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APR 25 2002

Department of Water Resources

2002 APR 24 PM 2:41

DISTRICT COURT-SRB
TWIN FALLS CO., IDAHO
FILED *MC*

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 41-00057
	)	(Nielson)
Case No. 39576	)	
_____	)	SPECIAL MASTER REPORT

FINDINGS OF FACT

Nielsons' Claim and Director's Report

Arthur and Bonnie Nielson, 1655 E. Center, Pocatello, Idaho 83201, filed a *Notice of Claim to a Water Right* on April 4, 1990, claiming .3 cfs from Spring Creek, tributary to Rock Creek, for irrigation of 15 acres from March 15 to November 15 with a priority date of April 30, 1880, based on a decree.¹ IDWR Exhibit B.

The Director of the Idaho Department of Water Resources filed his *Director's Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 41, Volume One* on November 2, 1999. The Director recommended claim 41-00057 for .1 cfs to irrigate 5 acres from April 1 to October 31. IDWR Exhibit A. The Director also noted on the claim form that the *1980 Decree* did not give a flow rate (quantity) and the point of diversion was undetermined. IDWR Exhibit B.

Objections and Settlement Conference

Merrill E. Walker filed an *Objection* on December 27, 1999, objecting to priority date. Mr. Walker alleged the priority date should be May 1, 1880. On April 30, 2001, the Special Master entered an *Order Granting Motion to File Late Objection* allowing the Nielsons to file their late *Objection* to quantity, priority date and place of use.

¹ The Nielsons based their claim on a *Judgment and Decree* entered by District Judge George W. Hargraves on June 9, 1980, in Power County District Court, Case No. 6674 ("*1980 Decree*"). That *Decree* awarded to the Nielsons "the right to divert the waters of Spring Creek across a portion of their property . . . for the purpose of flood irrigating approximately fifteen (15) acres, as long as they allow the water to then return to the natural channel of Spring Creek and flow unimpeded to Plaintiff's [Rachel Hunter Cox'] land for application." Nielson Exhibit A.

Special Master Brigitte Bilyeu, acting as settlement moderator, conducted a settlement conference on June 27, 2001, in Rockland, Idaho. She met with the Nielsons, Robert Freeman (the Nielsons' farm manager), Merrill and Brent Walker, Glen and Ida Cox (successors-in-interest to Rachel Hunter Cox, plaintiff in the *1980 Decree*) and Steve Clelland and Garrick Baxter (IDWR). Ms. Bilyeu reported: "There were some proposals made, but there were no agreements. The critical disagreement which remains is priority date and acreage."

Stipulation to Resolve Walker Objection

On November 9, 2001, the Nielsons, Mr. Walker and IDWR filed a *Stipulation to Resolve Objection to Priority Date*. The parties agreed the priority date for 41-00057 should be April 30, 1880, with the following remark included with the priority date: "This water right is subordinate to water right no. 41-04031." That done, the remaining contested issues were place of use (acreage) and quantity (diversion rate).

Hearing and Amendments

A hearing on the Nielsons' *Objection* to place of use and quantity was held on November 9, 2001, in Rockland, Idaho. The Nielsons appeared *pro se* and Garrick L. Baxter appeared for IDWR.²

IDWR

At the beginning of IDWR's presentation of the basis of its recommendation for 41-00057, Mr. Baxter said IDWR amended its recommendation from .1 cfs to irrigate 5 acres to .19 cfs to irrigate 9.6 acres. Mr. Baxter said the higher figures were correct based on recent evidence given to IDWR by the Nielsons.

Steve Clelland, senior water resource agent for IDWR, confirmed the higher figures. He said IDWR's original recommendation was based on his 1995 field exam and included 5 irrigated acres (4.7 acres rounded up to 5 acres) on the north side of Spring Creek. IDWR Exhibits C and D. With the additional evidence provided by the Nielsons, he concluded there is another 4.9 acres south of the Creek irrigated by an 8" pipe that flumes water from near the

² Immediately before the hearing on the Nielsons' *Objections* in subcase 41-00057, the Special Master held a lengthy hearing on the Nielsons' *Motion to Rescind* in subcase 41-10031. Both claims were based on the *1980 Decree* and it would be helpful to review the *Special Master Report and Recommendation* in subcase 41-10031, entered April 18, 2002, to better understand the present matter.

“spill” across the Creek. IDWR’s GIS presentation of the place of use depicts the single point of diversion and the 9.6 acres on both sides of Spring Creek. IDWR Exhibit E.

Mr. Clelland said there are no more than 9.6 acres irrigated under the Nielsons’ system because of physical boundaries on three sides of the property and gravity on the fourth side. Mr. Clelland also said there was no indication the land required more than the statutory diversion rate of 1” (.02 cfs) to an acre. I.C. § 42-220.

Nielson

In his opening statement, Mr. Nielson said he and his wife were not willing to accept IDWR’s amended recommendation of .19 cfs to irrigate 9.6 acres for two reasons. First, he argued the *1980 Decree* awarded the Nielsons the entire flow of Spring Creek, estimated by Judge Hargraves in the *1980 Decree* to average between 1.1988 cfs and 1.6 cfs. Second, Mr. Nielson said they did not want to spend thousands of dollars required to measure their diversion from Spring Creek. Mr. Nielson also said an undated ASC map (Nielson Exhibit B) shows there are at least 16.8 irrigated acres where IDWR identified only 9.6 acres.

