

**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)	Consolidated Subcase 35-07200
)	and
Case No. 39576)	Consolidated Subcase 41-02016
)	
)	ORDER GRANTING RESPONDENTS'
)	MOTIONS FOR PARTIAL SUMMARY
)	JUDGMENT

BACKGROUND

Director's Reports

Basin 35

IDWR filed multiple *Director's Reports* for groundwater claims for "irrigation and other uses" in Basin 35 because of the large number-- 2,382. The reports were divided into northern, middle and southern parts, beginning with the northern part of the basin:

Part 1-- IDWR filed the *Director's Report for Irrigation & Other Uses, Reporting Area 5, Part 1, Volume One (IDWR Basin 35)* on June 19, 1998. It filed a *Corrected Director's Report* on July 10, 1998.

Part 2-- The *Director's Report for Irrigation & Other Uses, Reporting Area 5, Part 2, Volume One (IDWR Basin 35)* was filed on September 15, 1998. A *Supplemental Director's Report for Irrigation and Other Uses, Reporting Area 5, Parts I & II, Volume One (IDWR Basin 35)* was filed January 29, 1999.

Part 3-- IDWR filed the *Director's Report for Irrigation and Other Uses, Reporting Area 5, Part III, Volumes One and Two (IDWR Basin 35)* on January 29, 1999. It filed *Volume Three* on June 23, 1999.

Basin 41

IDWR filed the *Director's Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 41, Volume One* on November 2, 1999.

Twin Falls and North Side Canal Company Objections

The Twin Falls and North Side Canal Companies ("Canal Companies") filed virtually identical *Objections* to approximately 1,972 groundwater irrigation claims in Basins 35 and 41.¹ Of those claims, 1,721 are based on licenses (including 1 application and 2 permits), 250 are based on beneficial use and 1 is based on a decree.²

The Canal Companies objected to 4 elements.³ As an example and to help understand their *Objections*, the 4 elements as recommended by IDWR for 35-07200 are noted in brackets along with the language quoted from the Canal Companies' *Objections*:

D. 2. Source: [Groundwater] Should be: Tributary to Snake River.

The source for this right is tributary to the Snake River. The recommendation for the 'source' element of this water right fails to address this legal and hydrologic interconnection.

D. 3. Quantity: [4.06 cfs, 1280.0 afy] Should be: Reduced as necessary to fully supply, and prevent injury to, senior water rights, including those held by or for the benefit of the Objector.

Diversion of this and other junior priority water rights has reduced, and will continue to reduce, the amount of water available to satisfy senior priority water rights, including those held by or for the benefit of the Objector, thereby causing injury. Sufficient water is not available to fill this water right without reducing the quantity of water under senior water rights. The quantity for this and other water rights must therefore be reduced, in priority order, as necessary to assure that senior water rights are satisfied within the available water supply.

D. 10. Other Provisions Necessary for Definition or Administration of this Water Right:

[A measuring device of a type approved by IDWR shall be maintained as a part of the diverting works.]

[In the near future IDWR will recommend a general provision for this sub-basin regarding the interconnection of water resources within the Snake River Basin.

¹ The Canal Companies did not object to domestic, commercial, municipal and industrial claims in Basins 35 and 41 because they were considered *de minimis*. Canal Companies' *Response Brief to Respondents' Motions for Partial Summary Judgment*, p. 2, footnote 2.

² To help the parties determine their litigation strategies in the face of such a large number of subcases, IDWR was asked to report on the various bases of the claims (license/permit, beneficial use and decree) to which the Canal Companies objected. On May 9, 2001, IDWR filed its *Notice of Filing of IDWR Basis of Claims Report* for 1,950 claims in Basin 35. On May 10, 2001, counsel for IDWR wrote to the Special Master to report the bases of 22 claims in Basin 41; for some reason, IDWR omitted reporting the basis for 41-02021 (license).

³ The Canal Companies did not object to all 4 elements in every groundwater irrigation claim filed in Basins 35 and 41. It depended on which *Director's Report* IDWR reported the claim because the elements were recommended differently as SRBA case law developed. Nevertheless, the 4 elements discussed hereinafter cover all Canal Company *Objections*.

