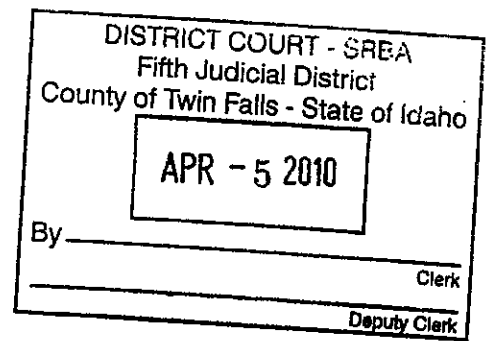


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APR 07 2010

DEPARTMENT OF
WATER RESOURCES



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
) 75-14090 (Sneed)
) 75-14092 (Gooby)
) 75-14093 (split)
) 75-14512 (Odell)
) 75-14513 (Barinaga / Williams)
) 75-14100 (Waite)
Case No. 39576) 75-14302 (Bourdon / Vera M. Hartley Trust)
) REQUEST FOR SUGGESTIONS RE: DRAFT
) SPECIAL MASTER REPORT AND
) RECOMMENDATION

Attached is a *Draft Special Master Report and Recommendation* (without *Recommendations* attached) for your review. It contains findings of fact and conclusions based on the one day trial held in Salmon, Idaho, on September 30, 2009.

This *Draft* is submitted for the purpose of receiving the parties' suggestions pursuant to I.R.C.P 53(e)(5), draft report of master. Particularly, the Special Master requests of IDWR that it submit draft partial decrees of the above six water rights with the elements as determined in the *Draft Special Master Report and Recommendation*.

IDWR and the parties are requested to submit suggestions no later than **Friday, April 23, 2010**, after which the Special Master intends to file the final *Special Master Report and Recommendation*.

DATED April 5, 2010.

A handwritten signature in black ink, appearing to read "Terrence A. Dolan".

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

DRAFT

**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**
) **75-14090 (Sneed)**
) **75-14092 (Gooby)**
) **75-14093 (split)**
) **75-14512 (Odell)**
) **75-14513 (Barinaga / Williams)**
) **75-14100 (Waite)**
) **75-14302 (Bourdon / Vera M. Hartley Trust)**
)
) **ORDER GRANTING MOTION TO AMEND**
) **CLAIM 75-14302**
) **and**
) **SPECIAL MASTER REPORT AND**
) **RECOMMENDATION**

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 following five beneficial use claims to divert water from Wallace Creek for irrigation in Lemhi County, all with a priority date of April 17, 1923:

75-14090

Russell and Michelle Sneed, 9449 Pershing Avenue, Orangevale, California,
95662
.04 cfs / 2 acres
April 1 to October 31

75-14092

Dale F. Gooby, 18 Savage Ranch Road, Salmon, Idaho, 83467
.19 cfs / 9.7 acres
April 1 to October 15

75-14093

David Yanoff
.16 cfs / 8 acres
April 1 to October 15

75-14100

Jeffrey V. Waite, P.O. Box 75, 60 Savage Ranch Road, Carmen, Idaho, 83462
.12 cfs / 6 acres
April 1 to November 1

75-14302

Greg and Sandy Bourdon / Vera M. Hartley Trust, 59 Savage Ranch Road,
Salmon, Idaho, 83467
.36 cfs / 18 acres
April 1 to October 31

Objections

75-14092 & 75-14093

On February 1 and 9, 2007, Mr. Waite and Dan Farley filed *Objections* alleging the water rights should not exist.

75-14100

On February 1, 2007, Mr. Waite filed an *Objection* objecting to quantity, priority date and place of use. On September 26, 2007, Mr. Bourdon filed his *Objection* alleging the water right should not exist.

75-14302

On February 1 and 9, 2007, Mr. Waite and Mr. Farley filed *Objections* alleging the water rights should not exist.

NCAPs & Split – 75-14093 (75-14512 and 75-14513)

On April 1, 2008, IDWR filed a *Notice of Completed Administrative Proceeding* in subcase 75-14093 for a substitution of party showing Linda Barinaga and Dick Williams, 2655 Linder Road, Kuna, Idaho, 83634, as the new owners. IDWR filed *Amended NCAPs* on April 14 and June 5, 2008, for substitution of party splitting 75-14093 (disallow) into 75-14512 (Yanoff) and 75-14513 (Barinaga / Williams). Finally, on September 8, 2008, IDWR filed an *NCAP* in subcase 75-14512 for substitution of party naming David J. Odell, 2742 Alpenglow Road,

Stevensville, Montana, 59870, as the new owner. The two claims split from 75-14093 were finally recommended as follows:

75-14512 – Odell

.04 cfs / 2.1 acres

April 1 to October 15

75-14513 – Barinaga / Williams

.12 cfs / 5.9 acres

April 1 to October 15

75-14090 – IDWR identified the Sneeds' claim as uncontested.

