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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

Case No. 39576

) Subcase: 36-00003G

)
) PRELIMINARY SPECIAL MASTER'S
) REPORT AND RECOMMENDATION
)
)

Background

1. Claim

Cleave and Betty Lloyd filed this claim on September 19, 1988, seeking .4 cfs of water from Billingsley Creek through the Buckeye Ditch to irrigate 20 acres with a total volume of consumptive use of 60 afy. The claimed priority date was September 10, 1884. The Lloyds based their claim on the *New International Mortgage Bank v. Idaho Power Company* decree entered in the United States District Court in 1932. In the remarks section of the claim form, the Lloyds wrote:

This rt. was obtained when 10 shares of Big Bend Irrig. Co. water was traded for this 20" of Decree thru the Buckeye Ditch.

On November 2, 1992, IDWR filed with the SRBA Court its Director's Report for Reporting Area 3 (Basin 36). The Director recommended .12 cfs to irrigate 3 acres with a total volume of consumptive use of 9 afy. Under remarks, the Director stated that ".03 cfs of this right is limited to use for conveyance losses in delivery of this right."

The Lloyds filed their *Objection* on April 29, 1993, objecting to quantity, purpose of use, period of year, place of use, consumptive use, remarks and other. IDWR filed its *Response to Objection* on September 10, 1993, proposing no changes in the recommendation. No one else filed an objection to 36-00003G.

At the pre-trial hearing, IDWR agreed that domestic use should be added to irrigation use.

At trial, the Lloyds amended their claim to include irrigation, domestic and "other purposes" based on the *New International* decree.

2. Trial

A ten hour trial was held on May 8, 1996, at the SRBA Courthouse in Twin Falls, Idaho. The Lloyds appeared and represented themselves. IDWR was represented by Brent King and Charles Honsinger. The day after trial, the Lloyds, George Lemmon, Brent King, Steve Clelland and the Special Master viewed the Lloyds' property and related water delivery systems in the Hagerman Valley.

Finding of Fact

1. Contract of Sale

On July 16, 1957, the Lloyds bought a 40 acre tract of land in the Hagerman Valley from Harry and Joy LeMoyné.¹ The Contract of Sale stated:

Vendors covenant and agree that there are four shares of the Big Bend Mining and Irrigation Co and twenty inches of water from Billingsley Creek which represent the water appurtenant to the property herein conveyed.

Contract of Sale, p. 2, attached to *Notice of Claim to a Water Right*.

Sometime after the purchase, the Lloyds deeded the W½ of the property (20 acres) to Mr. Lloyd's brother, but retained the E½. Their claim in the SRBA was for irrigation of the entire 20 acres in the E½ the Lloyds still own. Mr. Lloyd's brother has not filed a claim for water on his half.

2. New International Decree

IDWR agreed with the Lloyds that water right 36-00003G derives from water rights first decreed to the New International Mortgage Bank in 1932. In the *New International* decree, the court described land in the Hagerman Valley:

[T]hat the subsoil of said valley underlying said valley and all of the same is shattered, fissured lava flow, upon which has been deposited layers of clay and gravel, interspersed with water worn boulders, fragments of rock, and the soil is composed mainly of decomposed lava rock, oxidized lava rock and sand, and that owing to the nature of the soil and subsoil, the coarse texture and the mechanical composition of the soil and its free drainage, the said land and all of the land in Hagerman Valley requires a large amount of water, as hereinafter specified, for its successful irrigation and production thereon of ordinary agricultural crops.

OFFICE OF THE SPECIAL MASTER

1996.05.03.2005

¹ T 7S, R 13E, §-22, NE¼NE¼, B.M., Gooding County, Idaho.

Lloyd Exhibit 7, pp.1-2.²

After describing the Hagerman Valley, the court listed water rights awarded to the New International Mortgage Bank, including 20 cfs from Billingsley Creek for the "irrigation of its hereinafter described land and for domestic and other purposes thereon...." Lloyd Exhibit, pp. 3-4. It is this water, with a priority date of September 10, 1884, that the Lloyds and IDWR agree was transferred to the Lloyds' property.³

3. The Lloyds' Water Uses

The Lloyds are best described as resourceful and independent people. Soon after they bought the land 39 years ago, they built their own 8 kilowatt hydroelectric power generator behind their house. Water delivered through the Big Bend Ditch supplies all the electricity they need.⁴ The Lloyds also receive water through the Big Bend Ditch for their domestic use under 36-00133.⁵ They have no well.

