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 No. 36-02708 and 36-07218**
	)	
Case No. 39576	**)**	**ORDER ON MOTION TO ALTER OR**
	)	**AMEND JUDGMENT OR IN THE**
	)	**ALTERNATIVE, MOTION TO**
	)	**RECONSIDER MEMORANDUM**
	)	**DECISION AND ORDER ON**
	)	**CHALLENGE (Clear Lakes v. Clear**
_____	**)**	**Springs / Separate Source)**

Ruling:

Motion to Alter or Amend the Judgment, or in the alternative, Motion to Reconsider Memorandum Decision and Order, **Denied.**

Appearances:

Mr. Daniel V. Steenson and Mr. Charles L. Honsinger, Ringert Clark Chartered, Boise, Idaho, attorneys for Clear Lakes Trout Company, Inc. Mr. Steenson argued.

Mr. John C. Hepworth and Ms. Robin M. Brody, Hepworth, Lezamiz & Hohnhorst Chartered, Twin Falls, Idaho, attorneys for Clear Springs Foods, Inc. Ms. Brody argued.

Barry Wood, Administrative District Judge and Presiding Judge of the SRBA, presiding.

I.
BRIEF PROCEDURAL BACKGROUND

1. Clear Springs Foods, Inc., (hereinafter Clear Springs) filed claims in the SRBA for water rights 36-02708, 36-07201 and 36-07218. On November 2, 1992, the Director of the Idaho Department of Water Resources (IDWR) filed *Director's Report for Reporting Area 3* recommending Clear Springs' claims 36-02708, 36-07201 and

36-07218. On May 3, 1993, Clear Lakes, Inc., (hereinafter Clear Lakes) filed objections to those recommendations in which Clear Lakes objected to both the "source" and "point of diversion" elements of IDWR's recommendations, stating that water right 36-02708 and 36-07218 are diverted from a separate source than Clear Lakes' water right 36-07004. Clear Lakes requested language clarifying that "fact" in the decrees of water rights 36-02708 and 36-07218.[1]

2. During the trial held on the merits, Special Master Haemmerle granted *Clear Springs' Motion for Involuntary Dismissal*, finding that there were not separate sources for Clear Springs' rights 36-02708, 36-07201 and 36-07218 and Clear Lakes' 36-07004 right. On August 21, 1998, the Special Master issued written *Findings of Fact and Conclusions of Law on Involuntary Dismissal*. On August 28, 1998, the Special Master entered his ***Special Master's Report and Recommendations*** recommending water rights 36-02708, 36-07201 and 36-07218 for partial decree as reported by IDWR. On September 28, 1998, Clear Lakes filed a *Motion to Alter or Amend Special Master's Recommendation.*

3. On January 14, 1999, Clear Lakes filed a *Notice of Challenge* to the Special Master's ***Order Granting in Part, Denying in Part, Motion to Alter or Amend*** (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source) issued on December 31, 1998, in subcases 36-02708, 36-07201 and 36-07218.

4. On July 9, 1999, following briefing and two oral arguments, this Court issued a ***Memorandum Decision and Order on Challenge*** in subcases 36-02708, 36-07201, and 36-07218 (***Memorandum Decision***). The Partial Decrees were issued in these subcases

[1] Clear Lakes' objection to the "source," "point of diversion," and "remarks" elements of IDWR's recommendation of Clear Springs' water right 36-07201 stated that the recommendation did not specify that the source for Clear Springs' water right 36-07201 was part of the source for Clear Lakes' water right 36-02659, and requested clarifying language in the decree of Clear Springs' water right 36-07201. Water right 36-07201 is from the Brailsford stream. The Court in its ***Memorandum Decision*** ruled that the Brailsford stream is a separate source from the other water rights at issue here. Clear Lakes did not raise issues pertaining to water right 36-07201 in its present motion.

on April 10, 2000.[2] (The delay between the issuance of the Partial Decrees and the ***Memorandum Decision*** was the result of the subcases being consolidated with other subcases for purposes of addressing the issue of "facility volume." The subcases were not ripe for entry of Partial Decree until the facility volume issue had also been resolved.).

