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DEPARTMENT OF
WATER RESOURCES

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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

TRIAL BRIEF

Case No. 39576

SUBCASE NOS: 22-00265E, 22-00594, 22-
13479, 22-13987, & 22-13988

I. INTRODUCTION

The Idaho Department of Water Resources ("IDWR") approved Transfer Rights 22-00265E, 22-00594, 22-13479, 22-13987, and 22-13988 to the point of diversion of DKJ Farms. The SRBA has jurisdiction to determine the legality of IDWR's prior administrative decisions, determine the legal significance of facts that occur after prior administrative decisions, and determine issues that were not decided in prior decisions. First, forfeiture occurred between 1986 and 1997 after prior administrative decisions regarding Moody Creek. The Objectors request relief from the SRBA since the prior IDWR's administrative decisions resulted in harm to Objectors' water rights, illegal enlargement of DKJ Farms water allotment, loss of public interest, and violation of conservations laws. Further, both I.C. §42-222 and §42-3801 to 3806 contain environmental conservation laws which protect ecosystem of Moody Creek. Facts that occurred after IDWR administrative decisions show that harm has occurred to Moody Creek in violation of these environmental protections.

II. ARGUMENT

A. Forfeiture Occurred Between 1986 and 1997 After Prior Administrative Decisions Regarding Moody Creek.

By 1986, DKJ Farms obtained Rights 22-265E, 22-4195, 22-594, and 22-13479. With these rights, IDWR authorized DKJ Farms to divert all the water in Moody Creek to irrigate.

Between 1986 and 1997, the flow in Moody Creek was sufficient to sustain large cutthroat trout in the eight mile segment of the creek below DKJ's pumps. Fishing remained excellent until 1997 when fishing deteriorated. According to the Idaho Fish and Game Department, large cutthroat trout require a minimum flow of at least 1.5 cfs to survive. Therefore, since the water was allowed to follow past the point of diversion for 11 years, the bypass water constitutes a forfeiture since the water was not used for beneficial purposes by Jeppesons or DKJ Farms.

B. Harm Created by Rights 22-265E, 22-594, 22-13987, and 22-13988 to Downstream Junior Water Users Is Prohibited by I.C. §42-1425 and §42-222.

Under Idaho Code, junior water users are protected from harm caused by transfers of water rights with senior priority dates. I.C. §42-1425 prohibits approval of transfers that damage existing rights or create an enlargement of the right. I.C. §42-222 declares that transfers that cause harm to existing rights, enlargement, loss of public interest, or violation of conservation law are not allowed.

DKJ Farms argues all junior water right protections terminate after approval of transfer of a water right with a senior priority date. DKJ Farms uses the term "vested" to mean it can do anything it wants with Moody Creek despite any conditions or regulations subsequent to IDWR approval. If DKJ Farms' argument is true, all protections for downstream junior water users

created by I.C. §42-1425 and I.C. §42-222 are totally useless. As has occurred in this case, a senior water user who transfers a diversion point above downstream junior water users can simply wait until a transfer has been approved and then harm junior water users through water diversion. Since the Idaho Legislature made water transfers distinct from senior priority water allotments and provided specific protections to junior downstream water right holders with the creation of I.C. §42-1425 and §42-222, Idaho law is not compatible with DKJ Farm's contention that transferred "vested" water rights can harm junior downstream water users.

This Court has jurisdiction to decide this issue since injury to the Objectors has occurred following IDWR approval. DKJ Farms significantly dewatered Moody Creek starting in 2001, killing cutthroat trout and harming downstream water users each year. A non-flowing stream existed in 2001, 2007, and 2008 at the Elbow Moody Creek during the summers.

A dry creek provides unquestionable evidence of injuries. Existing rights harmed include the following:

1. Domestic Decree 22-10005 owned by George Brown
2. Stock Water Claim 22-13686 owned by R. Scott Wood.
3. Domestic Rights held by Trent Wood under the Constitution
4. Stock Water Rights 22-4094 owned by David Wood
5. Right 22-594 held by Woodmansee-Johnson Canal Co. in lower Moody Creek.

Objectors ask this Court for relief from DKJ Farms harmful dewatering of Moody Creek and damage to Objectors' existing water rights.

C. Transfer Right 22-265E Resulted in an Illegal Enlargement of Right 22-265.

Under I.C. §42-1425 and §42-222, transfers cannot result in enlargement of the original water right. Prior decisions illegally resulted in an enlargement in which Transfer Right 22-265E

has a significantly larger water allotment than the original Right 22-265. The illegal enlargement occurred in five ways:

1. Right 22-265 in lower Moody Creek was used to water only 148 acres. Prior administrative decisions enlarged Transfer Right 22-265E to 200 acres.

