

**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 Nos. 36-00003A, 36-00003B,
	)	36-00003C, 36-00003F, 36-00003K, 36-
Case No. 39576	)	00003L and 36-00003M
	)	
	)	ORDER ON STATE OF IDAHO'S
	)	MOTION FOR
	)	RECONSIDERATION AND/OR
_____	)	MOTION FOR CLARIFICATION

Appearances:

Mr. Peter J. Ampe, Deputy Attorney General, Natural Resources Division, Attorney for the State of Idaho.

Ms. Dana L. Hofstetter, Beeman & Hofstetter, P.C., Attorney for North Snake Ground Water District, May Farms, Ltd., and Faulkner Land and Livestock Company.

Mr. Patrick D. Brown, P.C., Attorney for Lynn Babington, David Kingston, Edna Rea (Verl Bell), and Doyt Simcoe.

**I.
BRIEF PROCEDURAL BACKGROUND**

1. On November 23, 1999, this Court issued its *Memorandum Decision and Order on Challenge* ("Memorandum Decision") in subcase nos. 36-00003A, 36-00003B, 36-00003C, 36-00003F, 36-00003K, 36-00003L and 36-00003M.
2. On December 8, 1999, the State of Idaho filed a *Motion for Reconsideration and/or Motion for Clarification*. The State of Idaho's motion is limited to part XII, issue no. 11., of the *Memorandum Decision*, which states as follows: "With respect to 36-

00003B, should a fish propagation purpose of use have been recommended as of the claimed priority date of September 10, 1884?"

II. MATTER DEEMED FULLY SUBMITTED FOR DECISION

The State of Idaho filed this motion on December 8, 1999. There having been no responses and/or additional briefing filed and the Court having requested none, this matter is deemed fully submitted for decision on the next business day, or December 9, 1999.

III. ISSUES RAISED/RELIEF REQUESTED

The issues and related arguments raised by the State of Idaho can be paraphrased as follows (i.e., the State's assertions are):

1. That this Court's ruling does not address the limitations imposed on the claimants by the pleadings in the case of *New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity no. 1602 (1932); and,
2. That this Court's ruling may also be interpreted as allowing a new use (fish propagation) to obtain a priority date prior to the date the new use began.

The State of Idaho requests that this Court reconsider its order on challenge regarding these two issues. In the alternative the State seeks clarification regarding the second issue.

IV. DECISION

1. **LIMITATIONS IMPOSED BY THE PLEADINGS**

The State of Idaho asserts that the decree entered in *New Int'l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932) ("New Int'l Decree" or "Decree") did not include a fish propagation purpose of use in any water right decreed to the predecessor(s)-in-interest of Kingston Properties L.P., the claimant of water right 36-00003B ("Kingston"), because such specific use was not claimed by Kingston's predecessor(s)-in-interest in that litigation. In essence, the State's argument is that irrespective of what the "other purposes" language in the New Int'l Decree may mean for other water rights adjudicated therein, "other purposes" does not include "fish propagation" for water right no. 36-00003B, because the New Int'l pleadings, and stipulation only speak to "irrigation," cultivation," "production of ordinary agricultural crops," and the like. Therefore, the State argues, Kingston is bound by the "purpose of use" statements found in these various documents, none of which make any mention of "other purposes" or "fish propagation."

As a preliminary matter, and as discussed in this Court's *Memorandum Decision*, although Kingston has not yet connected its title to any water right decreed in the New Int'l Decree, it appears that the land presently owned by Kingston is within the places of use originally decreed to the plaintiff, New International Mortgage Bank (the 03 right) and to one of the defendants/counter-claimants, Harlan Bell (the 019 and 020 rights). These subcases have been recommitted to Special Master Cushman for further proceedings for the purpose of determining ownership of the water rights involved in these subcases. Therefore, because the water right claim at issue may involve either the 03 right and/or the 019 / 020 rights, it is necessary to discuss the purpose of use as it pertains to both of these New Int'l rights. It should be noted that there are variations in the "purpose of use" statements which are scattered about in the New Int'l Decree and its underlying documents. However, as it relates to the subcase at issue, these variations are immaterial as the "other purposes" language contained in the Decree pertains to the described 03 right as well as the 019 / 020 rights.