5. On April 24, 2000, Clear Lakes timely filed a *Motion to Alter or Amend Judgment, or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge* (*Motion to Alter or Amend Judgment*) in subcases 36-02708, 36-07201 and 36-07218, which is now before the Court. The motion was filed pursuant to I.R.C.P. 59(e), and in the alternative, pursuant to I.R.C.P. 11(a)(2).

6. On May 8, 2000, Clear Lakes lodged a brief in support of its *Motion to Alter or Amend Judgment*. On June 13, 2000, Clear Springs lodged a response brief. On June 26, 2000, Clear Lakes lodged a reply brief.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument was held in open court on July 6, 2000. At the conclusion of the hearing, no party requested additional briefing and the Court having requested none, this matter is deemed fully submitted for decision the next business day, or July 7, 2000.

III.
ISSUES RAISED / ASSIGNMENT OF ERROR / RELIEF REQUESTED

Clear Lakes, through its motion, seeks to have this Court amend its ***Memorandum Decision*** to provide that "the source for Clear Springs' water rights 36-02708 and

[2] A more comprehensive procedural history is set forth in the ***Memorandum Decision***.

36-07218 should be administered separately from the source for Clear Lakes' water right 36-07004, and that Clear Springs' water rights 36-02708 and 36-07218 should be decreed with only one point of diversion."

As grounds for its motion, Clear Lakes asserts the following:

> The first ground for this motion is that the Court's conclusion that Clear Springs' water right nos. 36-02708 and 36-07218 have the same source as Clear Lakes' water right no. 36-07004 … cannot be reconciled with the clear and undisputed fact that Clear Springs' water rights were perfected in the western stream and that Clear Lakes' water right was established in the eastern stream, and that these two streams were physically separated so that the diversion from one stream could not affect the flow of water in the other steam [sic]. The second ground for this motion is that the Court has failed to consider or address the undisputed evidence that Clear Springs has never attempted or claimed the right to divert any of the water flowing in the eastern stream or the springs flowing into the eastern stream. This undisputed evidence includes the testimony of Jess Eastman, Clear Springs Chairman of the Board and developer of Clear Springs' water rights. Mr. Eastman's testimony unequivocally establishes that the eastern stream and its tributary springs have never been part of the source for Clear Springs' water rights. These errors are compounded by the Court's erroneous finding that Clear Springs' water rights include points of diversion that have never existed, but could, if decreed, enable Clear Springs to take eastern stream water that Clear Springs has never before used or claimed.

V.

DISCUSSION

Preliminarily, this Court has considered the arguments raised by Clear Lakes and again meticulously reviewed the evidence supporting the Special Master's factual findings and legal conclusions and the Special Master's Recommendation. The Court denies Clear Lake's motion for the reasons set forth in the ***Memorandum Decision*****.** This Court set forth in detail the facts and legal reasoning supporting its ruling upholding the Special Master's findings and has little to add herein other than to respond to the arguments raised by Clear Lakes and clarify Clear Lakes' misconception about the source element.

Secondly, it should be underscored that this Court was not the actual trier of fact and did not make the actual findings of fact, although the Court recognizes that a special master's findings which a district court adopts in a non-jury action are considered to be the findings of the district court. I.R.C.P. 52(a). *Seccombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989). The point being this Court reviewed the findings of fact under the clearly erroneous standard.

A.

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE SPECIAL MASTER'S RECOMMENDATION.

The starting point for this Court's review of a special master's report or recommendation is the standard of review. In the ***Memorandum Decision***, this Court set forth in explicit detail the appropriate standard of review for the district court's review of a special master's report or recommendation in the SRBA.[3] ***Memorandum Decision*** at 7-15. This Court also set forth in equal detail the operation and evidentiary effect of the Director's Report. ***Memorandum Decision*** at 9-11. This Court then set forth verbatim the findings of fact made by the Special Master. ***Memorandum Decision*** at 15-18. Following a second, thorough review of the evidence, this Court again concludes that there is substantial (if not overwhelming) evidence supporting the Special Master's findings.[4] In fact, the evidence presented would not overcome the presumption created by the Director's Report. I.C. § 42-1411 (4). Each of Clear Lakes' arguments is addressed below.