George Lemmon, water master for the Hagerman Valley, said the Lloyds never wasted water. They have always been assessed operation and maintenance charges based on 20" (.04 cfs) of water delivered through the Buckeye Ditch.

The Lloyds often commingle their water for multiple uses. Besides power generation,

² Lloyd Exhibit 7 is a copy of the *New International* decree from National Archives and Records Administration (NARA) in Seattle, Washington. This 36 page document was certified by the director of the National Archives-Pacific NW Region and is a photocopy of the original, maintained by the agency charged with keeping U.S. Government records, including this decree entered in the U.S. District Court for the District of Idaho, Southern Division. For a complete discussion of the differences between the NARA copy of the *New International* decree and the copy on file with the District Court Clerk for Gooding County, see Subcases 36-00134B and 36-00135A, **Order Denying Motion for Summary Judgment**, entered June 13, 1996.

³ There is no clear evidence of how or when the exchange of water was accomplished- "10 shares of Big Bend Irrig. Co. water was traded for this 20" of decree thru the Buckeye Ditch." Attached to the *Notice of Claim* is a letter dated April 14, 1959, from H.F. LeMoynes to George Lemmon, Secretary of the Buckeye Ditch Association. Mr. LeMoynes wrote that 20 inches of 1884 priority date water from the Buckeye Ditch "is being transferred to and shall hereafter be appurtenant to" land which the LeMoynes sold to the Lloyds two years earlier. Mr. Lloyd guessed that this water transfer, which he called "horse trading", occurred in the 1940's.

⁴ In 36-04142, the Lloyds claimed a beneficial use right to 5 cfs of water delivered through the Big Bend Ditch for power generation year 'round with a priority date of April 1, 1960. The Lloyds filed the only objection in that subcase.

⁵ 36-00133 is claimed by the Big Bend Irrigation and Mining Company with a priority date of December 17, 1903. That water probably represents some, if not all, of the Lloyds' shares in Big Bend Irrigation and Mining Company mentioned in their Contract of Sale with the LeMoynes. There was testimony that the Lloyds receive additional domestic water under 36-00192; however, IDWR recommended that claim for irrigation use only. The Lloyds' property is not included in the recommended place of use.

domestic and irrigation, the Lloyds have used their water for livestock, saw cooling at their own sawmill, truck washing, fire protection and even groundwater recharge. They also own and store a bewildering array of used automobiles, machinery and assorted materials on the premises.

Mr. Lloyd is a jack-of-all-trades whom many in the Hagerman Valley call upon to build, repair or clean their equipment. The Lloyds own large earth moving equipment Mr. Lloyd uses to repair and maintain up to eight different water ditches.⁶ He described his accomplishments best when he said, "I've made things work."

Harry LeMoyne recalled that the Lloyd property had 20 shares of Buckeye Ditch water when he bought it in the late 1940's. His family ran a sheep operation and they used the land mostly for pasture. He remembered the whole place was irrigated around the rocks by contour ditches. Fruit trees were scattered around lava rock outcroppings. Mr. LeMoyne never knew exactly how many acres were irrigated and no one measured the amount of water his family used. Mr. LeMoyne guessed that 20 of the 40 acres were irrigated. He did not specify where on the property those 20 irrigated acres were located.

4. Buckeye Ditch

Harry LeMoyne said the Buckeye Ditch was originally built by the Buckeye Ranch as a miner's ditch for placer mining. As more people moved into the Hagerman Valley, the Buckeye Ranch was split up and sold. Uses for water from the Buckeye Ditch changed. The ditch now carries water over five miles from the headgate on Billingsley Creek to approximately 20 water users. The Lloyd's property is about 2½ miles down the ditch. Steve Clelland, senior water resources agent for IDWR, said part of his task is to make sure that all these uses total no more than the original right.

From the time Mr. LeMoyne bought the Lloyd property in the late 1940's through the present, no one measured the amount of water taken out of the Buckeye Ditch. Water was measured only at the headgate on Billingsley Creek. Mr. LeMoyne recalled that folks simply took the water they needed when they needed it. Mr. Clelland described the practice as "informal rotation"- very common in the Hagerman Valley to this day. Mr. Clelland was not sure if all users along the Buckeye Ditch have the same priority date, but he could not recall water being administered in priority within the ditch.

⁶ Mr. Lloyd is president of both the Big Bend Irrigation and Mining Company and the Buckeye Ditch Company. Mr. Lloyd said he took the jobs to make sure the ditches were cleaned and kept in good repair. Otherwise, he and others would not receive their allotted water.