2. Prior administrative decisions increased the rate of diversion from Right 22-265 to Transfer Right 22-265E. To water 148 acres of potatoes, Right 22-265 needs only approximately 2.2 cfs. Prior decisions enlarged the diversion of Transfer Right 22-265E to 4 cfs.

3. Facts that occur after prior administrative decisions show more than 200 acres were irrigated by Transfer Right 22-265E.

4. Consequential facts reveal the rate of diversion by DJK Farms increased starting in 2001. Beginning in 2001, DJK Farms regularly dewateres Moody Creek. In 2004, the Henry's Fork Foundation measured a flow in Moody Creek of about 5 cfs above the point of diversion of DKJ Farms compared to 0 cfs at Wood's Crossing downstream from the diversion point. Further, in order to water 200 acres of potatoes on the Rexburg Bench, only 2.9 cfs is needed. Prior decisions approved 4 cfs, which is 1.1 cfs more than required and would actually result in water rot if all the water was actually applied to 200 potato acres. In fact, the extra water went to unauthorized acreage irrigated by the Moody Creek Irrigation System or to adjacent Lyman or Lyon Creek System with a reservoir owned by Jeppesen.

5. According to I.C. §42-202B, Right 22-265E constitutes a consumptive enlargement because Transfer Right 22-265E completely dries up an eight mile segment of Moody Creek while Right 22-265 affects less than a mile of Moody Creek and does not dry up the creek. Comparatively, Right 22-265E diverts more than an eight fold increase in volume from the water supply of the creek.

D. Loss of Public Interest Is a Fact That Occurs After Prior Administrative Decisions Approve Rights to the Point of Diversion of DKJ Farms.

I.C. §42-222 declares that transfers that cause a loss of public interest are not permitted. Prior administrative decisions have resulted in dewatering of an eight mile segment of Moody Creek, annihilation of a prime spawning habitat of cutthroat trout, and an imbalance in the Moody Creek ecosystem.

E. Demonstrated by a Dry Creek, Conservation Mismanagement That Occurred Following a Prior Administrative Decision Violates I.C. §42-222.

F. Accomplished Transfer Application by DKJ Farms for Rights 22-265E, 22-13987, & 22-13988 Are Illegal Under I.C. §42-1425.

Right 22-00265E is composed of Transfer 2034 approved in 1977 and Transfer 3002 approved in 1985 pursuant to Idaho Code 42-222. In 2010, IDWR changed Transfer Right 2034 to Water Right 22-12987 and Transfer 3002 to Water right 22-13988. Prior administrative decisions and facts that occur after prior decisions are not legal here because of injury to existing rights, enlargements, loss of public interest, and violations of conservation principles, contrary to Idaho Code 42-222.

Later on, prior administrative decisions approve Right 22-00265E pursuant to Idaho Code 42-1425. This approval is not legal for three reasons. At the time of decision-making, Right 22-00265E is illegal pursuant to Idaho Code 42-222 and an illegal right should not exist. Moreover, transfers that injure existing water rights or cause enlargement are illegal pursuant to Idaho Code 42-1425.

G. Since Right 22-13479 Is An Enlargement of Right 22-265E, Right 22-13479 Should Not Exist.

As argued above, Right 22-265E should not exist under I.C. §42-1425. In addition, Right 22-265E harms downstream water users in violation of Idaho Code. Since Right 22-13479 is an enlargement of Right 22-265E, Right 22-13479 should not exist.

Further, I.C. §42-1426 precludes an increase in the rate of diversion. Right 22-13479 seeks an increase of 3.1 cfs. Therefore, the prior administrative decision to approve Right 22-13479 is not legal pursuant to I.C. §42-1426. Moreover, since Right 22-13479 goes through illegal Right 22-265E, Right 22-13479 is not legal.

H. DKJ Farms Has Abandoned Water Right 22-594.

The Water Master of District 1 has allowed no delivery of this right to DKJ's point of diversion. Because this right has not been beneficially used by DKJ Farms or Woodmansee Canal in over five years, this right becomes abandoned and should not exist. The right has not been delivered to the point of diversion of DKJ Farms and no water exists at the point of diversion of Woodmansee Canal past June 20th.

In addition, Right 22-594 violates the same laws as Right 22-265E as argued above. Right 22-594 harms downstream users, results in an enlargement, damages a public interest, and violates conservation principles.

Further, there is insufficient water at the point of diversion of DKJ Farms to accommodate 2 cfs more diversion at this point.

If SRBA approves this right, even further depletion of an already dry creek will become legal. Moreover, legitimacy to the enlargement of Right 22-265E would be provided. The enlargement of Right 22-265E already completely dewateres the creek.