[3] The standard of review is important in this case because, pursuant to this motion, Clear Lakes is challenging the evidence supporting the factual findings of the Special Master. Namely, Clear Lakes contends that the evidence established that the respective diversions of Clear Lakes and Clear Springs are derived from independent sources.

[4] In reviewing the evidence independent of the Special Master's findings, this Court still arrives at the same result.

B.

THE RESPECTIVE WATER RIGHTS OF CLEAR LAKES AND CLEAR SPRINGS ARE NOT DERIVED FROM INDEPENDENT SOURCES.

Clear Lakes' first assignment of error is that this Court's conclusion that Clear Springs' water rights 36-02708 and 36-07218 have the same source as Clear Lakes' water right 36-07004 "cannot be reconciled with the clear and undisputed fact that Clear Springs' water rights were perfected in the western stream and Clear Lakes' water right was established in the eastern stream, and the two streams were physically separated so that the diversion from one stream could not affect the flow of water in the other steam [sic]."

Clear Lakes' argument fails in several respects. First, Clear Lakes' argument confuses the distinction and legal effect of the "point of diversion" and "source" elements of a water right. Clear Lakes argues that, historically, the eastern and western streams were physically separated and the diversion by Clear Lakes from the eastern stream would not affect the flow of water to Clear Springs' from the western stream and *vice versa*. As such, Clear Lakes reasons that the two streams legally constitute independent sources. This reasoning, however, oversimplifies the definition of "source." This Court agrees that one of the attributes of independent sources can be and often is that a diversion from one source will not affect the flow to the diversion from the other source. However, the same result is also possible, (as in this case) as between two diversions from the same water source.

An example of such a situation occurs where a stream flow divides into two separate channels, a west channel and an east channel.[5] Assume a senior appropriator has a point of diversion downstream from the fork on the west channel. A junior appropriator's point of diversion is also downstream from the fork but located on the east channel. The "source" for the two water rights is the same common stream. *See Malad Valley Irr. Co. v. Campbell*, 2 Idaho 411, 415, 18 P. 52, 56 (1888)(rights of prior appropriator from natural streams also extend to tributaries); *Scott v. Watkins*, 63 Idaho 506, 517, 122 P.2d 220, 231 (1942)(particular source supplying natural water course is

[5] This decision uses the terms "stream" and "channel" synonymously.

immaterial). However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be "futile." Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. *See United States v. Haga*, 276 F. 41, 43 (D. Idaho 1921)(holding appropriator on main channel can complain of diversion from tributary when tributary, if not interfered with, would make contribution to main channel). Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. *See e.g., Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9-10, 154 P.2d 507, 515-16 (1944)(citing *Crockett v. Jones*, 47 Idaho 497, 277 P. 550; *Morris v. Bean*, 146 F. 42)(holding a subsequent appropriator has a vested right to a continuance of conditions as they existed when he made his appropriation). In essence, the junior is protected by the respective location of the diversion works on the common source.

In the event that the junior relocates his point of diversion upstream from where the stream divides, the situation has a potentially different outcome. The junior is not afforded the same protection previously created by the natural flow of the stream. Now cutting off the junior's water supply may well increase the senior's water supply. The junior could argue that based on the present stream flow level even though he is located above the fork in the stream, the water that he is diverting mostly, or even entirely, flows down the eastern channel and, thus, shutting off his diversion works would not increase flows to the senior. Depending on where the junior relocated his diversion works, this may be true. However, this issue is addressed administratively pursuant to IDWR's procedures for making a "delivery call," and not through the SRBA. The junior would have the opportunity to try to show that the call would be futile. In any event, the source of water for the two diversion works is nonetheless the same.