This Court previously ruled that the New Int'l Decree had limited probative value or otherwise lacked specificity with respect to describing the purpose of use element for the water rights decreed therein. Although the New Int'l Decree clearly established "irrigation" and "domestic" as purposes of use, the "other purposes" language was not otherwise defined. Thus, this Court ruled that a party claiming a purpose of use other than irrigation or domestic under the "other purposes" language could present evidence regarding the purpose of use in existence at the time the Decree was entered. The State of Idaho asserts that notwithstanding the "other purposes" language contained in the Decree, the 36-00003B water right should be limited to the purposes of use expressly stated in the pleadings and the stipulation for decree filed in the case. This Court disagrees with the assertion for several reasons.

First, the Idaho Supreme Court has also recognized that the subject New Int'l Decree "describes the required elements of the water rights under I.C. 42-1409 **except** for consumptive use, period of use, amount of irrigated acreage **and some lack of explicit use.**" *State v. Hagerman Water Right Owners*, 130 Idaho 736, 738, 947 P.2d 409, 411 (1997)(emphasis added). Thus, this Court is correct as a matter of law in concluding that the Decree does not adequately or fully define the purpose of use element. In other words, it cannot be concluded that the Decree limits purpose of use to only irrigation and domestic.

Next, in attempting to interpret the intent behind the "other purposes" language, the Court does not have before it the complete record from the *New International* case (including a Reporter's Transcript of all hearings before the Court). As such, this Court cannot determine the motivation behind including the "other purposes" language in the Decree. The Court has taken judicial notice of those items contained in section III of the *Memorandum Decision*. The Stipulation, Answer and Counterclaim do not include the "other purposes" language as pointed out by the State. However, contrary to the State's assertion, the prayer in the Complaint does in fact contain the "other purposes" language as applied to the defendants in the case. *See Complaint in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of

the District of Idaho, In Equity No. 1602 (1932). Additionally, the findings of fact and the conclusions of law entered by the New Int'l Court on March 22, 1932, reference irrigation, domestic and "other purposes" as purposes of use for the described property pertaining to the 03 right and the 019 / 020 rights. *See Findings of Fact in New International Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern Division of the District of Idaho, In Equity No. 1602 (1932). The foregoing lends further credence to the assertion that the "other purposes" language was intended to be included in the Decree and applied to the subject water rights as opposed to the situation of a Court acting outside the scope of its jurisdiction or otherwise including the language in the Decree as an after-thought.

Further, as to any limitations imposed by the New Int'l pleadings with respect to the Answer and Counterclaim for the 019/020 water right, the pleading alleges that the claimed water had been historically used for "agricultural and domestic purposes." Agricultural purposes has a broader meaning than does irrigation and is not strictly limited to the irrigation of crops. Rather, irrigation falls within the broad meaning of agriculture as does fish propagation (i.e., most commonly thought of as some segment of the food production world).

Despite the intent behind including the "other purposes" language in the Decree, the fact is that the language was none-the-less included in the Decree. As such, this Court cannot strike, "blue pencil" or otherwise fail to attempt to give effect to that language. Although, the language appears to lack specificity today, sixty-eight (68) years ago all parties to the Decree may well have fully appreciated the context and meaning of the term. Since historically, the judgment was not appealed from, nor was a motion filed to correct the judgment, this Court is bound by the terms of the judgment even if, as contended by the State, the "other purposes" language in the Decree does not conform to the pleadings or stipulation. Again, however, it should be reiterated that because the "other purposes" provision is contained in both the Complaint and the Findings of Fact and Conclusions of Law it cannot be concluded as a matter of fact that the Decree does not conform to the agreement of the parties. The case law cited by the State in support of

the argument that consent decrees must conform to the agreement or stipulation of the parties is of little assistance in this regard. The authorities cited by the State involve timely appeals from judgments where it was contended that the judgment varied from the agreement of the parties. See e.g., *Bank of Boston Connecticut v. Degroff*, 624 A.2d 904 (Conn. Ct.App. 1993)(holding appeal may be properly taken from refusal of court to grant a motion to correct judgment); *Fisher v. Fisher*, 84 Idaho 303, 371 P.2d 847 (1962)(direct appeal from judgment where court refused to modify judgment to conform with alleged terms of stipulation). In this case, approximately sixty-eight (68) years have elapsed since judgment was entered, and apparently until the SRBA proceedings were under way it remained unchallenged. Thus this Court is without jurisdiction to go back and modify the judgment, assuming the Court were able to determine the full agreement which led to the judgment.