5. Conveyance Losses

Since the Lloyds claimed a diversion of more than 1" per acre (.02 cfs), IDWR calculated the ditch conveyance loss at the Lloyds' property by using the "Worstell Method". The formula takes into account the length and width of a ditch, plus the amount of water absorbed into the ditch soil. The Buckeye Ditch was never actually measured for conveyance losses, but the Worstell Method has been verified in similar ditches. In this instance, the equation yielded a conveyance loss of 25%, or .03 cfs of the total recommended diversion of .12 cfs. IDWR's calculations were in line with informal measurements made by the Lloyds' neighbor, Lynn Babbington.⁷

Moss and slime in the Buckeye Ditch contribute some to conveyance losses, but such growth often seals the lining of the ditch. Its real impact is on delivery of water through the ditch. First, plant growth actually displaces the water and can block its flow altogether. Second, when the plant growth becomes excessive, the ditch must be dried up and cleaned. Mr. Lloyd said he cleans the Buckeye Ditch three times each year. When the flow of water is resumed, conveyance loss is higher until the ditch lining is restored.

The Lloyds are concerned about ditch maintenance and conveyance losses because they commingle their water rights from the Buckeye Ditch and the Big Bend Ditch. They want to use the same amount of water from either ditch when the other ditch is dried up for cleaning. This can be accomplished by simply turning valves.

6. Acreage

Mr. Clelland said the Lloyds' use of water on their property over the past 20 or 30 years has been consistent. Based on several field inspections and assorted aerial photographs, Mr. Clelland calculated that the Lloyds irrigate no more than 3 acres within their 20 acre parcel- mostly around the house and shop. The remainder of the property is occupied by buildings, roadways, work areas, storage, lava rock pressure ridges or non-irrigated native grasses.

During trial, Mr. Lloyd said he still irrigates the whole 40 acre parcel he and his wife bought from the LeMoynes. That includes his brother's 20 acres. However, Mr. Lloyd estimated that only 10 acres of his and his wife's 20 acre parcel is irrigable and being irrigated on an irregular basis. He stopped irrigating some of the land because of his age (69), the time and expense of maintaining his own ditches and the low return for his efforts.

⁷ The Lloyds introduced a Soil Conservation Service report, dated October 2, 1992. The report described canal losses along the Big Bend and Buckeye Ditches between 4% and 32% per mile. But without further evidence or testimony, the court was unable to relate those figures to IDWR's results.

7. Duty of Water

Because the Lloyds' claim was recommended for irrigation of fewer than 5 acres, Mr. Clelland applied IDWR's diversion standard of 1½" per acre (.03 cfs). IDWR routinely applied this higher than 1" per acre (.02 cfs) standard to account for inefficiency inherent in smaller systems. When applied to the recommended 3 acres, that equaled a diversion of .09 cfs. That figure, plus a recommended conveyance loss of .03 cfs, equaled the .12 cfs in the Director's Report. IDWR offered no testimony to support its standard for the duty of water in the Hagerman Valley.

On the other hand, Mr. Lloyd offered some evidence in support of a diversion quantity higher than recommended by IDWR.⁸ The first bit of evidence was a report, dated October 2, 1992, from the United States Department of Agriculture, Soil Conservation Service (SCS), in Boise. The report first described "two unique features of the Hagerman area":

1. A climate hotter than that of the Snake River Plain a few hundred feet higher in elevation; and,
2. Sandy soils of high permeability, low water holding capacity, and low water holding retention ability.

The SCS report continued by defining the irrigation season in the Hagerman Valley as "in excess of 200 days", and then suggested the appropriate duty of water:

It takes a high degree of management to surface irrigate these soils. It can be argued that it takes 28 gpm/ac.[.06 cfs or 3.1"/acre] delivered to the field to successfully manage surface irrigation. Sandy soils, bare conditions, steep slopes, and high flows per furrow can all contribute to erosion and sediment transport. Computer modeling, however, shows little runoff, but high deep percolation.

Lloyd Exhibit 3, p. 2.

A supplement to the SCS report, dated October 7, 1992, more specifically described a farm near the Lloyds' property:

Furrow irrigation modeling shows application rates of 28 gpm/ac (3.1 in/ac) and a high degree of irrigation water management needed to meet consumptive use rates for mint. These application rates are needed due to a combination of factors including climate, soil textures, excessively drained soil, topography, and the lower irrigation efficiencies of surface irrigation systems. Erosion and sediment transport

⁸ The Lloyds claimed .4 cfs to irrigate 20 acres or .02 cfs/acre (1"/acre). IDWR recommended a higher diversion rate per acre than claimed- .09 cfs to irrigate 3 acres (excluding .03 cfs for conveyance losses) or .03 cfs/acre (1½"/acre). However, the Lloyds objected to the recommended quantity, *inter alia*, as being "less than decreed and/or beneficially used... Objectors reserve the right to claim...quantities of use as shown by the evidence at trial." *Objection*, p. 7.

are not a problem due to little runoff, but the model shows excessive deep percolation.

