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JUN 17 2009

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SREA Fifth Judicial District County of Twin Falls - State of Idaho	
JUN 16 2009	
By _____	Clerk
_____	Deputy Clerk

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 75-27L
	)	(Benzon)
Case No. 39576	)	
_____	)	SPECIAL MASTER REPORT

Findings of Fact

Director's Report

The Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, Reporting Area 23, Basin 75* on January 11, 2007. The Director recommended the claim to John A. Benzon, 257 Williams Creek Road, Salmon, Idaho, 83467, for .08 cfs from Williams Creek to irrigate 3.6 acres in Lemhi County from April 1 to November 1 with a priority date of May 1, 1886, based on a decree.

Objections:

Capps – Randy Capps filed an *Objection* on May 7, 2007, alleging water right 75-27L should not exist:

Mr. Benzon has never had water from Williams Creek on his property legally to this date and never from the Highline Ditch legally. . . . However, if water right 75-27L, 1/08/07 is valid by the Idaho Department of Water Resources, I protest the moving of the diversion point of 75-27L from NESWNW Sec. 12 T20N R 21E to T20N R21E S11 NENENE Lot 1.

Capps letter, dated April 24, 2007, attached to *Objection*.

Mr. Capps also attached a two-page letter dated January 24, 2003, from attorney Jerry R. Rigby to Norm Young at IDWR, IDWR's "Adjudication Claim Report 75-27L" dated July 28,

2002, and a certified letter from Kevin Rice, Watermaster, and Bill Gattung, Secretary, Williams Creek Water District 75-B, addressed to Mr. Benzon. Mr. Rice's letter alleged Mr. Benzon was diverting water from the Highline Ditch to his property; the Ditch is a private line; it is illegal for Mr. Benzon to divert water from the Ditch; and continuing diversion from the Ditch will result in legal action.

Gattung – Bill Gattung filed an identical *Objection* the same date with the same attachments except he attached a three-page letter dated December 10, 2002, from attorney Jerry R. Rigby to Robert Foster at IDWR in Salmon, Idaho.

Rice – Kevin Rice filed his *Objection* the same date as well and identical to Mr. Gattung's.

Trial

Trial on the three *Objections* was held on May 27, 2009, at the Lemhi County Courthouse in Salmon, Idaho. Original claimant John A. Benzon is deceased – his son and successor-in-interest, John A. Benzon, Jr., appeared *pro se*; objectors Capps, Gattung and Rice appeared *pro se*; and Garrick L. Baxter appeared for IDWR, along with senior water resource agent Monica Van Bussum and paralegal Suzy Cooley-Denney.

Evidence

At the beginning of trial, counsel for IDWR announced the Director amended his recommended point of diversion where water is diverted from Williams Creek into the Highline Ditch. Mr. Baxter explained the variations between the original claimed point of diversion, original recommendation and amendment:

Claim – T 20N, R 21E, § 12, NE¼ SW¼ NW¼

Original recommendation – T 20N, R 21E, § 11, NE¼ NE¼ NE¼, Lot 1

Amended recommendation – T 20N, R 21E, § 11, NE¼ NE¼, Lot 1

That was the only amendment to the Director's recommendation of Mr. Benzon's claim.

IDWR

Ms. Van Bussum, a senior water resource agent with IDWR for two years, was designated as an expert in water right investigations and recommendations. I.R.E. 702. She

testified that Mr. Benzon's property lies 30'-40' uphill from the public road and can only divert water via gravity from the Highline Ditch located above the property. Water cannot be diverted to the Benzon property via gravity from another ditch called the "Other Wms Ck Ditch" (IDWR Exh. 2) below the property.

Ms. Van Bussum said the Benzon claim for water from Williams Creek is part of an original water right decreed by District Judge F. J. Cowen on October 27, 1919, in a Lemhi County case entitled: *The Estate of George L. Shoup, Limited, An Idaho Corporation v. Ray Edwards*. The *Decree* provided in relevant part:

That the said plaintiff is entitled to the use of 760 inches, or 15 1/5 cubic feet per second in time of the waters of Williams Creek, situated in said County of Lemhi, State of Idaho, with date of priority of May 1, 1886, for the purpose of irrigating said lands and for domestic use.