Next, the intent of the parties to the Decree must also be evaluated against the backdrop that in 1932, a specific purpose or nature of use was not an element required for describing a water right. Rather the water right had to be for a beneficial use. Accordingly, many older decrees failed to include a specific purpose of use in describing a water right or did not describe the purpose of use in narrow and discrete terms. The Idaho legislature even recognized this situation in enacting I.C. § 42-1427 which states in relevant part:

The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and the Courts have made this original description of a water right more specific by the addition of other elements.

Thus it logically follows that if a purpose of use element was not historically required to describe a water right in a decree, that the parties to the decree would not be too concerned about concisely pleading, stipulating to, or otherwise narrowly defining purposes of use. Moreover, in the context of a purpose of use for fish propagation which is considered a non-consumptive use of water it is even less likely that the parties would

contemplate the need to expressly include fish propagation as a purposes of use. This is particularly true in the context where the fish propagation is being used as a purpose in conjunction with, or secondary to, irrigation.

Finally, it should be reiterated that this Court's ruling does not give a claimant *carte blanche* to rely on the Decree and the "other purposes" language to support any presently existing purpose of use. Rather, because of the lack of explicitness as to the purpose of use (at least as to a claim other than for irrigation or domestic), this Court ruled that the claimant must present evidence as to purpose of use at the time the Decree was entered. Also, this is not to say that the claimant is entitled to ignore the intervening sixty-eight years of conduct regarding purpose of use in proving up the water right. As such, the purpose of use originally decreed could have been changed, abandoned or forfeited in the interim period. *See State v. Hagerman Water Right Owners Inc.*, 130 Idaho 736, 741, 947 P.2d 409 (1997)(decreed water rights are not insulated from reexamination by the court and may be lost or reduced based on evidence that right has been forfeited, abandoned or lost through adverse possession).

For the foregoing reasons, this Court disagrees that the claimants to 03 right (and the 019 / 020 rights) are automatically limited to the purpose of use for irrigation or domestic stated in the pleadings and in the Stipulation. Stated another way, this Court refuses the State's request to automatically apply the more strict 1999 legal requirements, which have evolved over time, to the legal climate in 1932 relative to defining purpose of use.

2. THE APPROPRIATENESS OF THE PRIORITY DATE

The State next argues that even if the Court finds that fish propagation is a purpose of use under the Decree, that the evidence presented by the Claimant only established the existence of the fish ponds as early as the 1920's. The State argues that since the Decree contains an 1884 priority date, this Court is in effect impermissibly granting an 1884 priority date for a purpose of use that could only be proved to exist as early as the 1920's. Again, this Court disagrees.

The basis for the claimed water right is the Decree. At issue is the interpretation of the Decree as to the purpose of use. The evidence presented as to purpose of use went to the interpretation of the “other purposes” language. Hence a claimant is not required to go back and attempt to prove the purpose of use as of the priority date contained in the Decree and essentially relitigate the case despite the absence of contrary evidence. Rather, given the “other purposes” language it is sufficient that the purpose of use be shown at the time the Decree was entered. Again, the Court is interpreting the Decree, not requiring the relitigation of the underlying merits of the Decree.

Contrary to the State’s assertion, despite the evidence only showing the existence of the fish ponds in the 1920’s, having the fish propagation right decreed with an 1884 priority date would not constitute an enlargement in use. As stated above, the Court is interpreting the Decree as opposed to having the merits relitigated by the claimant. Obviously it would be to the claimant’s benefit to able to prove the purpose of use back to the priority date as decreed. However, this Court ruled that the “other purposes” language included the purpose of use in effect at the time the Decree was entered. This Court is not setting the priority date based on the evidence presented today. Rather, the Decree in 1932 set the priority date of 1884 for irrigation, domestic and other purposes. An enlargement in use would also not occur because historically a water user could change the purpose of use for a water right and still maintain the same priority date so long as other water users were not injured. Although this issue has never been squarely addressed in Idaho¹, other jurisdictions (including federal) have historically applied the common law “no injury” rule to changes in purpose of use. Idaho however has relied on authority from other jurisdictions in applying the no injury rule in conjunction with changes in the point of diversion. In *Hard v. Boise City Irrigation and Land Co.*, 9 Idaho 589, 76 P. 331 (1904), the Idaho Supreme Court stated (with emphasis):

¹ In *Beker Industries Incorporated v. Georgetown Irrigation District*, 101 Idaho 187, 192, 610 P.2d 546, 551 (1980), the Idaho Supreme Court acknowledged the absence of any Idaho cases addressing the issue where the purpose of use for a water right has been changed from one category, delineated in Article 15 § 3 of the Idaho Constitution such as agriculture, to another category such as mining.

