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DISTRICT COURT-SRBA
TWINFALLS CO., IDAHO
FILED _____

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 No: 34-10674
	)	
Case No. 39576	)	WATER RIGHT SETTLEMENT
	)	REPORT

PROCEDURAL MATTERS

The settlement conference was held as scheduled on February 1, 1995, at 8:00 a.m. in the District Courtroom, Memorial Building, Arco, Idaho. Deputy attorneys general A. Lynne Krogh and Susan E. Hamlin were present on behalf of IDWR and the State of Idaho. Dave Carlson, IDWR technician from Idaho Falls, was also in attendance. IDWR completed its initial disclosure and submitted its settlement statement in a timely manner.

No one attended on behalf of the claimant, Ben Howard & Son, a partnership. They failed to complete their initial disclosure and did not submit a settlement statement. The court file indicates that the claimants' address is Box 111, Whitebird, Idaho, but Mr. Smith said that Ben Howard lives near Challis, Idaho. A certified mail return receipt in the file dated March 10, 1993, addressed to the claimant in Whitebird bears the signature "Ben Howard".

Wiley F. Smith (Mt. Borah Ranch), the sole objector, was present *pro se*. Mr. Smith completed his initial disclosure and submitted his settlement statement in a timely manner.

BACKGROUND

The claim is for .06 CFS for stockwater use from September 15 to June 10 (approximately 9 months) based on beneficial use with a priority date of December 31, 1940. Mr. Smith objected to the point of diversion, in part because his water right, 34-04005, is the only water right diverting from an "un-named stream" in §36 (T 11N, R 21E)- state-owned land.

Water is carried in Mr. Smith's pipeline 2 miles to his land in §11 (T 10N, R 21E). Mr. Smith uses most of the water for irrigation and stockwatering, but some has been diverted to the claimants' adjacent land for stockwatering of 300 cattle in §§ 2 and 10 (T 10N, R 21E).

There is some confusion in the file about the source for 34-10674. It is described as Arentson Gulch, but that appears to be wrong. According to the leases and maps, the source and point of diversion for 34-04005 is an un-named stream in §36, not Arentson Gulch. The point where water is *delivered* in §11 is the Arentson Gulch for use on the claimants' land in §§2 and 10. Hence, the source for 34-10674, if such right exists, should be the un-named stream in §36.

Mr. Smith maintains this water delivery has been made and should continue based solely on the terms of a Lease of Water dated July 5, 1928, and a Supplemental Lease of Water dated February 26, 1934. In those agreements, Mr. Smith's predecessor agreed to "furnish" 1½ miners inches, later raised to 3 miners inches (.06 CFS), to the claimants' predecessor for a term of 99 years, "whenever there is sufficient water... and can be conveyed through said ditch...." Water was to be furnished "from the time the water comes down in the Spring of the year to and including June 10th, and from September 15th until the water freezes up in the Fall of the year...." The claimants' predecessor agreed to pay \$25 per year for the water. That annual payment continues to the present.

Other than the claim, there is no evidence currently in the file to support a priority date of December 31, 1940. On the contrary, the evidence suggests earlier priority dates of 1928 or 1934- the dates of the leases. Further, there is no evidence to support the recommended 9 month period of use beginning in the Fall and ending in the Spring. So far as we know, water has been used only in a split season- in the Spring and then later in the Fall.

UNRESOLVED ISSUES

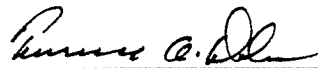
Issues yet to be resolved include: (1) Did the claimants' predecessor acquire one or more water rights in 1928 and 1934 independent of the leases or did he obtain leased water rights which terminate in the year 2027?; (2) Who owns 34-10674, the claimants or Mr. Smith?; (3) What is the correct priority date for 34-10674?; (4) Should the season of use be as stated in the 1934 lease or as claimed and recommended by IDWR?; and (5) Should 34-10674 be disallowed and 34-04005 amended to include the claimants' land as an additional point of stockwatering?

If it is determined that the claimants' predecessor acquired a valid water right independent of the leases, there is an issue of forfeiture. Mr. Smith alleges that the claimants have not used the leased water for 5 years because the claimants' pipeline is broken- this despite the annual payments to Mr. Smith of \$25. Can the claimants forfeit a water right, yet retain their lease rights? Are the existence of lease rights, which are presumably acknowledged by the claimants, based on their continuing annual payments, and conceded by Mr. Smith, incompatible with any claim of a separate water right by the claimants?

SETTLEMENT

Because the claimants failed to attend the settlement conference, there was no way for the parties to settle all or even part of the subcase. However, the 2 hour meeting helped define the issues and suggest possible solutions. Ms. Krogh agreed to draft and send to the claimants a *Standard Form 5* (Proposed Elements of a Water Right) for their consideration, with a copy to Mr. Smith. March 31, 1995, was agreed as a deadline to submit a *Standard Form 5*, request reconvening of the settlement conference or request a scheduling conference. Such time will allow IDWR to locate the claimants and also research the preferred answers to the above questions. That research includes partial reconsideration of 34-04005.

Dated: February 7, 1995.



TERRENCE A. DOLAN
Settlement Moderator, Reporting Area 1
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the WATER RIGHT SETTLEMENT REPORT was mailed on February 7, 1995, with sufficient first-class postage to the following:

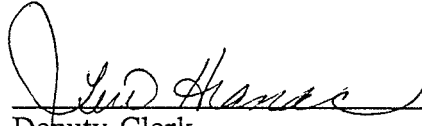
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The United States Department of Justice
Environment and Natural Resources Division
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Ben Howard & Son
Box 111
Whitebird, ID 83554
(with Standard Form 3, Notice of Change in Address)

Ben Howard & Son
Challis, ID 83226
(courtesy copy, with Standard Form 3)

Wiley F. Smith
Star Route
Mackay, ID 85251


Deputy Clerk