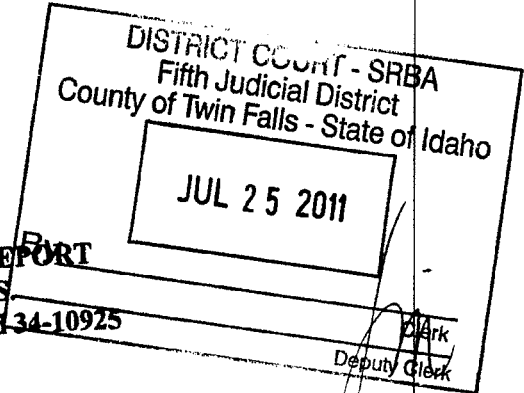


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**SUPPLEMENTAL DIRECTOR'S REPORT
REGARDING SUBCASE NOS
34-2459, 34-2460, 34-2461, 34-2462, and 34-10925**



In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Gary Spackman, Interim Director
Carter Fritschle, Manager, Adjudication Section

July 25, 2011

In response to the verbal order of remand for injury analysis made pursuant to the provisions of Idaho Code § 42-1425(2)(a), entered on the record by Special Master Bilyeu on April 13, 2011, and the *Order Vacating and Resetting Trial Date, Setting Deadlines, and Informal Settlement Conference* in Subcases 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925, entered on June 3, 2011, the Idaho Department of Water Resources (IDWR) hereby submits its Supplemental Director's Report. This report addresses the question of whether the addition of two points of diversion recommended for these rights pursuant to the provisions of the accomplished transfer statute, Idaho Code § 42-1425, in the Amended Director's Reports filed in these subcases on December 7, 2009, "injured a water right existing on the date of the change" Idaho Code § 42-1425(2)(a).

Analysis

At the outset it is important to recognize, as Special Master Bilyeu did in her *Order Denying Motion for Summary Judgment* in these subcases, entered March 28, 2011, at 6, that in its Amended Director's Reports IDWR has already addressed the question of injury by including in the priority date element of each of these rights a remark that advances the priority date to the date of the accomplished transfer whenever water pursuant to the right is diverted out of the two points of diversion in question.

SRBA Presiding Judge Wildman has recognized the authority of IDWR under Idaho Code § 42-1425 to recommend accomplished transfers with restrictions such as this to avoid injury to existing users. See *Memorandum Decision and Order on Challenge* in Subcase Nos. 01-23B, 01-297, 35-2543 and 35-4246, entered April 4, 2011, (Aberdeen-Springfield Decision) at 30.

In reviewing the material submitted to it on remand IDWR has been unable to ascertain what injury the objectors are asserting that cannot be mitigated by advancing the priority dates of

**SUPPLEMENTAL DIRECTOR'S REPORT
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these rights when the claimant pumps water from the two wells in question. Special Master Bilyeu in her *Special Master Report and Recommendation, Findings of Fact and Conclusions of Law, for Water Rights 34-02315, 34-02358A, 34-02417A, 34-02419A, 34-02429B, 34-02472A and 34-12419*, entered February 12, 1999 (the Era Flat Decision), at 9, stated that the use of water by a junior appropriator does not injure a senior appropriator until “it results in a deprivation of [the senior appropriator’s] allotted amount.” Accordingly, in that decision, which involved a situation very similar to the present situation, the Special Master determined that the objectors’ assertion of injury was insufficient to prevent the Court from recognizing an accomplished transfer of the place of use recommended by IDWR pursuant to Idaho Code § 42-1425 because IDWR had advanced the priority dates to make the rights in question junior to those of the objectors. *Id.* The Special Master concluded that this was sufficient to mitigate the alleged injury because it enabled the objectors to “enforce the prior appropriation doctrine” by virtue of their senior priorities. *Id.*

In the Era Flat Decision, Special Master Bilyeu relied in part on *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators*, 129 Idaho 454 (1996), a decision wherein the constitutionality of the amnesty statutes was affirmed in large part because the Idaho Supreme Court viewed the statutory provisions for the advancement of priority dates to prevent injury as sufficient protection to junior appropriators.

IDWR has reviewed both the materials submitted on remand in support of and in opposition to a determination of injury. These submissions for the most part consist of competing technical analyses, and related documents, regarding of the nature, magnitude, and timing of the effect of pumping from the two wells in question on the surrounding water table, and hence their effect on the pumping levels of the wells used by the objectors.

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The determination of what depth of water table is legally protectable does not constitute either a statutory element of a water right, or a matter necessary for definition, clarification, or administration of a water right, to be determined by the SRBA Court pursuant to Idaho Code § 42-1412(6). Indeed, the determination of what constitutes a reasonable ground water pumping level is committed *exclusively* to determination by the director of IDWR by the provisions of Idaho Code §§ 42-226 and 42-237a(g). See also *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 (1973). IDWR views a technical dispute over the effect of pumping on ground water levels, coupled with a legal dispute over whether (and if so to what degree) the objectors are entitled to protection of pumping levels, are matters to be raised in an administrative proceeding before IDWR.

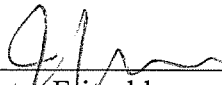
By advancing the priority date of these rights when the two wells in question are being used, IDWR has put the objectors in the position of holding rights senior to the claimant's rights. Thereby the objectors are in a position to enforce their senior priorities under the prior appropriation doctrine, giving them access to all appropriate administrative remedies and rights of judicial review encompassed therein, including the right to assert the need for protection of pumping levels. See IDAPA 37.03.11 (Conjunctive Management Rules).

In the Era Flats case, Special Master Bilyeu determined that the advancement of priority dates was sufficient protection against injury. In the Fremont-Madison case the Idaho Supreme Court determined the advancement of priority dates was sufficient protection against injury. IDWR views it as sufficient protection against injury in these subcases as well.

Conclusion

Accordingly, on remand IDWR concludes that the rights as presently recommended provide the objectors sufficient protection against injury. It sees no need to amend its recommendations of these rights.

Submitted this 25th of July, 2011.

For  _____
Carter Fritschle
Manager, Adjudication Section

CERTIFICATE OF SERVICE

I certify that on July 25, 2011, I served the original and/or copies of this form, including all attachments, to the following persons by delivering the original and/or copies, as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
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Twin Falls, Idaho 83303-2707

☐ Overnight Mail
☐ Regular Mail
☐ Hand-Delivered
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2. Copies to:

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Boise, ID 83724

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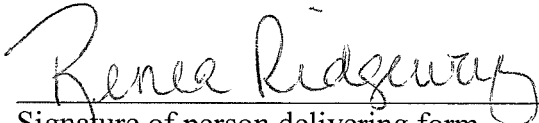
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