

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF SNAKE RIVER)
BASIN ADJUDICATION CLAIM NOS.)
43-00015A-22A, 43-00025A, 43-00026A,)
43-00029A, 43-00015B-22B, 43-00025B,)
43-00026B, 43-00029B, 43-00015C,)
43-00068, 43-00300, 43-412, and 43-12913)
_____)

**FINDINGS OF FACT AND
RECOMMENDATION**

On June 26, 2001, the Idaho Department of Water Resources conducted a Fact Finding Hearing pursuant to *Idaho Code* § 42-1410(1) in the matter of Snake River Adjudication Claim Nos. 43-00015A through 22A, 43-00025A, 43-00026A, 43-00029A, 43-00015B through 22B, 43-00025B, 43-00026B, 43-00029B, 43-00015C, 43-00068, 43-00300, 43-00412, 43-12913. The intent of the fact finding hearing was to assist the Idaho Department of Water Resources (IDWR) in developing a more thorough understanding of the facts surrounding the above-listed Snake River Basin Adjudication (SRBA) Claims and related Bar M water rights. Interested parties presented both oral testimony and written evidence during the hearing. After reviewing the evidence provided at the hearing, IDWR continued to investigate and research this matter. This investigation has resulted in the following findings of facts and recommendation.

FINDINGS OF FACT

1. Albion Idaho Land Co. owned the Bar M Ranch in 1928. The Bar M Ranch water rights were decreed to Albion Idaho Land Co. in the *Albion Idaho Land Co. v. Adams*, Decree No. 992 (D. Idaho 1928) (*Jobe Adams Decree*). These water rights are hereinafter referred to as the Bar M water rights. The original Bar M water rights

consisted of 15 individual water rights, specifically right numbers 43-00015, 43-00016, 43-00017, 43-00018, 43-00019, 43-00020, 43-00021, 43-00022, 43-00023, 43-00024, 43-00025, 43-00026, 43-00027, 43-00028, and 43-00029.

2. The place of use for the Bar M water rights as decreed in the *Jobe Adams Decree* is downstream from the confluence of Cassia Creek and the Raft River. The Bar M water rights consisted of a combined total of 34 cfs: 31.60 cfs from the Raft River and 2.40 cfs from Cassia Creek. Cassia Creek is tributary to Raft River. Raft River does not contribute any water to Cassia Creek.
3. On June 6, 1939, Cassia Creek Irrigation Co., Inc. (Cassia Creek Irrigation, Co.) was incorporated for a 50-year duration. On June 6, 1939, the Cassia Creek Irrigation Co. entered into a land purchase contract with Albion Idaho Land Co. for the Bar M Ranch. In 1940, Cassia Creek Irrigation Co. purchased the Bar M Ranch.
4. On December 5, 1940, Cassia Creek Irrigation Co. filed with the Idaho Department of Reclamation (now known as the Idaho Department of Water Resources) an application to change the points of diversion and place of use for the Bar M Ranch water rights. The application for transfer proposed to move the points of diversion from Raft River to 74 points of diversion on Cassia Creek, and to move the place of use from the Bar M Ranch to the lands owned by the shareholders of Cassia Creek Irrigation Co. This Application for Transfer was numbered 618. On March 21, 1941, Transfer 618 was approved by the Department of Reclamation. This transfer is hereinafter referred to as "the transfer."

5. The transfer's approval resulted in 34.0 cfs being diverted from Cassia Creek under the Bar M rights. Prior to the transfer, only 2.4 cfs of the Bar M water rights came from Cassia Creek rather than the Raft River.
6. Local water users on Raft River and Cassia Creek appealed the approved transfer to the District Court claiming, among other things, that Cassia Creek Irrigation Co. "intends to supply its entire decrees from the waters of Cassia Creek and to make constant and continuous use thereof and to divert the same at 74 points on Cassia Creek and to distribute said waters through a system of rotation among its members without regard to the rights held by them under said decrees or the rights of other users of water of said streams." *Beecher v. Cassia Creek Irr. Co., Inc.*, Petition No. 4070, ¶ VIII (11th Jud. Dist. Idaho 1941).
7. On June 1, 1943, the District Court modified the transfer and established water delivery as follows: delivery of the transferred water will be by rotation, "provided, nevertheless, that at all times when there is sufficient water in Cassia Creek and its tributaries to entitle the hereinafter named water users, each or any of them, to divert water under their decreed water right and priority date thereof, as established by the [*Jobe Adams Decree*] . . . none of the transferred water shall be diverted above any such water users point of diversion on Cassia Creek or its tributaries when such diversion would leave insufficient water at such water users headgate to fill his water right." *Beecher v. Cassia Creek Irr. Co.*, Decree No. 4070 ¶ III, pg. 5 (11th Jud. Dist. Idaho 1943) The Cassia Creek Irrigation Co. appealed the District Court decision to the Idaho Supreme Court.
8. The Idaho Supreme Court in *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 507 (1944) considered "whether other users, particularly

