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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JAN 13 2010

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

) Subcases 72-16778, 72-16779, 72-16780,
) 72-16781, 72-16782, 72-16783, 72-16784,
) 72-16785, 72-16786, 72-16787, 72-16788,
) and 72-16789
)
) SPECIAL MASTER'S REPORT AND
) RECOMMENDATION ON MOTIONS
) TO FILE LATE NOTICES OF CLAIM

I. BACKGROUND

On October 30, 2008, Wayne and Melody Baker; Richard and Cheryl Baker; Eddie Baker; Gary and Jackie Ingram; Archie Sherwood; Lilac LLC; and Kenneth Ryan ("Claimants"), through their attorney Daniel V. Steenson, filed a *Standard Form 4, Motion to File a Late Notice of Claim* for each of the above-captioned water rights. The *Motion* was heard by Judge Melanson on January 20, 2009. On January 21, 2009, Judge Melanson issued an *Order of Reference* appointing Theodore R. Booth as special master for the purpose of making findings under the standard for late notices of claim pursuant to I.R.C.P. 55(c). Specifically, Judge Melanson has instructed this Special Master to determine the degree of prejudice, if any, to other parties on the same claimed source, and whether a meritorious position has been presented. Judge Melanson has already made the finding that the Claimants have demonstrated an excuse for the untimely filing of the subject late claims.

On May 5, 2009, a scheduling conference was held for the purpose of determining a briefing schedule and a hearing date. In accordance with the briefing schedule, Valley Sun LLC ("Valley Sun"), through its attorney Laird J. Lucas, filed *Valley Sun's Opening Brief Opposing Motions to File Late Notices of Claims*, together with the *Affidavit of*

Laird J. Lucas. On October 16, 2009, the Claimants filed the *Claimants' Brief in Response to Valley Sun's Opening Brief*, together with the *Affidavit of Jon C. Gould*, the *Affidavit of Brian Hamilton*, and the *Affidavit of David B. Shaw*. On October 30, 2009, *Valley Sun's Reply Brief Opposing Motions to File Late Notices of Claims* was filed. A hearing on the matter was held on November 10, 2009.

With the exception of water right claims 72-16778 and 72-16781, the purpose of use for these water right claims is for conveyance losses associated with the diversion and use of water rights that have had partial decrees issued in the SRBA.

II. LEGAL STANDARD ON A MOTION TO FILE A LATE NOTICE OF CLAIM

A motion to file a late notice of claim in the SRBA is evaluated under the criteria of Idaho Rule of Civil Procedure 55(c), which provides the standard for setting aside the entry of a default. *See AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho courts apply a "good cause" for untimeliness standard. I.R.C.P. 55(c). The "good cause" standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d at 279 (Ct. App. 1993). The I.R.C.P. 55(c) standard takes into account the following: (1) whether the default was willful; (2) whether setting aside the judgment would prejudice the opponent; and (3) whether a meritorious position has been presented.

III. ANALYSIS

A. Conveyance Loss Claims Associated with *Gossi Decreed Rights*.

The following table shows the claims sought to be filed for the purpose of conveyance losses associated with previously decreed water rights.

NUMBER	CORRESPONDING IRRIGATION RIGHTS ¹	CLAIMANT(s)
72-16779	72-10302A, 72-10302B, 72-10302C, 72-10303, 72-10304, 72-204, 72-2048	Eddie Baker Jr., Eddie E. Baker
72-16780	72-10302A, 72-10304, 72-204, 72-16778	Eddie Baker Jr., Eddie E. Baker
72-16782	72-224, 72-225, 72-196, 72-197, 72-199, 72-200, 72-202F, 72-201C, 72-201F, 72-202D, 72-202E, 72-202G	D. Wayne Baker, Melodie L. Baker
72-16783	72-198	D. Wayne Baker, Melodie L. Baker
72-16784	72-226A, 72-227A	Gary Ingram and Jackie Ingram
72-16785	72-228A, 78-229	Archie Sherwood
72-16786	72-193B, 72-2095	Richard D. Baker and Cheryl K. Baker
72-16787	72-190	Richard D. Baker and Cheryl K. Baker
72-16788	72-232B	Kenneth Ryan
72-16789	72-193A, 72-2142	Lilac Three LLC / Lilac Six LLC