I. Eastern, Teton, and Woodmansee-Johnson Canals Converge Into Lower Moody Creek Below the Point of Diversion of DKJ Farms.

Without knowing the flow rate anywhere in Moody Creek, prior administrative decisions moved rights from a point of diversion in the lower creek receiving water from four sources to the point of diversion of DKJ Farms receiving water from the creek only. Facts after this move

who injury to existing junior rights downstream from the point of diversion of DKJ Farms, contrary to I.C. §§42-222 and 42-1425.

Visually, there is more water in the lower creek than in the upper creek during August, September, and October. In addition, there is much less water solely from the creek at point of diversion of Right 22-265 than at Right 22-265E upstream due to evaporation, stagnation, and seepage into the creek bed over the eight mile segment of the creek below the Right 22-265E point of diversion.

J. Transfer Rights 22-265E, 22-594, and 22-13479 Violate the Stream Channel Act of 1971 (I.C. 42-3801-3806).

In addition to protection for junior water right users in transfer situations, the Stream Channel Act prohibits destruction of a creek or fish therein through water removal without a permit after 1971. DKJ Farms significantly dewatered Moody Creek starting in 2001, killing cutthroat trout. In fact, DKJ Farms caused a non-flowing creek in the summers of 2001, 2007, and 2008 which led to the senseless death of many cutthroat trout.

Once again, DKJ Farms justifies violation of Idaho law with the mistaken notion of “vested” water rights. DKJ Farms uses the term “vested” to mean it can do anything it wants with Moody Creek despite any conditions or regulations subsequent to IDWR approval. DKJ Farms argues its appropriation right at the original diversion point obtained prior to 1971 excuses non-compliance with the Stream Channel Act under I.C. §42-3806.

However, as stated previously, the Idaho Legislature made water transfers distinct from senior priority water allotments with the creation of I.C. §42-1425 and §42-222. For example, similar to the Stream Channel Act, I.C. §42-222 declares transfers are illegal if they cause a loss in public interest or violation of conservation laws. Since transfers entail a re-evaluation of the water right and are distinct from the previous granted right, a transfer after 1971 should be

subject to the Stream Channel Act, which is a condition subsequent to IDWR approval. Of note, §42-3806 makes no exemption for transfers after 1971.

Rights 22-265E, 22-594, and 22-13479 were all applied for after 1971. DKJ Farms has used these rights to kill the native cutthroat trout and harm other wildlife after IDWR recommended approval of the water transfers. Objectors request this Court to restore the water flow in Moody Creek so it can regain its beneficial status as a nature and wildlife habitat for the citizens of Idaho.

K. Disregard of the Stream Channel Act by IDWR in Prior Administrative Decisions Has Resulted in Issues Not Decided by IDWR.

Director Tuthill admitted that the Stream Channel Act was not used in decisions approving Transfer Right 22-265E. Since Right 22-265E was approved pursuant to Idaho Code 42-222 and a common conservation bond exists, the Stream Channel Protection Act should have been utilized. This Court has jurisdiction to determine issues that were not decided in prior administrative decisions.

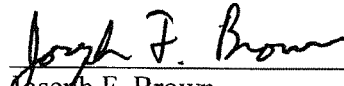
If the Stream Channel Protect Act was used, the Director of IDWR must issue a permit to allow dewatering of a by rights moved to a new location and destruction of cutthroat trout. No permits were issued. Therefore, rights at the point of diversion of DKJ Farms in Moody Creek are not legal pursuant to I.C. §42-3801 et. seq.

III. CONCLUSION

Rights 22-00265E, 22-00594, 22-13479, 22-13987, and 22-13988 to the point of diversion of DKJ Farms have in part been forfeited due to non-use between 1986 and 1997 when enough water flowed to allow the existence of cutthroat trout in Moody Creek. Further, facts that have occurred following IDWR decisions show that DKJ Farms has harmed the Objectors' water rights, illegally enlarged its water allotment and caused a loss of public interest in Moody

Creek. In addition, Rights 22-00265E, 22-13479, 22-13987, and 22-13988 have harmed the Moody Creek Ecosystem in violation of the environmental protections in I.C. §42-222 and §42-3801 to 3806 as demonstrated by facts that have occurred following IDWR decisions.

Respectfully submitted this 5th day of October, 2011.



Joseph F. Brown
Attorney for Objectors

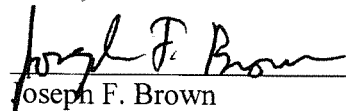
CERTIFICATE OF SERVICE

I certify that on October 5, 2011, I mailed, emailed and/or faxed the original and true and correct copies of the above and foregoing **TRIAL BRIEF** by depositing in the U.S. Mail, postage prepaid, to the following persons:

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