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DISTRICT COURT - SRBA
TWIN FALLS 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: 36-15480
	)	
Case No. 39576	)	ORDER REQUIRING BASIS FOR
	)	RECOMMENDATIONS IN
	)	DIRECTOR'S REPORT
_____	)	

On March 21, 1996, the Special Master entered a *Preliminary Special Master's Report and Recommendation* concerning the above subcase based on a fully executed Standard Form 5. This beneficial use claim is for irrigation of 303 acres with a priority date of April 1, 1958. Under the "place of use" element, irrigation was limited to 368 acres described in an overlapping license-based claim, 36-07308, with a priority date of March 2, 1973. Dennis and Randy Newton claim both rights. Essentially, as preliminarily reported, the Newtons would be able to use 1958 priority water for 303 acres anywhere within a 368 acre tract.

To date, no one has filed a motion to reconsider or to correct clerical errors in this subcase. However, there is a concern that the "place of use" element as currently stated may not comply with Idaho law.

I.C. § 42-1409 (1) (h), requires that, for each notice of claim in the SRBA containing irrigation use, "the number of irrigated acres within each forty (40) acre subdivision" must be identified. The only exception is for irrigation projects covering 25,000 acres or more. The same requirement to describe irrigated lands within 40 acre subdivisions applies when IDWR prepares the Director's Report. I.C. § 42-1411 (2) (h). Finally, partial decrees must likewise "contain or incorporate a statement of each element of a water right" as stated in the Director's Report. I.C. § 42-1412 (6).

The apparent reason behind the Legislature's requirement that irrigated land be described by the number of acres within 40 acre subdivisions relates to appurtenance. Under I.C. § 42-220, both licensed and decreed water rights "shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted."

More recently, in the 1994 SRBA enactments, the Legislature stated:

The right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant.

I.C. § 42-1402.

It makes no difference that subcase 36-15480 is based on constitutional or beneficial use of the water.

Water appropriated by the "constitutional" method- that is, by diversion and application to beneficial use without conforming to the statutory procedure- becomes an appurtenance of the land to which it is applied, as well as water appropriated under the statute.

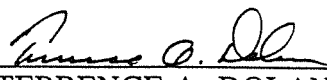
Wells A. Hutchins, *The Law of Water Rights*, 5 IDAHO L. REV. 1, 31 (1968).

Based on current law in Idaho, therefore, there is reason to believe that, except for large projects, decrees that does not describe the number of irrigated acres within 40 acre subdivisions are defective.

Therefore, pursuant to I.C. § 42-1412 (4), IT IS ORDERED that the claimants and IDWR shall, within thirty (30) days from the date of this Order, in writing:

1. Describe the 303 acres recommended for irrigation under subcase 36-15480 within 40 acre subdivisions; and
2. State any reasons they may know why the irrigated acreage in subcase 36-15480 should not be described within 40 acre subdivisions.

DATED April 15, 1996.



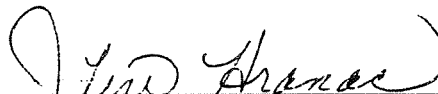
TERRENCE A. DOLAN
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER REQUIRING BASIS FOR RECOMMENDATIONS IN DIRECTOR'S REPORT was mailed on April 15, 1996, with sufficient first-class postage to the following:

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