In taking a variation to the above example, suppose both the junior and senior decide to modify their respective diversion works by altering the natural course of the stream and constructing a reservoir from which both intend to divert. The modifications again eliminate the protection afforded the junior by the natural fork in the stream. The source is the same and the junior has permitted the senior to change his point of diversion despite the potential for injury. This is what occurred between Clear Lakes and Clear Springs in the instant case -- the natural flow of the stream has been altered. The evidence is unequivocal that the source for both the "eastern" and "western" channels is a series of springs scattered along the canyon wall. Historically, the springs discharged water that collected and formed a channel. Clear Lakes argues that the springs did not collect into a common channel, but rather, collected into two separate channels created by an underwater formation, which caused the flows to divide into two separate channels.[6] The Special Master found, and this Court affirmed, that historically the springs flowed and collected into a common channel that subsequently divided into the eastern and western channels from which Clear Lakes and Clear Springs diverted. There is substantial evidence in the record to support this finding as addressed at length in the ***Memorandum Decision***.

Although the evidence supports the finding that the water was commingled into a single channel, Clear Lakes' own description of the stream conditions in existence prior to the stream alterations would not establish the existence of two independent sources for the respective water rights of Clear Lakes and Clear Springs. First, the source for the water rights of both Clear Lakes and Clear Springs is the series of springs scattered along the canyon wall.[7] The source is not the alleged separate streams. The water rights extend

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[6] Clear Lakes argues the situation is analogous to the situation where springs form two separate creeks which are administered as independent sources. Clear Lakes cites examples such as Riley Creek and Billingsley Creek, which are located in the Hagerman Valley, as well as the Brailsford Channel, which this Court also ruled as being a separate source.

[7] This Court has previously ruled in this case that when one speaks of a water "source," it is imperative to examine the context in which the term "source" is being applied. In the ***Memorandum Decision and Order on Challenge*** in these subcases filed July 9, 1999, this Court stated at page 29:

> An additional point of clarification on this "source" issue may be useful. Clearly, "source" may have different meanings in different situations. As Mr. Hardy noted, the Snake River Aquifer is **the** source (singular) for all relevant springs and stream flows (plural) involved in these subcases. The springs are discharged at various points across the north rim or wall of the Snake River Canyon. But because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four

to tributaries. *Malad Valley Irr. Co*, at 415, 18 P. at 56; *Scott* at 517, 122 P.2d at 231; *Haga*, 276 F. at 43. This source is common to both Clear Lakes and Clear Springs. The respective claims, permit applications, and Director's Reports for both Clear Lakes and Clear Springs do not identify particular springs as being the source. The evidence offered at trial also supports that the source is the series of springs. Neither the permit applications, licenses, or Director's Reports, specifically identify or even delineate that a particular spring fed a particular channel. The record is also bereft of any evidence or argument that remotely suggests that a certain spring fed a particular channel. There is also no evidence in the record that would demonstrate the historical flows down the respective streams. All the evidence suggests that the water was co-mingled before flowing into the respective streams. Clear Lakes' position is even more tenuous because it admits that the division creating the separate streams was "underwater." This is clearly evidence of the water co-mingling after leaving the springs and prior to forming the separate streams.[8] Thus, to even begin to make an argument for independent sources,

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> rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source." It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

Useful by way of analogy is the United States Supreme Court's decision in *Kaiser Aetna et al. v. United States*, 444 U.S. 164, 100 S. Ct. 383 (1979) in discussing the concept of navigable waters wherein Justice Rehnquist wrote:

> The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket. 408 F. Supp., at 48-49**.** As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case." Id., at 49.

444 U.S. at 170, 171.

[8] Since the "division" was located underwater there was clearly co-mingling of the water. Therefore to some extent all the water flowing from the springs was tributary to both channels. At the hearing on the Challenge counsel for Clear Lakes stated:

Mr. Honsinger: Our position Your Honor, is that these springs discharged, hit the ground, did not form a pool, but instead, separated, flowing to the east and west, to the east and west.