Shoup *Decree*, IDWR Exh. 3.¹

Ms. Van Bussum said a compelling document from IDWR's records supporting the Director's recommendation of 75-27L was a June 4, 1974 *Affidavit* by Richard M. Shoup. In the *Affidavit*, Mr. Shoup said he was then a resident of Lemhi County for 74 years. He was familiar with a 4.8 acre parcel once owned by the Shoup family and now owned by Mr. Benzon. He wrote:

That your affiant knows of his own knowledge that said parcel of ground was under cultivation and hay was grown from 1913-1917 Until [sic] the year of 1917. That during the time the land was under cultivation there was a ditch which carried water from Williams Creek to said land.

That the ditch carried 25 inches of water and that 1 inches [sic] of water per acre was necessary to irrigate said premises.

That said parcel of ground is a portion of the real property described in a certain Decree dates October 27, 1919, wherein the water of Williams Creek was decreed, and that said lands are a portion of the real property which was granted a priority date of May 1, 1888.²

IDWR Exh. 4.

¹ The *Decree* also contained a lengthy description of the land owned by Mr. Shoup's estate, known as the Shoup Ranch. No one contested the fact that Mr. Benzon's property and his claimed place of use were part of the Shoup Ranch to which the *Decree* adjudicated water from Williams Creek.

² Mr. Gattung objected to IDWR Exhibit 4 because there was only Mr. Shoup's typed signature, but the exhibit was admitted under I.R.E. 803(8), public records exception to the hearsay rule. Mr. Gattung also pointed out that the priority date referred to in the *Affidavit* was May 1, 1888, not the correct 1886. This may be considered a minor discrepancy – the *Decree* speaks for itself.

Ms. Van Bussum testified there was some evidence of irrigation within Mr. Benzon's claimed place of use based on aerial photography and no evidence of forfeiture. Hence, the Director recommended Mr. Benzon's claim for .08 cfs from Williams Creek to irrigate 3.6 acres – slightly less than the claimed 4 acres. Although the Highline Ditch was not mentioned in the Director's recommendation as the means of conveyance, the Director described the diversion point of the Highline Ditch, significant portions of which lie within or border Mr. Benzon's property.

Ms. Van Bussum reported that all three objectors have water rights out of the Highline Ditch. She found no evidence of ditches that may have preceded the Highline Ditch, ones that may have been replaced by the Highline Ditch for delivery of Williams Creek water to Mr. Benzon's and the objectors' properties.

Objectors:

Rice – Kevin Rice called his father to testify. George A. Rice said he has lived in Lemhi County since 1943. He said no water was diverted from the Highline Ditch to the Benzon property by its previous owner, Bert Snyder – only well water was used. He saw six foot high sagebrush on the property until the 1970's. George Rice recalled the Highline Canal was completed in 1935 by Ed Corbett and George, Gar and Paul Hodges.

Kevin Rice offered an *Affidavit of Gar L. Hodges*, dated July 29, 2004. Mr. Hodges, born in 1914, wrote his family bought their ranch property on Williams Creek from George L. Shoup in 1935. Near that time, they built a lateral ditch from Williams Creek with three head gates to convey water equally to George, Gar and Paul Hodges' property. Presumably, this lateral ditch is the Highline Ditch. Gar Hodges sold his property to objector Bill Gattung and his wife in 1975.

Kevin Rice testified he bought his property from his father in 1995, but he has maintained the Highline Ditch since 1977. He said the Benzon property has been dry since it was bought, but in early 2000, he saw a siphon tube was being used to divert water from the Highline Ditch to the Benzon property.

Capps – Randy Capps testified he has cleaned the Highline Ditch since 1974, and never saw a headgate to the Benzon property.

Gattung – Bill Gattung testified the Highline Ditch was built in 1935 or 1939. He has one headgate and the Rices have two. Mr. Gattung's diversion is then split three ways to other users. Mr. Gattung said the maximum capacity of the Highline Ditch is 300". The Highline Ditch Company was formed 10 years ago to maintain the ditch, but the company is not incorporated. Mr. Gattung offered Gattung Exh. 1 to describe the various ditches diverting water from Williams Creek in the same general area, marked: Highline Ditch, Rainbow Ditch, Anderson Ditch, Order Ditch and "old ditches."