In his closing statement after the presentation of evidence, Mr. Nielson said he and his wife did not disagree with IDWR’s recommendation and there was no reason for the Special Master to view the property. The Nielsons felt IDWR was not an aid but a detriment to the irrigation community and this squabble over 2 or 3 acres was unjust. Mr. Nielson said they have no personal feeling against IDWR, but they feel IDWR won’t let them live the American way – free enterprise - to expand and grow.

DISCUSSION

The Director of IDWR is required by statute to investigate and report each claim to a water right. I.C. § 42-1411. That means the Director must determine at least the following elements necessary to define and administer irrigation water rights acquired under state law: 1) claimants, 2) source of water, 3) quantity, 4) priority date, 5) purpose of use, 6) period of use and 7) place of use. If a claim is based on a decree and any of the necessary elements are missing or vague, the Director must determine and report them to the SRBA Court. The *1980 Decree* upon which the Nielsons’ claim is based lacked two of the necessary elements: quantity (diversion rate) and point of diversion.

The *1980 Decree* awarded to the Nielsons some unknown amount of water from Spring Creek to irrigate "approximately fifteen (15) acres." Normally, such a description of the place of use (acreage) in a decree is sufficient proof of that element of a water right. In this subcase, however, IDWR's field investigation revealed the maximum acreage that can be irrigated under the current system is 9.6 acres, not 15 acres as claimed.

Since only the parties to the private adjudication (Rachel Hunter Cox, the Nielsons and James Woodworth) are bound by the terms of the *1980 Decree*,³ the Director of IDWR was required by statute to make his recommendation concerning the place of use (acreage) "to the extent of beneficial use." I.C. § 42-1401B. No one claiming a water right under a decree "shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed" I.C. § 42-220. By law, then, IDWR was required to recommend the Nielsons' claim for no more acreage than has been irrigated under the present system - 9.6 acres. Applying the statutory diversion rate of 1" or .02 cfs per acre yields a total diversion rate of .19 cfs for claim 41-00057.

When IDWR filed its *Director's Report* with the SRBA Court, its recommendation for claim 41-00057 constituted *prima facie* evidence of the nature and extent of the Nielsons' claim. I.C. § 42-1411(4). The Nielsons then had "the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in [the] director's report." I.C. § 42-1411(5).

The Nielsons failed to present evidence to overcome the *prima facie* weight accorded the *Director's Report* or to prove the application of that presumption was clearly erroneous. The map attached to their *Notice of Claim* (SRBA Court file and IDWR Exhibit B) and the map they offered at trial (Nielson Exhibit B) were undated, uncorroborated and the hand-written notes on each map were inconsistent with each other. In short, the maps only added confusion on the number of acres irrigated under 41-00057. The inevitable conclusion, then, is that IDWR's recommendation is accurate:

The Legislature's direction that the contents of the Director's report shall constitute *prima facie* evidence of some water right claims was a permissible exercise of the authority, recognized in I.R.E. 301, to create an evidentiary presumption. Unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the Director's report are established.

³ *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409 (1997).

CONCLUSIONS OF LAW

The Nielsons are entitled to partial decree adjudicating a water right as recommended by IDWR and as described in the attached *Special Master Recommendation for Partial Decree for Water Right 41-00057*.

DATED April 24, 2002.



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 41-00057

2002 APR 24 PM 2:41
DISTRICT COURT-SRBA
TWIN FALLS, IDAHO
FILED *[Signature]*

NAME AND ADDRESS: ARTHUR H NIELSON
BONNIE F NIELSON
1655 EAST CENTER
POCATELLO, ID 83201

SOURCE: SPRING CREEK TRIBUTARY: ROCK CREEK

QUANTITY: 0.19 CFS

PRIORITY DATE: 04/30/1880

THIS WATER RIGHT IS SUBORDINATE TO WATER RIGHT NO. 41-04031.

POINT OF DIVERSION: T11S R31E S31 SWNWNE Within Power County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 10-31	0.19 CFS

PLACE OF USE: Irrigation Within Power County
T09S R31E S31 SENW 9.6
9.6 Acres Total

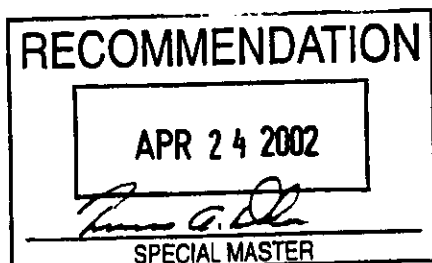
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

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.

Roger Burdick
Presiding Judge of the
Snake River Basin Adjudication



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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO

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

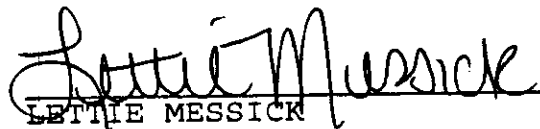
Water Right(s): 41-00057

On April 24, 2002, 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 April 24, 2002.


LETTIE MESSICK
Deputy Clerk

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TWIN FALLS, IDAHO
FILED *ON*

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): 41-00057

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 April 24, 2002, with sufficient first-class postage prepaid to the following:

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

COURTESY COPY
GLEN & IDA COX
531 TETON DRIVE
BURLEY, ID 83318

MERRILL E WALKER
PO BOX 336
ROCKLAND, ID 83271
Phone: 208-548-2343

CERTIFICATE OF MAILING

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04/24/02

ARTHUR H & BONNIE F NIELSON
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BONNIE F NIELSON
1655 EAST CENTER
POCATELLO, ID 83201
Phone: 208-232-8063


LETTIE MESSICK
Deputy Clerk