An opportunity will be provided at that time to file an objection within the district court to that provision. This water right will be subject to such general provisions as the district court determines necessary for the definition of the rights or for the efficient administration of water rights.]

Should be: Revised to sufficiently define the legal and hydrologic relationship between this water right and other water rights and to provide a sufficient basis for administration of this and other water rights.

The provision does not sufficiently define the legal and hydrologic relationship between this water right and other water rights or provide a sufficient basis for administration of this and other water rights.

D. 11. I object because: This water right should not exist.

The water used under this water right was previously appropriated and used by senior water rights holders, including the Objectors, and was therefore not subject to appropriation by the Claimant.

Finally, the Canal Companies added “savings” language to their *Objections* in case new issues arose:

Reservation of rights. The Objector specifically reserves the right to amend this objection as circumstances, including additional investigation and discovery, may warrant. The Objector also reserves the right to object to any general provision(s) proposed for this water right in the future, including any revised interconnection and/or conjunctive management general provision(s).

Consolidations

Basin 35

All subcases in Part 1 of Basin 35 in which the Canal Company filed *Objections* were consolidated under a lead subcase, 35-07200. *Interim Order Consolidating Issues Concerning Canal Company Objections (Basin 35-Part 1) and Order Designating Lead Subcase*, consolidated subcase 35-07200, November 17, 1998. Issues beyond those raised by the Canal Companies were handled separately. Subcases in Parts 2 and 3 of Basin 35 with the same *Objections* were added later. *Order Consolidating Issues Concerning Canal Company Objections (Basin 35-Parts 2 & 3) and Order Designating Lead Subcase*, consolidated subcase 35-07200, August 30, 1999.

Basin 41

The 23 subcases in Basin 41 to which the Canal Companies objected were consolidated under a lead subcase, 41-02016. *Order Consolidating Issues Concerning Canal Company Objections and Designating Lead Subcase*, consolidated subcase 41-02016, November 15, 2000.

Motions for Partial Summary Judgment

Basin 35

On May 10, 2001, the State of Idaho and various groundwater users/claimants and groundwater districts represented by the Givens Pursley law firm⁴ (collectively “Respondents”) filed two separate *Respondents’ Motion for Partial Summary Judgment* in consolidated subcase 35-07200. One *Motion* listed 1,752 claims based on licenses and the other *Motion* listed 246 claims based on beneficial use. Both *Motions* sought dismissal of the Canal Companies’ *Objections* but did not apply to any other objections or responses.

Basin 41

The same day, the Respondents filed virtually identical *Motions* in consolidated subcase 41-02016. One *Motion* listed 18 claims based on licenses and the other listed 5 claims based on beneficial use.⁵

Hearing on Motions for Partial Summary Judgment

A hearing on the *Motions for Partial Summary Judgment* was held on July 12, 2001, at the SRBA Courthouse in Twin Falls, Idaho. Jeffrey C. Fereday appeared for various groundwater users/claimants and groundwater districts; David J. Barber appeared for the State of Idaho; John K. Simpson appeared for the Twin Falls and North Side Canal Companies; Roger D. Ling appeared for the A&B, Burley and Falls Irrigation Districts and Aberdeen-Springfield Canal Company; Jerry R. Rigby appeared for the Fremont-Madison Irrigation District; Josephine P. Beeman and Deborah E. Nelson appeared for the North Side Ground Water District; and Nicholas B. Spencer appeared for IDWR.

⁴ For the list of parties represented by the Givens Pursley law firm in this matter, see Exhibit B to *Respondents’ Motions for Partial Summary Judgment*, consolidated subcases 35-07200 and 41-02016.

⁵ The total number of claims on exhibits attached to the Respondents’ *Motions for Partial Summary Judgment* filed in Basins 35 and 41 is 2,021. The total number of claims for which IDWR reported the bases is 1,972. Some discrepancies are probably the result of amendments as the lists were compared. It may also be due in part to “splits” of water rights. For all practical purposes, though, the exact numbers are less important in light of the conclusions in this *Order*.