Claimant

John A. Benzon, Jr., offered the testimony of his brother in law, Frank Jones. Mr. Jones said alfalfa was raised on the Benzon property from 1990 until 1995, but he did not know the water source. In 1998 or 1999, he helped John A. Benzon, Sr., install a 1½" siphon to divert water from the Highline Ditch to irrigate a 200' x 100' garden area and 12-13 fruit trees. IDWR's Bob Foster told Mr. Jones the Highline Ditch was a private ditch. As far as he knew, Mr. Shoup owned the property when the ditch was built in 1938 or 1939. He estimated 300' of the Highline Ditch runs inside Mr. Benzon's property.

Closing Arguments:

Gattung – Mr. Gattung said the Benzons have not used water from the Highline Ditch since 1939. They are not members of the Highline Ditch Company, pay no dues, have no vote and have not attended any meetings. He argued the ditch is private-built with private money and the ditch users never "gave" the Benzons any water since that would be unlawful.

Rice – Kevin Rice said if Mr. Benzon has a water right from the Highline Ditch, he will owe back assessments and everyone will be cut short. He said the aerial photograph, IDWR Exh. 2, shows no water use on the Benzon property and the land has had no water since 1935.

Capps – Mr. Capps suggested Mr. Benzon's claimed priority date "doesn't jibe." Besides, the land can't be flood irrigated.

Benzon – John M. Benzon, Jr., said his father was never invited to join the Highline Ditch Company with its 14 members. He has lived on the property since 2003, and watered it every year with Williams Creek water. The ditch is partly on his property, his father used the water

and he continues to use the water with a siphon tube reduced down to a garden hose. One year he trimmed along the ditch and he has never been billed “assessment fees.”

Conclusions of Law

Evidence offered in support of the Director’s recommendation of this claim, while not extensive, is compelling. To begin with, the Director serves as an “independent expert and technical assistant” to the SRBA Court (I.C. §42-1401B) whose report and recommendation are “prima facie evidence of the nature and extent of the water rights acquired under state law [I.C. §42-1411(4)].” That means that unless the evidentiary presumption is overcome by evidence, the facts set forth in the *Director’s Report* are established. *State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995).

The central document supporting the Director’s recommendation is the 1919 Shoup *Decree* which awarded a water right to the Shoup Ranch. Beginning with that premise, the most important facts and conclusions are: 1) Mr. Benzon’s and the objectors’ lands receiving water from the Highline Ditch with an 1886 priority date were part of the Shoup Ranch when the *Decree* was entered, and 2) all the parties in this subcase are successors in interest to Mr. Shoup. In other words, the parties now own a piece of the Shoup Ranch, together with appurtenant water rights, and they are bound by the terms of the Shoup *Decree*.

There was conflicting evidence of when and how water from Williams Creek was diverted to Mr. Benzon’s property, probably because of the lapse of 90 years since the Shoup *Decree* was entered. Based on Richard Shoup’s 1974 *Affidavit*, Mr. Benzon’s property was being irrigated as part of the Shoup Ranch during the five years immediately before the *Decree* was entered. Mr. Shoup mentioned that there was an unnamed ditch carrying 25 inches of water from Williams Creek to the land – no name was given the ditch – but it is significant that there was a ditch and the land was being irrigated. It is only logical to conclude that was the reason Judge Cowen awarded the Shoup Ranch, including Mr. Benzon’s and the objectors’ parcels, an 1886 water right.

The objectors submitted compelling evidence that the Highline Ditch was built in 1935 or 1939. However, near the end of the trial, there were vague references to “old ditches” in the vicinity that are no longer visible or in use. Since Richard Shoup recalled there was a ditch delivering water to the Benzon property as many as 95 years ago, there is only one reasonable

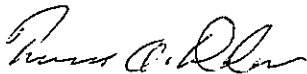
explanation – the Highline Ditch replaced some or all of an earlier ditch. That would hardly be uncommon since newer ditches, often enlarged, routinely follow existing ditches to save effort. That notion is reinforced by the fact that approximately 300' of the Highline Ditch lies within Mr. Benzon's property. The original owners of the Shoup Ranch would logically have built the earlier ditch within their own property boundary whenever possible.