That persons entitled to the use of water may change the place of diversion if others are not injured by such change seems to be the universal rule, the test always being: 'If others are not injured by such change.'

In *Romelli v. Irish*, 96 Cal. 214, 31 Pac. 41, a California case, it is said: 'It is also settled law that persons entitled to the use of water may change the place of diversion or place where it is used, **or the use to which it was first applied if others are not injured by such change.**'

The following strong language is used in *Union Mill etc. Co. v. Dangberg*, 81 Fed., page 115: 'A party having obtained the prior right to the use of a given quantity of water is not restricted in such right to the use or place to which it was first applied. It is well settled that a person entitled to a given quantity of the water of a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, **and may also change the character of its use if the rights of others be not affected thereby.**

Id. at 598.

Although *Hard* did not address the issue of purpose of use, the Court clearly adopted the "no injury" rule which, in accordance with the authorities relied on by the Court, also applies to changes in purpose of use. It is incongruous that the Court would adopt the general rule only partially by refusing to apply the no injury rule to changes in purpose of use. This is especially true in light of the fact that a discrete purpose of use was historically not used to describe a water right. See I.C. § 42-1427. Furthermore, the legislature has also adopted the no injury rule as it pertains to changes in nature of use. See I.C. § 42-222; I.C. 42-1425-1426.

In *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937), the Idaho Supreme Court held that the no injury rule applied to changes in purposes of use that are within the generically described classifications of purposes of use set forth in Article 15 § 3 of the Idaho Constitution. Article 15 § 3 of the Idaho Constitution lists domestic, mining, manufacturing, and agricultural as beneficial purposes. Idaho Const. Art. 15 § 3. The Court in *Zezi* upheld the change of purpose of use within the generic classification of mining. Specifically, that the change from one type of mining to another type of mining does not invalidate an appropriation for mining purposes. *Id.* at 712, 68 P.2d at 55. This holding was reconfirmed in *Beker Industries Inc. v. Georgetown Irrigation District*, 101

Idaho 187, 192, 610 P.2d 546, 551 (1980). In *Beker*, the Court distinguished between water use changes occurring within a generic category from the situation where a water user changes generic uses (e.g. mining to agriculture). In the instant case, of the four generic purposes of use mentioned in the Idaho Constitution, fish propagation most correctly fits under the classification of agriculture, as does irrigation. Accordingly, any change in purpose of use from irrigation to fish propagation would be considered a change within the generic or collective classification of agricultural purpose.² This is also consistent with the broadly stated beneficial purposes listed in the Article 15 § 3 of the Idaho Constitution. Simply put, historically and constitutionally, water rights were not defined in discrete narrow purposes of use. That being said, and given the non-consumptive nature of a fish propagation right, this Court cannot conclude that this Court's interpretation of the "other purposes" language allowed an impermissible enlargement in use by applying an 1884 priority date to the fish propagation right.

Lastly, this Court's ruling is consistent with the legislative policy set forth in I.C. § 42-1427, wherein rather than nullify prior decrees that inadequately defined a water right by present day requirements, the statute provides for a Director's Recommendation based on the purpose of use as of the date of commencement of the SRBA. This policy also could possibly have the effect of enlarging a water right by resulting in the recommendation of a purpose of use that was historically not intended by the decree.

V.

CONCLUSION

For the foregoing reasons, this Court holds that the pleadings in the New Int'l case did not preclude the New Int'l Decree from including fish propagation as a purpose of use under the "other purposes" language as the Decree applies to the 03 or the 019/020

² The Supreme Court of Washington, in *Nuebert v. Yakima-Tieton Irrigation District*, 814 P.2d 199 (1991) addressed a similar issue regarding purpose of use. Specifically, the issue was whether a purpose of use for irrigation also included a purpose of use for frost protection. In finding that irrigation did include the beneficial purpose of frost protection, the Washington Court held that the term "irrigation" implies a construction broader than merely nourishing plant roots. Further, the Court held: "A broad construction of beneficial uses which treats all agricultural uses collectively is also consistent with this state's original appropriation law which provided a right to appropriate water 'for irrigation, mining or manufacturing purposes....'"(citing Laws of 1891, ch. 142, § 1, p. 327).

water rights. Further, that applying the priority date as contained in the Decree to a fish propagation purpose of use does not constitute an impermissible enlargement.

IT IS SO ORDERED:

DATED: JANUARY 11, 2000

BARRY WOOD
PRESIDING JUDGE OF THE SNAKE
RIVER BASIN ADJUDICATION