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PERMISSIBLE PLACE OF USE FOR IRRIGATION RIGHTS

In Re SRBA

Twin Falls County Civil Case No. 39576
Subcase No. 36-15480

Report to the Special Master for
Reporting Area 3 (Basin 36)

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
David B. Shaw, Adjudication Bureau Chief

May 15, 1996

PERMISSIBLE PLACE OF USE FOR IRRIGATION RIGHTS

The Director of the Idaho Department of Water Resources (IDWR) submits this report regarding the basis for its recommendations as to the place of use for water right no. 36-15480, in response to the request of the Special Master, pursuant to Idaho Code §42-1412(4). This report was prepared by David B. Shaw, the Adjudication Bureau Chief for IDWR.

The place of use for water right no. 36-15480 is described as 368 acres within certain listed quarter-quarter sections (40-acre tracts). The place of use is further described by language which limits the use of the right to the irrigation of 303 acres within the 368 acres in a single irrigation season. The description of the place of use of an irrigation right as a given number of acres within a larger identified parcel is commonly referred to as a "permissible place of use."

A. Permissible Place of Use Generally

IDWR developed the practice of describing irrigation water rights with a permissible place of use in response to the need for a method to accurately describe the place of use for water rights which were originally appurtenant to separate parcels but are now used in combination to irrigate a single larger parcel. The necessity for the permissible place of use method is perhaps best demonstrated using a simplified example.

Assume there are four water users (A, B, C and D), each of whom at different times acquired a 40-acre tract of land (quarter-quarter section) within the same

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quarter section and appropriated a water right, at the statutory standard of 0.02 cfs or one inch per acre for the full 40 acres. As a result, these water users had the following water rights:

Water User A: 0.80 cfs, with priority of 1920, for the irrigation of 40 acres in the NENE

Water User B: 0.80 cfs, with a priority of 1925, for the irrigation of 40 acres in the SENE

Water User C: 0.80 cfs, with a priority of 1930, for the irrigation of 40 acres in the SWNE

Water User D: 0.80 cfs. with a priority of 1935, for irrigation of 40 acres in the NWNE

Over the years, Water User E acquired each of the four parcels with the appurtenant water rights. In the late 1960's, in an effort to improve the farm operating efficiency, Water User E made a substantial investment in a center pivot sprinkler system, with the pivot in the center of the NE quarter of the section, a sprinkler system that sweeps in a circle within the borders of the quarter section, and with corner catchers that reach the corners within the quarter section that are outside the circle. Water User E diverts the total 3.2 cfs under the four rights through this system which, for purposes of this example, sprinkler irrigates the entire 160 acres. The result is that Water User E is currently, and has been for over 25 years, using all four of the rights on each of the 40 acre tracts.

In describing the place of use for these four rights, IDWR (and the court) faces a quandary. A water user who makes a change in place of use of a water right may not change a 40-acre right into a 160-acre right, because the expansion in the

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number of acres irrigated pursuant to the right would constitute an expansion in use of the right and result in injury to other rights.¹ On the other hand, if the place of use of each water right continues to be described as one-40 acre tract, then the claimant's continued use of the pivot system is in violation of the water right as described, because each water right is in fact used on all four 40-acre tracts.

IDWR resolved this dilemma by developing the permissible place of use for describing the place of use. The place of use of each water right is the 160-acre tract on which each water right is in fact used. Each water right, however, remains a water right for 40 acres and contains language limiting the use of each right to the irrigation of 40 acres. So long as the four 40-acre rights are used together to irrigate the same 160 acres, there is no expansion and no injury to other water rights, and the actual place of use is accurately described.

The example described here is a simple, although not unrealistic, example of situations that are common in the irrigated areas of Idaho. Consolidation of smaller acreages into larger farms has taken place along with land leveling and the increased use of sprinklers that have allowed smaller acreages to be combined into larger more economical units. When these changes have occurred water rights have frequently been combined and several small water rights are used in common on the larger acreage. IDWR has developed the "permissible place of use" method of describing

¹ Idaho Code §42-222; Hall v. Blackman, 22 Idaho 556, 126 P. 1047 (1912).

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these water rights as the most accurate method of making the paper water right match the actual practice occurring on the ground.

As noted by the special master, description of the place of use of the water right in this manner has significant consequences, particularly in light of the doctrine of "appurtenance." Pursuant to this doctrine, a water right is deemed to be appurtenant to the land on which it is used. In the example noted above, each water right is appurtenant to the entire 160 acres which is not only the described place of use but also the actual place of use. The doctrine of appurtenance in turn has two important consequences. First, if a water user desires to change the place of use of the water right, the water user must apply for and obtain the approval of IDWR.² Second, if the water user conveys land to which the water user has appurtenant water rights, the conveyance of the land includes the appurtenant water rights, unless the deed specifically provides otherwise.³ If the water user conveys only a portion of the land, the conveyance includes a proportionate share of the water rights appurtenant in the same proportion as the land is divided, unless the deed specifically provides otherwise.⁴ Using the example above, if Water User E were to convey ten acres of the 160 acre place of use to Water User F, then Water User F would acquire

² Idaho Code §42-222.

³ Koon v. Empey, 40 Idaho 6, 231 P. 1097, (1924).

⁴ Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984).

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1/10 of each of the four appurtenant water rights, unless the deed provided otherwise.