Trial

Trial on the *Objections* was held in Salmon, Idaho, on September 30, 2009. Mr. Gooby and Mr. Waite appeared *pro se*; Milton A. "Jock" Slavin appeared for Mr. Farley; Jerry R. Rigby appeared for Ms. Barinaga, Mr. Williams and the Bourdons; and Garrick L. Baxter appeared for IDWR, along with Monica P. Van Bussum, Bob Foster and Suzy Cooley-Denney. Mr. Odell did not appear.

Ms. Van Bussum, a senior water resource agent for IDWR, presented the basis for IDWR's recommendations of these Upper Wallace Creek claims. All the parcels were once part of the Joseph Sanderson Homestead patented on April 17, 1923. IDWR Exhibit 2; also see Waite Exhibit E (for illustration of boundary). She said the water is diverted from Wallace Creek and conveyed to the parties' lands via the Upper Wallace Creek Ditch (also called the Sanderson Ditch or Montgomery Ditch), so they were all recommended with the same 1923 priority date.¹

Ms. Van Bussum said she would not have recommended a 1923 priority date for the claims, but instead a later date – perhaps as late as 1968. But because the IDWR agent who first investigated the claims chose 1923, and some of the uncontested claims on the ditch have already been partially decreed with that priority date,² she felt it would be unfair to change the system. Besides, she saw no potential injury to any other water users in the area. The only circumstance under which IDWR might change its recommended priority date for the Upper Wallace Creek

¹ There was some uncertainty over the recommended priority date, possibly because Mr. Waite recalled there was a ditch or ditches built to supply placer mines in the area before significant irrigation began. Perhaps all or parts of them became the Upper Wallace Creek Ditch.

² Water rights 75-4385D (Olsen), 75-14099 (Maulem) and 75-14303 (Geidell) were partially decreed on November 17, 2008, and March 30, 2009, after no objections were filed.

claims would be if the three partially decreed rights were set aside, but IDWR did not suggest that.

A neighbor, William R. Maxwell, whose parents once owned the Sanderson Homestead, said a small part was being irrigated when his parents bought the Homestead in 1951. All the lands were watered at various times between 1951 and 1978 as the supply lines were extended and rotated.

Kenneth "Bud" Lesley, a resident of Salmon for 29 years, leased most of the Sanderson Homestead between 1981 and 1985 for grazing horses and mules. He agreed with Mr. Maxwell's testimony that the lands were mostly sprinkler irrigated. He maintained the ditch and continued the same irrigation. The only flood irrigation was on what is now Mr. Waite's parcel which he purchased in 1985.

75-14100 (Waite)

Ms. Van Bussum reiterated IDWR's recommendations in each of the five contested claims, including quantities and irrigated acreage, except for Mr. Waite's claim. Ms. Van Bussum said IDWR amended its recommended acreage for Mr. Waite's claim from 6 acres (.12 cfs) to 22.5 acres (.45 cfs) based on the 1968 and 1987 aerial imagery she presented at trial. IDWR Exhibit 3. Mr. Waite agreed with that change and IDWR's recommended priority date for his claim as well as the other Upper Wallace Creek claims.

75-14302 (Bourdon / Vera M. Hartley Trust)³

The original SRBA claim was for 28 acres and IDWR recommended 18 acres (.36 cfs), but based on the aerial photos, Ms. Van Bussum would now recommend 25 acres (.5 cfs) if the claimants had objected. But the claimants did not object to quantity or acreage. Based on this testimony, the claimants moved to amend their claim under I.R.C.P. 15(c) to conform to the evidence. Counsel for Mr. Farley agreed with the motion and the motion was taken under advisement.