It is the understanding of this Special Master that all of the above-listed “corresponding irrigation rights” are based upon the 1938 decree in *Gossi v. Giampedraglia*, Sixth District, Custer County (Feb 14, 1938) (hereinafter “*Gossi Decree*”), with the exceptions of water rights 72-2048 and 72-2095, which are based upon licenses, and 72-16778 which is a motion to file a late notice of claim for irrigation. A copy of the *Gossi Decree* is attached as Exhibit 2 to the *Affidavit of Laird J. Lucas*. *Partial Decrees* have been issued in the SRBA for all of the above-listed “corresponding irrigation rights” except for 72-16778.

The Claimants assert that the subject late claims for conveyance losses are necessary because the amounts of water decreed in the *Gossi Decree* did not take into

¹ The water right numbers in this column are extracted from the Notices of Claim that have been lodged for each of the conveyance loss claims.

consideration the seepage losses in the ditch systems through which these rights are delivered from the points of diversion to the respective places of use. The Claimants state that the current water use associated with the irrigation of their lands has not changed from historical practices and that the amount of water historically diverted has always been greater than the decreed amounts; but that it has been necessary to divert such larger amounts in order to get a sufficient quantity of water to the places of use, given the length of the ditches and the porous nature of the soil upon which the ditches are constructed. The Claimants state that water diverted under these decreed rights have never been measured until recently, when the Idaho Department of Fish and Game installed fish screens on several of the diversions, and these fish screens were designed to accommodate the amount of water diverted. Additionally, the Claimants received notice from IDWR in 2008 that the Department would begin measuring and regulating diversions from the East Fork of the Salmon River as a result of the formation of Water District 170 in 2006.

The *Gossi Decree* was entered pursuant to a stipulation of the parties thereto. The *Decree* states: "That 1½ inches of water per acre, or its equivalent in cubic feet per second of time, is necessary and ample for the proper irrigation of said land." *Id.*, p. 2.

The *Gossi Decree* also states:

That each of the parties to this action . . . or their predecessors in interest, did respectively appropriate the quantities of water hereinafter stated, and on the dates and from the streams respectively hereinafter stated, and set opposite the names of each of said parties, *such water being an estimate* under a four inch pressure or its equivalent in cubic feet per second of time, and ever since said dates of the said several appropriations, said waters have been so diverted and used on said lands in the irrigation thereof.

Id., p. 3 (emphasis added). It is also stated in the *Gossi Decree*:

That each and every of the parties to this suit, plaintiffs and defendants, their agents, servants, attorneys and employees, and each, every and all persons acting in aid of and for any of the parties to this suit, *are hereby forever restrained and enjoined from* in any way or manner interfering with or *diverting or using* the waters of said East Fork of the Salmon River and its tributaries, except in accordance with the terms and provisions of this decree.

Id., p. 7 (emphasis added). The Claimants assert that they have historically diverted greater quantities of water than what was provided by their previously decreed water rights for the purpose of compensating for conveyance losses. The late claims at issue are based upon the beneficial use of the water for conveyance loss purposes, with claimed priority dates that reflect the earliest recollections of witnesses who observed the diversions and the associated ditch systems and irrigation practices.

The Claimants are not seeking to have the previously issued SRBA partial decrees set aside. To the extent that the *Gossi Decree* was latently ambiguous as to whether the quantities of water decreed therein were intended to be quantified or measured at the places where the water enters the irrigated fields as opposed to being measured at the points of diversion, such ambiguity has been eliminated in the SRBA *Partial Decrees*, which decree the respective quantities of water to be measured at the points of diversion.