respondents, of the waters of Cassia Creek and its tributaries are injured or will be injured by [transferring the Bar M water rights to Cassia Creek]." *Id.* at 7, 154 P.2d at 509. The Court stated,

The rule would seem to be established that a change in point of use will not be permitted without limitations if the enlarged use in time or amount increases the burden on the stream, or decreases the volume of water in the stream to the injury of appropriators on the stream The court in a proceeding of this character has jurisdiction to impose reasonable limitations and conditions to avoid injury [citations omitted]. Rotation above respondents' points of diversion could well lessen the volume of the stream and deprive them of their appropriation in point of time during which they were entitled to the use of the water.

Id. at 8, 154 P.2d at 509-10. The Court went on to say that "all appropriators on Cassia Creek are entitled to divert water from said creek according to their priorities in the same volume and under the same conditions as existed prior to the transfer of the waters of the Bar M Ranch." *Id.* at 9, 154 P.2d at 510. With this rationale, the Supreme Court affirmed the limitations set up by the District Court but remanded the case back for amended findings concerning priority dates for Cassia Creek users to be consistent with those originally set forth in the *Jobe Adams Decree*.

9. The Supreme Court held in *Beecher* that the District Court erred when it deviated from the priority dates set forth in the *Jobe Adams Decree* by

adding up the various appropriations of respondents, taking respondent Beecher as an example, who had a decreed right of 1.88 s.f. with a priority of April 30, 1872. He also testified he had a water right of 1873, 1879 and some of 1880. The court dated Beecher's entire rights as of 1872. There are other instances in the record which demonstrate the fact that the court advanced junior priorities as of the date of the first appropriation. The court should have followed the Federal decree and fixed the priorities as of the same date as fixed in the Federal decree to avoid unnecessary confusion in administering the water. The decree should be amended in this respect.

Id. at 10-11, 154 P.2d at 511 (emphasis added). This finding is consistent with Idaho water law in that the priority date for a right cannot be prior to the date when the water right was actually put to beneficial use.

10. The Court also found that

a non-interference agreement [was] signed [by Cassia Creek water users] with the distinct understanding that what are known as the old water rights, or the prior appropriations by water users, would not be in any way jeopardized by reason of the change in diversion or the transfer of the Bar M water rights. It was distinctly understood and agreed that all existing prior rights would be supplied irrespective of the change in the point of use.

d. at 11, 294 P.2d. at 511. The Department finds that the "prior appropriations by water users" referred to by the Court were those Cassia Creek water rights that existed prior to the transfer of the Bar M rights in 1941, including decreed, licensed and beneficial use rights.

11. On August 2, 1945, the District Court amended its findings and decree. The amended decree states: "[W]hen the total flow of Cassia Creek is less than 21.54 cubic feet of water at the three-way diversion point on Cassia Creek, measured with no diversion from the creek, except to satisfy the 'Bar M' decree with priority of April 30, 1872, and the Beecher, Sears and Ward decrees of equal priority, the transferred rights are no longer good to any extent, and should be disregarded." *Beecher v. Cassia Creek Irr. Co.*, Amendment to Decree No. 4070 (11th Jud. Dist. Idaho 1945).

12. On November 30, 1956, the charter of Cassia Creek Irrigation Co. was recorded as forfeited by the Secretary of State's Office. The Department was unable to find any evidence of a formal dissolution of the company or its assets.