ARGUMENTS

Respondents' Arguments

The Respondents' arguments in support of their *Motions for Partial Summary Judgment* in Basins 35 and 41 are much the same, but to some extent depend on whether the claims are based on a license or beneficial use.

The Respondents argued the Canal Companies' objections to "source" and "quantity," cannot be pursued in the SRBA:

[The objections] go to the administration of water rights, not to any element of the right and, therefore, are beyond the jurisdiction of the SRBA Court. . . It is not this Court's job, nor is it within its jurisdiction, to determine whether the exercise of valid existing water rights reduces the quantity of water available to any senior water right holder.

Respondents' Brief in Support of Motion for Partial Summary Judgment, at 9.

The Respondents argued the Canal Companies' objection to "other provisions necessary for definition or administration of this water right," is moot. The Respondents said the Canal Companies were in reality objecting to IDWR's proposed general provision for conjunctive management of ground and surface water and that issue is now being litigated separately before the Presiding Judge.⁶

Finally, where the Canal Companies' alleged "this water right should not exist" for licensed-based claims, the Respondents argued that previously licensed water rights cannot be collaterally attacked in the SRBA. For claims based on beneficial use and the one claim in Basin 35 based on a decree, the Respondents said the Canal Companies failed to come forward with substantial evidence to rebut the *prima facie* weight given the *Director's Reports*.⁷

Canal Company Arguments

The Canal Companies said they objected to groundwater irrigation claims in Basins 35 and 41 because of the injury and impact the claims have on spring flows that supply the Canal Companies' water rights. They argued IDWR failed to recognize the interconnection of ground and surface water when it licensed and recommended the claims.

⁶ *Basin Wide Issue 5* (Conjunctive Management General Provision), 91-00005, is set for trial before Presiding Judge Roger S. Burdick on September 24, 2001.

⁷ For claims based on beneficial use, the Respondents suggested the Canal Companies bear an impossible task. They would have to prove "that, as of the date each of these water rights was initiated, there was insufficient water for the beneficial use or that the right reduced the quantity of water available to water rights that existed at the time of the first beneficial use." *Respondents' Brief in Support of Motion for Partial Summary Judgment*, at 7.

The Canal Companies argued if their *Objections* are dismissed, the result will be “piecemeal objections” after the conjunctive management general provision is decided; it would be better and more efficient for the Court to resolve the interconnection issue now in one proceeding with the consolidated subcases.

The Canal Companies then submitted the *Affidavit of Charles E. Brockway* who concluded: “The Twin Falls Canal Company and North Side Canal Company have natural flow water rights that entitle them to water supplies that originate in and are impacted by ground water development in Basins 35 and 41.” *Affidavit* at 2.

A&B, Burley and Falls Irrigation Districts and Aberdeen-Springfield Canal Company Arguments

The A&B, Burley and Falls Irrigation Districts and the Aberdeen-Springfield Canal Company joined the Canal Companies’ arguments. They concurred “that to the extent there are certain unique issues in regard to the water sources in a particular sub-basin, that such sub-basin should be addressed through a general provision which is found to be necessary to aid in the administration of those water rights, whether or not the issue is the determination of the extent of interconnection or the absence of interconnection.” *Participants’ Brief in Opposition to Respondents’ Motions for Summary Judgment*, at 1.

Affidavit of David R. Tuthill, Jr.

With its *Reply Brief Regarding Motions for Summary Judgment*, the State of Idaho attached the *Affidavit of David R. Tuthill, Jr.*. Mr. Tuthill, the IDWR Adjudication Bureau Chief, agreed with Dr. Brockway there are times when pumpage of groundwater impacts the Canal Companies’ surface water rights. However, “it is clear from the records that there are weeks or months during many years when all of the natural flow rights held by the Canal Companies are fully satisfied by natural flow.” *Affidavit*, at 5.