Valley Sun makes several arguments against the granting of the late claims. Specifically, Valley Sun argues: (1) that the proposed late claims constitute an impermissible collateral attack on the previously decreed rights; (2) that Idaho law does not recognize a “stand alone” water right solely for conveyance loss; (3) that the amounts of water claimed are excessive and wasteful; and (4) that Valley Sun will be prejudiced if the late claims are allowed. As explained below, it is the opinion of this Special Master that the Claimants have not demonstrated a meritorious position for the late claims to conveyance-loss water for the *Gossi Decreed* rights for the reason that the terms of the *Gossi Decree* prohibited the parties from using or diverting any additional water.

The parties to the *Gossi Decree*, and their successors in interest are “forever restrained and enjoined from in any way or manner . . . diverting or using the waters of said East Fork of the Salmon River and its tributaries, except in accordance with the terms and provisions of this decree.” *Id.*, p. 7. With respect to the diversion and use of water for irrigation of the lands described in the *Gossi Decree*, it is the opinion of this Special Master that parties to the *Gossi Decree* and their successors in interest could not divert or use more water than was described therein. The *Gossi Decree* certainly could not have prevented the parties from making new appropriations of water for the use on

land not specified in the *Decree*, but as to the land and appurtenant water use described therein, the *Decree* is clear that the parties were forever enjoined and restrained from diverting more water than specified.

This Special Master understands that the quantities of water specified in the *Gossi Decree* were based upon estimations rather than actual measurement, and this Special Master further understands that the quantity of water of 1½ inches per acre may well have been intended to mean such quantity being available at the place of use, with conveyance losses not having been considered by the parties and the Court in fashioning the *Decree*. The Claimants have not ever sought modification of the *Gossi Decree* in Custer County Court; the Claimants did not file claims in the SRBA seeking to include an amount for conveyance losses in the process of confirming the *Gossi Decreed* rights in the SRBA; and the parties do not now seek to have such SRBA partial decrees set aside.

In Idaho, a water right is to be measured at the point of diversion, not the place of use. *Stickney v. Hanrahan*, 7 Idaho 424, 63 P. 189 (1900)(to prevent waste, water must be measured at the point of diversion); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912); *Glenn Dale Ranches, Inc., v. Shaub*, 94 Idaho 585, 494 P.2d 1029 (1972). This Special Master recognizes the possibility that the *Gossi Decree* has a latent ambiguity with respect to whether the quantities decreed therein were intended to be the quantity diverted from the source, or rather the quantity delivered to the place of use. As stated above, however, any such latent ambiguity has been resolved by the issuance of the SRBA partial decrees, which will be interpreted consistent with Idaho law that the quantity of water decreed therein is to be measured at the point of diversion. In the event that the *Gossi Decree* was intended to quantify the water decreed therein at the points of redirection from the ditch system, such intent can be carried forward into the SRBA partial decrees, but at this stage of the proceedings this would necessarily require setting aside the previously issued SRBA partial decrees for the *Gossi Decreed* rights.

Based upon the express terms of the *Gossi Decree*, the parties were forever enjoined and restrained from diverting or using more water than set forth therein for use upon the lands described in the *Decree*. It is the opinion of this Special Master that the parties could not therefore appropriate and perfect a valid water right for a use of water

that would violate the very terms of the *Decree*. Accordingly, this Special Master finds and concludes that the Claimants have not met their burden of demonstrating a meritorious position with respect to claims for conveyance losses associated with any water rights decreed in the *Gossi Decree*.

A. Conveyance Loss Claims Associated with Licensed Rights

With respect to the claims for conveyance losses associated with water right licenses 72-2048 and 72-2095 the analysis is essentially the same as for the *Gossi Decreed* rights. Typically, IDWR issues licenses that conform to Idaho law with respect to water rights being quantified or measured at the point of diversion. That being said, this Special Master has seen numerous examples of situations where the quantity of a water right is measured at some location other than the point of diversion. Typically in such situations the SRBA partial decree will have a remark explaining where the quantity of the right is to be measured. *See e.g.* Subcase Nos. 63-00123G and 63-00123F (Remark under quantity element states: “The right holder is entitled to the quantity of water decreed herein at the point of rediversion from the Farmer’s Union Canal”).