13. The original Bar M water rights were decreed to the Albion Idaho Land Co. as follows:

Decreed Right No.	Priority date	Diversion Rate (cfs)	Source ¹	Period of use
43-15	9-11-83	1.60	RR	None decreed
43-16	4-30-83	1.20	RR	None decreed
43-17	1-1-86	5.20	RR	4-1 to 7-1
43-18	11-30-86	0.80	CC	None decreed
43-19	4-30-72	2.60	RR	4-1 to 11-1
43-20	5-31-78	0.80	CC	None decreed
43-21	5-31-88	2.40	RR	4-1 to 7-1
43-22	5-31-82	3.20	RR	4-1 to 7-1
43-23	5-31-82	1.00	RR	4-1 to 7-1
43-24	5-31-82	5.00	RR	4-1 to 7-1
43-25	5-31-83	2.80	RR	4-1 to 7-1
43-26	5-31-73	4.00	RR	4-1 to 7-1
43-27	1-1-86	0.80	CC	None decreed
43-28	5-31-88	1.00	RR	4-1 to 7-1
43-29	3-7-86	1.60	RR	None decreed
	Total	34 cfs		

14. One claimant, Golden Gardiner, ("Gardiner") filed the following claims to portions of the 15 originally decreed Bar M water rights:

Claim No.	Also Includes	Priority Date	Diversion Rate (cfs)	Source ¹	Season of Use
43-15A		9-11-83	.04	CC	3-15 to 11-15
43-15C		9-11-83	.04	CC	3-15 to 11-15
43-16A		4-30-83	.03	CC	3-15 to 11-15
43-16B		4-30-83	.03	CC	3-15 to 11-15
43-17A	43-27	1-1-86	.14	CC	3-15 to 11-15
43-17B	43-27	1-1-86	.13	CC	3-15 to 7-1
43-18A		11-30-86	.02	CC	3-15 to 11-15
43-18B		11-30-86	.02	CC	3-15 to 11-15
43-19A		4-30-72	.06	CC	3-15 to 11-15
43-19B		4-30-72	.06	CC	3-15 to 11-15
43-20A		5-31-78	.02	CC	3-15 to 11-15
43-20B		5-31-78	.02	CC	3-15 to 11-15
43-21A	43-28	5-31-88	.08	CC	3-15 to 11-15
43-21B	43-28	5-31-88	.07	CC	3-15 to 7-1

¹ RR refers to Raft River and CC refers to Cassia Creek.

43-22A	43-23 43-24	5-31-82	.21	CC	3-15 to 11-15
43-22B	43-23 43-24	5-31-82	.2	CC	3-15 to 7-1
43-25A		5-31-83	.06	CC	3-15 to 11-15
43-25B		5-31-83	.06	CC	3-15 to 7-1
43-26A		5-31-73	.09	CC	3-15 to 11-15
43-26B		5-31-73	.09	CC	3-15 to 7-1
43-29A		3-7-86	.04	CC	3-15 to 11-15
43-29B		3-7-86	.04	CC	3-15 to 11-15
		Total	1.55 cfs		

15. Three other claimants, Thomas Teeter (claim number 43-15B), Larry Kincade (claim number 43-68) and Albert Cottle (claim 43-412) referred to Bar M water in remarks on their claims to other water rights but claimed no specific quantity or priority date.
16. Gardiner claims a pro-rata portion (approximately five percent) of all of the Bar M water rights. However, the Bar M water rights have not been formally delivered to any Cassia Creek water users, including Gardiner, for several decades. There are no entries in the water master records that any delivery of the Bar M water rights was intended or completed. No delivery call has been made by any of the Cassia Creek water users, including Gardiner for Bar M water for several decades.
17. Each year Gardiner, along with other junior Cassia Creek water users, has been shut off to allow the more senior water users, those holding priority dates of 1885 and earlier, to use the available water. Gardiner was aware he was being curtailed and still made no call for his claimed portion of the senior 1872, 1873, 1878, 1882 and 1883 Bar M water rights. Gardiner was delivered and diverted and used his junior decreed water rights only.
18. Idaho Code § 42-222 states that "all rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by failure for a term of five (5) years to apply it to the beneficial use for which it was appropriated" In this case,

Gardiner has not made use of a pro-rata portion of the Bar M water rights for several decades. Instead, Gardiner has enjoyed the benefit of having his junior decreed water right delivered longer because delivery to the Bar M was no longer necessary.

19. The water users on Cassia Creek have benefited from the purchase of the Bar M water rights by the Cassia Creek Irrigation Company and the subsequent transfer of water off of Bar M land. The Cassia Creek water users can now use water longer under their original decreed rights because water delivery to the Bar M Ranch is no longer required.

20. When the Bar M water rights were transferred to Cassia Creek, delivery of Cassia Creek water to water users on Raft River ceased. Thus, since the early 1940s, Cassia Creek has been administered separately from Raft River.

RECOMMENDATION

1. The District Court and the Supreme Court affirmed the transfer of the Bar M water rights to Cassia Creek so long as the transfer did not cause injury to existing Cassia Creek water users. The conditions placed on the transfer by the District and Supreme Court's decisions were not practical. Thus, the transfer as modified by the District and Supreme Court, was not implemented by the water users on Cassia Creek. Instead, the water users chose to no longer deliver the Bar M water rights. Thus, the Bar M water rights were no longer delivered to or used by the Cassia Creek Irrigation Company or any of its shareholders.
2. The Department finds that the Bar M water rights have been forfeited and the water once used to satisfy the Bar M water rights has been left in the stream, which improves or "strengthens" the deliverability of water to the Cassia Creek water users. This occurs because when a senior water right is forfeited, the junior water rights

move up the ladder of priority. See *Jenkins v. Department of Water Resources*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982).

3. Golden Gardiner has claimed roughly five percent of the total Bar M water rights in the SRBA through claim numbers 43-00015A through 22A, 43-00025A, 43-00026A, 43-00029A, 43-00016B through 22B, 43-00025B, 43-00026B, 43-00029B, 43-00015C. The Department has recommended these water rights as disallowed due to forfeiture.
4. IDWR has included Cassia Creek in its General Provisions for Basin 43 as a separate stream. This indicates that Cassia Creek has been and will continue to be administered separately from Raft River.

DATED this st 1 day of October, 2001.


DAVID R. TUTHILL, JR.
ADJUDICATIONS BUREAU CHIEF

CERTIFICATE OF SERVICE

I certify that on October 01, 2001, I served a true and correct copy of the foregoing Findings of Fact and Recommendation upon the persons listed below by placing the document in the United States Mail, postage paid, and addressed as follows:

Joe Barrett Jr.
HC 72 Box 2024
Malta, ID 83342

Albert Cottle
1750 S. Cottle Lane
Box 1232
Malta, ID 83342

Golden Gardiner
1750 S. Hwy 81
Malta, ID 83342

Matt Gardiner
234 S. 100 W.
St. George, UT 84770

Jay Harper
2252 E. 1500 S.
Malta, ID 83342

Ronald Harper
1300 S. 2225 E.
Malta, ID 83342

Tommy Hutchison
HC 61 Box 1248
Malta, ID 83342

Brian Kincade
1781 E Hwy 77
Malta, ID 83342

Stan Lloyd
2270 S. Elba-Almo Hwy
Elba, ID 83342

Richard Moranville
HC 61 Box 1376
Elba, ID 83326

Alvin Neddo
HC 67 Box 1000
Malta, ID 83342

Merlin Ottley
904 E Ottley Rd 1370
Elba, ID 83342

Tom Ottley
P.O. Box 455
Elba, ID 83326

Dale Pierce
2269 E. Pierce Lane
Box 2058
Malta, ID 83342

Cedric Taylor
P.O. Box 637
Malta, ID 83342

Kim Thornton
P.O. Box 635
Malta, ID 83342

Bud Tracy
155 N0. Main
Malta, ID 83342

Art Ward
c/o Paul Ward
1960 S Elba/Almo Rd
Elba, ID 83342

Charles Ward
2075 E. 1700 S.
Malta, ID 83342

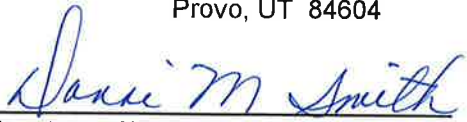
Paul Ward
1960 S. Elba/Almo Rd
Elba, ID 83342

Thomas Ward
450 W. US Hwy 30
Burley, ID 83318

Arden Wickel
2337 E. 1500 S.
Malta, ID 83342

Bill Wickel
HC 61 Box 1284
Malta, ID 83342

Ruel Barker
1621 W. 950 N.
Provo, UT 84604


Signature of individual mailing document