DISCUSSION

Idaho Rules of Civil Procedure, Rule 56 (c), states: “The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In these consolidated subcases, the Respondents are

entitled to partial summary judgment as a matter of law because there are no genuine issues as to material facts.

The Canal Companies objected to 4 elements- source, quantity, other provisions necessary for definition or administration of the rights and the water right should not exist- but in reality, the objections relate to conjunctive management. In other words, the Canal Companies are not so concerned about the elements of any particular groundwater claim for irrigation use in Basins 35 and 41. Their real concern is how IDWR has and will manage junior groundwater claims conjunctively with the Canal Companies' senior surface water rights. In their own words, the Canal Companies alleged:

Overall, the basis for such objections is that IDWR did not then recognize the interconnection of ground and surface water when recommending the water right claims. The source and quantity elements should have been recommended to sufficiently protect the interconnected senior surface water rights. Additionally, the Director did not recognize that each ground water right being recommended was allocated previously appropriated water that the senior water right holders are entitled to and use. In evaluating these claims, even in the licensing procedure, the Director did not then consider the interconnection of ground and surface water rights. The result is that in the judgment of the Canal Companies, they were required to object to these ground water claims to protect their water rights from injury.

Response Brief to Respondents' Motions for Partial Summary Judgment, at 3.

The Canal Companies and Respondents agree groundwater pumping in Basins 35 and 41 affect the Canal Companies surface water rights. That is not a contested issue and neither are the elements of any particular groundwater claim in the basins. The Canal Companies have submitted no evidence that those elements should not be decreed as they were recommended by IDWR. Again, their sole concern is conjunctive management of those water rights.

From their standpoint, the Canal Companies had no choice but to object to the 1,972 groundwater irrigation claims in Basins 35 and 41:

At the time objections were filed in both basin 35 and 41, Basin-wide Issue 5 (conjunctive management general provision) was only applicable in the test basins 34, 36, and 57 [footnote omitted]. Subsequently, the court ordered basin-wide 5 is applicable Snake River Basin-Wide. In Re SRBA Case No. 39576, 91-00005, 91-00005A and 91-00005B, *Amended Order of Consolidation/Separation of Issues (Realignment and Redesignation of Issues) of Basin-Wide Issues 5, 5A, and 5B; AOI§11 (12/3/99)*. The conjunctive management issue, or 'interconnection of sources of water generally' is to be a 'Snake-River-Basin-wide determination.' The individual objections were filed prior to the application of the conjunctive management general provision to the pertinent basins. As a result, the Canal

Companies took the necessary steps to ensure that the eventually decreed rights would be administered to recognize the interconnection.

Response Brief to Respondents' Motions for Partial Summary Judgment, at 7.

The Canal Companies argued their *Objections* should not be dismissed even though *Basin Wide Issue 5* (Conjunctive Management General Provision) now applies throughout the Snake River Basin Adjudication, including Basins 35 and 41. They maintain their *Objections* will allow the Court to deal with the unique and specific issues in those basins without the necessity of further objections.

The Special Master disagrees. The *Objections* served the purpose of preserving the Canal Companies' concerns over the impact caused by groundwater irrigation claims in Basins 35 and 41. Now, *Basin-Wide Issue 5* will address those concerns at the basin-wide level instead of the individual claim level. Each groundwater irrigation claim partially decreed in Basins 35 and 41 will be subject to a conjunctive management general provision and that is exactly what the Canal Companies sought in their *Objections*.

Dismissal of the *Objections* will relieve the Canal Companies from prosecuting its objections multiple times in fact-specific subcases, individual claimants will not have the burden of litigating their claims on "basin-wide" issues and judicial economy will be better served.

THEREFORE, IT IS ORDERED that the *Respondents' Motions for Partial Summary Judgment* in consolidated subcases 35-07200 and 41-02016 are **granted**.

DATED August 27, 2001.

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING RESPONDENTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT was mailed on August 27, 2001 with sufficient first-class postage to the following:

Certificate of Mailing for Basin 35 (see attached)

Certificate of Mailing for Basin 41 (see attached)

Deputy Clerk