As with the rights decreed in the *Gossi Decree*, it is certainly possible that the licenses issued for these two rights were intended to quantify the water at the point of rediversion out of the ditch as opposed to the actual point of diversion from the natural stream channel. If this were in fact the case, the provisions of such a license could have been carried forward into the SRBA partial decrees. This however, did not happen. *Partial Decrees* for these two licensed rights have been issued and absent a remark to the contrary the quantity of water set forth in an SRBA partial decree is quantified and measured at the point of diversion. *See Memorandum Decision and Order on Challenge; Order on State of Idaho’s Motion to Dismiss Claimants Notice of Challenge*, Subcase 36-8099 (River Grove Farms) (Jan. 11, 2000) p. 27-28. As such, any argument that the quantification of these licensed rights was intended in the licenses to be at a point of rediversion would necessarily involve seeking to set aside the SRBA partial decrees. Stacking a beneficial use water right for conveyance loss on top of a previously licensed water right is not the proper remedy to correct an error in the licensure

proceedings, or to make the SRBA partial decree accurately reflect the terms of the license. Accordingly, this Special Master finds and concludes that the Claimants have not met their burden of demonstrating a meritorious position with respect to claims for conveyance losses associated with licensed water rights 72-2048 and 72-2095.

B. Irrigation Claim Nos. 72-16778 and 72-16781.

Water right claims 72-16778 and 72-16781 are for irrigation use and are based upon diversion and beneficial use of water for land not decreed in the *Gossi Decree*. Valley Sun argues that these irrigation late claims should be denied because the Claimants have failed to establish good cause under I.R.C.P. 55(c). Specifically, Valley Sun argues that the Claimant's assertion that he was only recently advised by the BLM that he needed to obtain a water right to irrigate federal public land does not excuse the late filing because "[e]very water user knows – or should know – of their obligation to have a valid state water right before diverting and applying water for irrigation use." *Valley Sun Opening Brief* at 15, fn. 4 This Special Master disagrees. These water right claims are based upon diversion and application to beneficial use. Under this method of appropriation there is no requirement that the water user intended to obtain a valid water right, nor is there a requirement that the water user understood that the acts of diversion and application to beneficial use would be the basis for creating a water right recognized under state law. *Joyce Livestock Co., v. United States*, 144 Idaho 1, 156 P.3d 502 (2007). The fact that a water user later comes to the understanding that their actions of diversion and application to beneficial use created a valid water right, and that a claim for such right must be made in a general stream adjudication, does not by itself show lack of good cause.

With respect to irrigation claim nos. 72-16778 and 72-16781, and based upon the file and record herein, this Special Master finds that that the Claimants have demonstrated a meritorious position. Regarding prejudice to Valley Sun, this Special Master notes that Valley Sun will have a full and fair opportunity to file objections to these late claims and the ability to raise any issues will not be diminished by the untimeliness of the claims. As noted above, the SRBA Presiding Judge has already

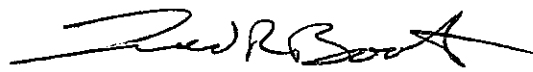
made a finding that the Claimants have demonstrated an excuse for the untimely filing of the claims. *See Order of Reference* (January 21, 2009). Accordingly, it is the recommendation of this Special Master that the motions to file late claims 72-16778 and 72-16781 be **granted**, and that the claims be forwarded to IDWR for investigation and reporting in a late claims director's report.

IV. RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the *Motions to File Late Notices of Claim* for irrigation water rights 72-16778 and 72-16781 be **granted**, and that the late claim be forwarded to IDWR for investigation and reporting in a late claims director's report.

IT IS FURTHER RECOMMENDED that the *Motions to File Late Notices of Claim* for conveyance-loss water rights 72-16779, 72-16780, 72-16782, 72-16783, 72-16784, 72-16785, 72-16786, 72-16787, 72-16788, and 72-16789 be **denied**. It is also recommended that any order issued by the Court denying the motions to file late notices of claim for these conveyance-loss water rights not be certified as final pursuant to I.R.C.P. 54(b) pending a determination as to whether the Claimant's will seek further relief such as attempting to have the partial decrees for the previously decreed water rights set aside.

Dated January 13, 2010



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication