientists have always valued observation as a primary analytical tool. Observation and experience are replete with information, and in these subcases Anderson's observations and experience over 60 years were persuasive. The Hubble Analysis is undoubtedly a useful engineering tool. But this court is not persuaded that it is superior to a lifetime of observations on the Anderson farm.

B. CHANGED ELEMENTS

This special master recommends the decree for these rights should not include a combined diversion rate of 4.13 cfs. All other elements are recommended as reported in the *Amended Director's Report* for each right, except for the priority date for 34-13562 which is recommended as May 1, 1928 as stipulated.

IT IS ORDERED that on or before November 24, 1997, IDWR shall submit *Special Master's Recommendations* for water rights 34-00060, 34-00259F, 34-00738E, 34-02412C, and 34-13562.

DATED November 12, 1997.

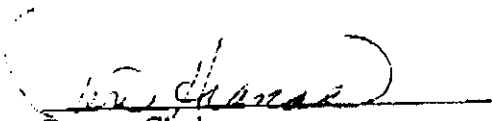

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of FINDINGS OF FACT AND ORDER was mailed on November 12, 1997, with sufficient first-class postage prepaid to the following:

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Deputy Clerk