There was considerable discussion about the exact number of irrigable acres because sometime in 1987, part of the land slid downhill and there was a dispute whether the 25 acres were currently irrigable. Ms. Van Bussum maintained her recommendation of 25 acres is still

³ At trial, there was discussion the Vera M. Hartley Trust had been removed as co-owner in subcase 75-14302, but the Court's records show no such change.

accurate based on aerial photos, the ARC mapping procedure she used and her own field exam. In addition, she said there was no evidence of forfeiture before the SRBA claim was filed in 1990.

75-14093 (split)

75-14512 (Odell)

75-14513 (Barinaga / Williams)

75-14092 (Gooby)

Ms. Van Bussum said these three claims should be decreed as recommended because aerial photos indicate irrigation in 1968 and 1987. Like the other Upper Wallace Creek claims – for consistency sake and fairness – IDWR would stand by its recommendations of the same 1923 priority date.

Conclusions of Law

The Idaho legislature has appointed the IDWR Director as “an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported.” I.C. § 42-1401B(1). The *Director’s Report* “shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law.” I.C. § 42-1411(4). “Any party filing an objection to any portion of the director’s report shall have the burden of going forward with the evidence to rebut the director’s report as to all issues raised by the objection.” I.C. § 42-1411(5).

The evidence presented at trial, while conflicting and confusing at times, supports IDWR’s recommendations of these five Upper Wallace Creek claims, including its amendment of Mr. Waite’s claim (75-14100) and its “but for an objection” recommendation of the Bourdon / Vera M. Hartley Trust claim (75-14302).

The uniform priority date of 1923 recommended for all claims from the same ditch, including partially decreed and uncontested water rights, makes sense from a fairness standpoint and from the perspective of the water rights administrator. Additionally, the Court will avoid lengthy proceedings involving notice and future litigation of the partially decreed and uncontested water rights. After all, several Upper Wallace Creek water users were not part of this trial because their claims were uncontested.

Throughout the testimony, it was evident that most of the land was not irrigated as early as 1923, but instead the lands were irrigated as the water delivery system was developed and expanded over the years. Some lands near the Sanderson Homestead was irrigated as early as 1918 according to Mr. Waite, possibly out of placer mining ditches. It would not be a stretch to imagine small plots along those ditches crossing the Homestead and beyond with irrigated gardens to grow subsistence crops. In these circumstances, it is reasonable that IDWR should have the discretion and authority to recommend a uniform priority date, particularly where no other water users will be harmed.

Ms. Van Bussum's expertise in mapping is sufficient to support the irrigated acreage and quantities recommended by IDWR for the five claims. Mr. Maxwell's testimony certainly supported her findings and given their *prima facie* weight, the claims should be partially decreed as such. While Mr. Maxwell was not identified as a mapping expert, the boundaries he marked on IDWR Exhibit 3 should help Ms. Van Bussum pinpoint the location and number of acres she now recommends. That includes the additional acreage she would now recommend for the Bourdon / Vera M. Hartley Trust claim (75-14302) if the Court were to allow the claim to be amended. Given these facts, a motion to amend the claim is clearly warranted, particularly because the amended claim is less than the original claim.

For the above reasons, the claimants are entitled to partial decrees adjudicating water rights as recommended by IDWR and as described in the attached *Special Master Recommendations for Partial Decrees for Water Rights 75-14090 (Sneed), 75-14092 (Gooby), 75-14100 (Waite), 75-14302 (Bourdon / Vera M. Hartley Trust), 75-14512 (Odell) and 75-14513 (Barinaga / Williams)*. Claim 75-14093 should be **disallowed** because of the split.

Order

THEREFORE, IT IS ORDERED that the motion to amend claim 75-14302 pursuant to I.R.C.P. 15(b) filed by claimants Bourdon / Vera M. Hartley Trust is **granted**.

Recommendation

THEREFORE, IT IS RECOMMENDED that claim 75-14093 be **disallowed**.

DATED April 5, 2010.

DRAFT

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the REQUEST FOR SUGGESTIONS RE DRAFT SPECIAL MASTER REPORT AND RECOMMENDATION was mailed on April 05, 2010, with sufficient first-class postage to the following:

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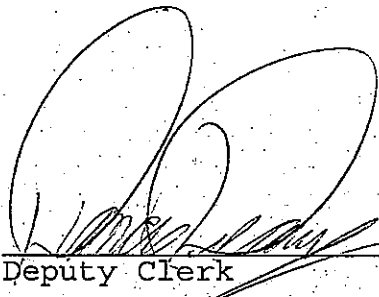
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REQUEST FOR SUGGESTIONS

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