Lloyd Exhibit 3, p. 1.⁹

Because the amount of water historically used for irrigation on the Lloyds' property has never been measured, it is impossible to precisely determine an appropriate duty of water. Besides Mr. Clelland, the only other testimony on the matter was given by Mr. Lemmon. He said he once owned 70 acres adjacent to the Lloyds' property and he needed 4" or .08 cfs/acre to irrigate.

8. Consumptive Use

After Mr. Clelland determined the acreage and applied the standard duty of water for small irrigated acreage, that left only the matter of annual volume of consumptive use. For that element, he applied IDWR's standard rate of 3 acre feet/acre for the Hagerman Valley which equaled a total volume of consumptive use of 9 afy. As with the duty of water, IDWR offered no testimony to support its standard for annual volume of consumptive use in the Hagerman Valley. The Lloyds offered no evidence to rebut IDWR's recommended annual volume of consumptive use.

Conclusions of Law

1. *Prima Facie* Evidence

Elements of water rights recommended in the Director's Report are presumed to be true unless disproved by some evidence to the contrary. The Idaho Legislature put it this way in their latest amendment of I.C. § 42-1411 (4):

[T]he director's report...shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law. The unobjected to portions of the director's report shall be decreed as reported.

Since passage of the amendment, the Idaho Supreme Court has had the opportunity to put its stamp of approval on the legislation:

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.

⁹ The Lloyds' irrigation, by contour ditches and hand lines, approximates the furrow irrigation described in the SCS letter dated October 7, 1992.

In Re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614, 624 (1995).

2. Purposes of Use

In 1988, the Lloyds only claimed irrigation use based on the *New International* decree. Later, they amended their claim to add domestic and “other purposes”. As mentioned earlier, IDWR agreed that domestic should be included in this water right. The only issue presented under this element is whether “other purposes” should be included along with irrigation and domestic.

When the *New International* decree was entered in 1932, it is true that the Lloyds’ predecessor was awarded 20 cfs from Billingsley Creek for “the irrigation of its hereinafter described land and for domestic and other purposes thereon....” However, the federal court could only have intended to include then existing beneficial uses, not some future uses. That means beneficial uses being made of water flowing through the Buckeye Ditch in 1932. The reason for this limit is the general maxim of water law: water must be (1) *diverted* with an (2) *intent* to appropriate it for a (3) *beneficial use* before there can be a valid appropriation.¹⁰ To support a valid appropriation of water, and hence entitle an appropriator to a decreed water right, all three elements of *diversion*, *intent* and *beneficial use* must exist at the time the decree is entered.

We do not know what was included in “other purposes” in 1932, and the Lloyds have offered no suggestions. Perhaps the court was thinking of placer mining since the Buckeye Ditch was first built for mining. We can only guess. But for now, the Lloyds are only entitled to irrigation and domestic¹¹ uses under 36-00003G.

3. Place of Use/Irrigated Acreage

At trial, it was clear the Lloyds were claiming a water right only for their 20 acre parcel, not for Mr. Lloyd’s brother’s 20 acre parcel. There was some confusion on this point because most of the evidence and testimony concerned water rights and irrigated acreage on the whole 40 acre tract the Lloyds bought from the LeMoynes. The issue, then, is to determine how many of the 20 acres the Lloyds irrigate. The Lloyds first claimed all 20 acres were irrigated, but IDWR recommended

¹⁰ *Water Law*, 2d ed., David H. Getches, p. 88 (1990).

¹¹ At trial, counsel for IDWR pointed out that most, if not all, of the uses the Lloyds make of their water may be included under “domestic purposes” as defined by I.C. § 42-111:

- (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (½) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
- (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

3 acres. At trial, Mr. Lloyd agreed that maybe they irrigate only 10 acres.

The only certain way to determine irrigated acreage is to survey the land. But this method is expensive and time consuming. The next best method is to rely on aerial photographs and maps, as IDWR did in this subcase. Their procedure of using NAPP photography, Landsat data and orthophotoquad maps, plus field inspections to verify the results, was the most convincing evidence of actual irrigated acreage.