Description of the rights using a permissible place of use also has significant consequences for purposes of the distribution of water rights.⁵ As noted above, the permissible place of use was developed to address the situation where water rights originally appropriated for separate tracts are now used in combination on a single larger tract. Water rights originally appropriated for separate tracts seldom have the same priority date. In the example above, if lack of available water made it necessary to cease the diversion of water pursuant to rights with a priority of 1930 or later, the water user would have water rights sufficient for the irrigation of only 120 acres. Under the permissible place of use, the water user could choose which 120 acres of the 160 acres the water user desired to irrigate. This allows the water user an appropriate level of flexibility in selecting crops and crop rotations in light of the available water supply and the conditions and circumstances of the water user's land and irrigation practices. In the example above, where the water user needs the full 3.2 cfs to maintain sufficient pressure to operate the pivot system, the water user would have to choose between not irrigating at all, obtaining a source of supplemental water, or adopting a different method of irrigation that would permit irrigation with less than 3.2 cfs.

⁵ In this context, "distribution" refers to the distribution of water in times of shortage in accordance with existing water rights pursuant to Idaho Code Title 42, chapter 6.

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IDWR has recommended many water rights in the three test basins with a permissible place of use. These recommendations were made pursuant to Idaho Code §42-1411(h), which provides for IDWR to determine the legal description of the place of use of a water right, including the number of irrigated acres within each forty acre subdivision, to the extent the director deems appropriate to define and administer the water right. The basis for such recommendations is that the permissible place of use is not only sufficient to describe the place of use as provided by the statute, it also is necessary to accurately describe the actual place of use. When taken in combination with the remaining elements of the water right, including language noting the water right is used in combination with other water rights, it is sufficient for administration of the water right.

As noted above, if the place of use of each water right were to be described as one-40 acre tract, then the water user's continued use of the center pivot system would be in violation of the water rights as described, because each water right is in fact used on all four 40-acre tracts.⁶ In addition, although it would be possible in the above example to "deem" each water right to continue to be appurtenant to the original 40-acre tract despite its actual use, there are many circumstances in which multiple water rights are used in combination for irrigation of a single tract, and the

⁶ See Idaho Code §§42-351 and 42-352, which provide for issuance of cease and desist orders for use of water not in conformance with the conditions of a valid water right, and injunctive relief and civil penalties for use in violation of a cease and desist order.

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portion to which each water right should be "deemed" to be appurtenant cannot reasonably be determined.

To modify the example used above, assume that in 1965 Water User E acquired 160 acres of land with no appurtenant water rights, and acquired a center pivot system for the irrigation of that quarter section. Due to the extent of existing appropriations from the water source, a new appropriation with a 1965 priority could only be satisfied during high flow conditions. To obtain a reliable water supply, Water User E instead chose to purchase existing water rights and transfer them to the newly acquired lands. Water User E was able to locate four willing sellers, each with a separate water right with a different priority date and appurtenant to a different parcel of land, each in the amount of 0.80 cfs for the irrigation of 40 acres. Once Water User E has acquired the four rights, sufficient for Water User E's land and irrigation system, Water User E begins irrigation of his 160 acres with the four water rights through his center pivot system. In this example, each water right never became appurtenant to one specific 40-acre tract within the 160-acre tract through actual use of that water right upon a specific 40-acre tract, so the facts are insufficient to determine to which 40-acre tract the water right should be "deemed" appurtenant.

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B. Water Right No. 36-15480

The claimant claimed water right no. 36-07308 based upon a license issued by IDWR and IDWR recommended water right no. 36-07308 for 6.00 cfs for the irrigation of 368 acres with a 1973 priority date. The claimant was subsequently granted leave to file a late objection in order to assert what was an amended claim seeking a 1958 priority for this right. Based on further information submitted by the claimant, IDWR found that, in 1958, the system capacity was 4.56 cfs and the water was used for the irrigation of 303 of the licensed 368 acres. IDWR and the claimant submitted a Standard Form 5 describing this use as water right no. 36-15480. At the time of the licensing field examination in 1979 the claimant's system capacity was 6.18 cfs and all of the recommended 368 acres were being irrigated. IDWR and the claimant therefore submitted an SF5 for 36-07308 in the amount of 1.62 cfs, which is the difference between water right no. 36-15480 (4.56 cfs) and the system capacity (6.18 cfs), for the irrigation of 368 acres.

All 368 acres are irrigated through a common irrigation system from the same point of diversion. The 65 acres licensed to be irrigated under license no. 36-07308 that were not being irrigated in 1958 are believed to be located in several irregular shaped parcels entirely within the 368 acres found to be irrigated at the time of the issuance of the license. The existing common irrigation system distributes water over the entire 368 acres without regard for which lands were irrigated in 1958 and which

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were not.

As illustrated in the example above, if the acreage for these two water rights were separately identified the resulting water rights would not reflect the actual use of water. Water rights that do not match the actual water use do not assist in the administration or distribution of water to the water rights.

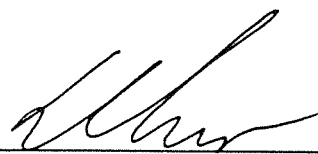
One of IDWR's goals for the SRBA is to be able to administer water rights based upon a decree that matches actual water use. If the decree of water rights in the SRBA does not match the actual water use, the decree will only add confusion, not clarity, to the administration of water rights in Idaho.

DATED this 14 day of May, 1996.

State of Idaho)
) ss.
County of Ada)

David B. Shaw, being first duly sworn, upon oath, deposes and says:

That I am the Adjudication Bureau Chief for IDWR, and that I have read the foregoing report, know its contents, and that the statements contained therein are true to the best of my knowledge and belief.



David B. Shaw
Adjudication Bureau Chief

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Subscribed and sworn to before me this 14th day of May, 1996.

Darri M Smith

Notary Public for Idaho

Residing at: BOISE ID

My commission expires: 12/5/2000

CERTIFICATE OF MAILING

I certify that on the 14th day of May, 1996, I mailed copies of the foregoing document, including all attachments, with sufficient first class postage, to the following:

Dennis & Randy Newton
Route 1, Box 1468
Paul, Idaho 83347

Darri M Smith