Arguments that the Highline Ditch is private and that Mr. Benzon is not a member of the Highline Ditch Company and has not paid dues or attended meetings are irrelevant. Mr. Benzon is entitled to a water right as recommended by the Director and that means he is entitled to divert a portion of Williams Creek water the same as the objectors. Since the objectors never contested the recommended quantity as a proportionate share of the Shoup Ranch water right, that means Mr. Benzon can lawfully take up to .08 cfs from the Highline Ditch to irrigate a maximum of 3.6 acres with an 1886 priority date – the same date as the objectors.

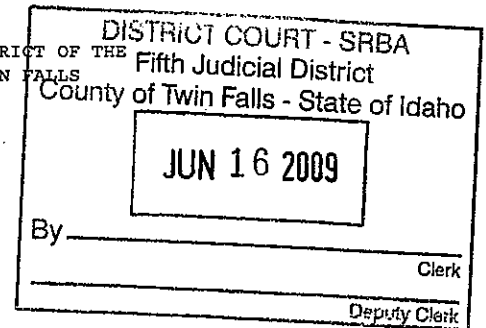
Issues of past ditch maintenance, dues and membership in the Highline Ditch Company are not before the Court, but will likely be resolved in the future bearing in mind the relatively small amounts of diversions made by the Benzons over the years. As with any voluntary ditch association, each party diverting water from the ditch should bear some measure of maintenance in relation to his or her share of water.

In sum, Mr. Benzon is entitled to a water right as recommended by the Director and as described in the attached *Special Master Recommendation for Partial Decree for Water Right 75-27L*.

DATED June 16, 2009.


TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

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)
)
PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 75-00027L

NAME AND ADDRESS: JOHN A BENZON
257 WILLIAMS CREEK RD
SALMON, ID 83467

SOURCE: WILLIAMS CREEK TRIBUTARY: SALMON RIVER

QUANTITY: 0.08 CFS

This right when combined with all other rights shall provide no
more than .03 cfs per acre nor more than 3.0 afa per acre for
irrigation of the lands above.

PRIORITY DATE: 05/01/1886

POINT OF DIVERSION: T20N R21E S11 LOT 1 (NENE) Within Lemhi County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 11-01	0.08 CFS

PLACE OF USE: Irrigation Within Lemhi County
T20N R21E S12 SENW 3.6
3.6 Acres Total

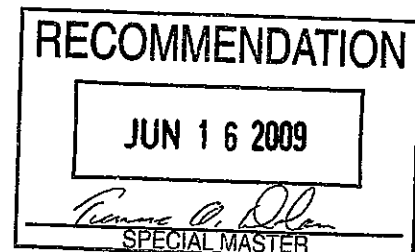
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance
with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a
final judgment and that the court has and does hereby direct that the above judgment or order shall be a final
judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication



DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUN 16 2009	
By _____	Clerk
_____	Deputy Clerk

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)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

Water Right(s): 75-00027L

On June 16, 2009, Special Master TERRENCE A. DOLAN issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

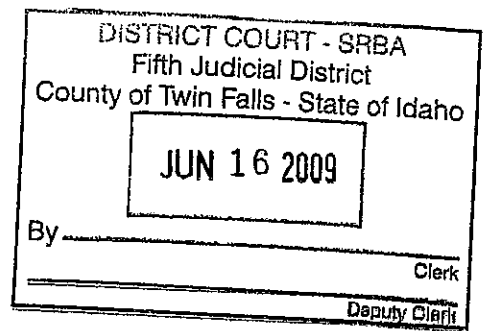
Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED June 16, 2009.



DIANA R DELANEY
Deputy Clerk



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)
_____)

CERTIFICATE OF MAILING

Water Right(s) : 75-00027L

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on June 16, 2009, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

KEVIN RICE
127 CORBETT LN
SALMON, ID 83467
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257 WILLIAMS CREEK RD
SALMON, ID 83467
Phone: 208-756-4573

RANDY CAPPS
87 CORBETT LN
SALMON, ID 83467
Phone: 208-756-2997

CERTIFICATE OF MAILING

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