Testimony by the Lloyds' witnesses was less credible because they described irrigated acreage relative to the 40 acre tract and not to the Lloyds' 20 acres. Those witnesses also relied heavily on the number of inches or shares of water assessed to the land as evidence of irrigated acreage. For example, they assumed that if the Lloyds are assessed for 20" of water from the Buckeye Ditch, they must be irrigating 20 acres. No one explained how many of those 20 irrigated acres were retained when the Lloyds sold half of their land to Mr. Lloyd's brother.

When the court viewed the Lloyds' property, it was apparent that most of the 20 acres cannot be irrigated. Much of what may have been irrigated before the Lloyds bought the property has since been converted to other uses. Buildings, work areas and storage have taken over a substantial part.

Based on the evidence presented at the hearing, including documents and testimony, plus the court's viewing, the court is persuaded that the Lloyds should be awarded water sufficient to irrigate 3 acres within their 20 acre tract. Water to irrigate more than 3 acres would not be a beneficial use of water.

4. Quantity/Duty of Water

It was clear that the Lloyds overcame IDWR's *prima facie* evidence concerning the quantity of water that is beneficially required to irrigate their 3 acres. IDWR relied solely on application of its standard diversion rate of .03 cfs/acre for small irrigation systems. But there was no testimony or documentation to support IDWR's standard. The court was left with minimal bases to determine its admissibility, relevance, weight and credibility.

The Lloyds' SCS report and its supplement accurately described the climate and soil conditions in the Hagerman Valley. In fact, the language could just as easily have been written by Judge Cavanaugh in the *New International* decree back in 1932. The SCS report concluded that a reasonable duty of water for land similar to the Lloyds' is .06 cfs/acre, or double IDWR's recommendation. That duty of water yields a diversion quantity of .18 cfs for the Lloyds' 3 acres. The court was not convinced that the higher duty of .08 cfs/acre suggested by Mr. Lemmon is appropriate. There was simply not enough credible evidence to support that higher diversion

amount.

5. Conveyance Loss

Having determined the diversion quantity, that leaves the matter of conveyance loss. IDWR's recommendation included a 25% conveyance loss based on the Worstell Method. The court is convinced that such a percentage is accurate and reasonable under these circumstances, particularly since the Lloyds offered no evidence to the contrary. Therefore, calculated the same way as the claim was recommended, the conveyance loss equals .06 cfs:

$$\begin{aligned} & .18 \text{ cfs } (.06 \text{ cfs/acre diversion rate} \times 3 \text{ acres}) \\ + & \text{ .02 cfs (in-home domestic use)} \\ = & \text{ .20 cfs} \\ + & \text{ .06 cfs (conveyance loss) } [.26 \text{ cfs} \times 25\% = .06 \text{ cfs}] \\ = & \text{ .26 cfs (total quantity of water diverted).} \end{aligned}$$

6. Consumptive Use

IDWR's recommended annual volume of consumptive use for the Lloyds' 3 irrigated acres was 9 afy (3 af/a x 3 acres = 9 afy). The Lloyds claimed 60 afy (3 af/a x 20 acres = 60 afy) or the same consumptive use per acre. Since the Lloyds offered no evidence to disprove IDWR's recommended consumptive use, the court is left to conclude that the appropriate annual volume of consumptive use is 9 afy.

Recommendation

It is recommended that Cleave and Betty Lloyd be adjudicated the following water right under claim 36-00003G:

Name and address of claimants:

**Cleave and Betty Lloyd
Route 1, Box 14
Hagerman, Idaho 83332**

Source of water:

**Billingsley Creek
Water is delivered through the Buckeye Ditch.**

Quantity of water used:

**Irrigation- .24 cfs
Domestic- .02 cfs (in-home use)
Total- .26 cfs**

.06 cfs of this right is limited to use for conveyance loss in delivery of this right.

Date of priority:

September 10, 1884

Point of diversion:

**T 7S, R 13E, § 11, B.M., Gooding County, Idaho,
SE¼SE¼NE¼**

Purposes of use:

Domestic and irrigation

Period of use:

Irrigation- irrigation season

Domestic- January 1 to December 31

Places of uses:

Domestic-

**T 7S, R 13 E, § 22, B.M., Gooding County, Idaho,
SE¼NE¼NE¼**

Irrigation-

**T 7S, R 13E, § 22, B.M., Gooding County, Idaho,
NE¼NE¼- 3 acres**

Annual volume of consumptive use:

Irrigation- 9 afy

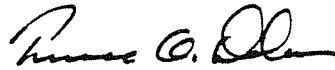
Conditions on exercise of water right:

None

Remarks or other matters necessary for definition of the right, for clarification of any element of the right, or for administration of the right by the director:

None

DATED July 1, 1996.



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