The Court: But it was all underwater?

Clear Lakes would first have to establish which particular springs fed the particular channel from which Clear Lakes was diverting. The record would not support the conclusion that only certain springs fed a particular channel, the evidence is to the contrary. Since the water co-mingled prior to, and contemporaneously with, the formation of the two channels, the respective channels more accurately constitute different points of diversion along a common source as opposed to independent sources. If the underwater division creating the two streams still existed today, as in the above hypothetical, Clear Lakes might in all likelihood be insulated from a delivery call by Clear Springs because both parties diverted downstream of the underwater division. As a result, cutting off Clear Lakes' water supply at the historical point of diversion would not increase the water supply to Clear Springs. The source is the same, the difference is that Clear Lakes would have been protected by the respective points of diversion in relation to the natural conditions in existence prior to the stream alterations. Clear Lakes would also be protected by the "no injury rule" in the event Clear Springs attempted to move its point of diversion above the underwater division. However, once Clear Lakes consented to the modification of the stream and the diversion works, any protections afforded by the historical stream conditions were eliminated. Following the stream modifications, cutting off Clear Lakes' water supply may well increase Clear Springs' water supply in times of shortage. However, this process is an administrative determination and not an issue to be decided in the SRBA.

Mr. Honsinger: The point at which the streams were separated was under water, yes, Your Honor. But eastern water flowed to the east. Western water flowed to the west. It wasn't co-mingled. It flowed to the east and west around the island.

Tr., at pp. 19 and 20.

Clear Lakes' position does not make sense. Clearly, the above description of the historical conditions argued by counsel indicates that some of the water was co-mingled (i.e., the factual description is inconsistent with the conclusion). Thus the springs are tributary to the respective channels. However, even if the water was not co-mingled, the historical conditions are no longer in existence and as the conditions exist today the water is co-mingled. Since there is no evidence in the record about the historical flows down the respective channels, even if the Court concluded the channels were in fact derived from independent sources, the Court would have no way of determining the scope of the respective rights. The evidence does not show which particular springs fed each channel.

Lastly, this is not a situation where Clear Lakes intended to appropriate water from specific springs, then co-mingle the water with other spring water in the natural channel and then divert the water downstream. The co-mingling of water prior to its ultimate use is well recognized in Idaho. I.C. § 42-105; *Keller v. Magic Water Co. Inc.*, 92 Idaho 276, 284, 441 P.2d 725, 733 (1968). However, Clear Lakes' subjective intent as to which particular spring it was diverting from does not establish the source. The point of diversion establishes the source. Thus, in order to properly claim water from a particular spring, Clear Lakes would have had to physically divert the water from a particular spring, prior to it being co-mingled with the water discharged from the other springs. Clear Lakes could then co-mingle the diverted water with other spring water below the physical diversion, and then reclaim the water downstream.

C.
EVEN IF THE TWO STREAMS HISTORICALLY COULD HAVE BEEN CONSIDERED INDEPENDENT SOURCES, SUBSEQUENT STREAM MODIFICATIONS HAVE CREATED A SINGLE SOURCE.

Historically, even if for the sake of argument the two streams could be considered independent sources, subsequent stream modifications have eliminated the conditions which resulted in the two alleged sources. Clear Lakes argues that an independent source exists where the diversion from one source will not affect the flow of water to another source. If independent sources do in fact exist, then Clear Springs' diversion should not affect Clear Lakes' water supply. Thus, Clear Lakes has nothing to be concerned about because even if the two diversions are labeled as being from the same source, any delivery call made by Clear Springs would be futile.

Alternatively, if the conditions have been modified such that Clear Lakes' diversion can potentially affect Clear Springs' senior right, then pursuant to Clear Lakes' own reasoning the two sources cannot be independent. If this is the case, then Clear Lakes is asking this Court to decree its water right based on historical conditions that are no longer in existence and to which Clear Lakes consented to being changed. The problem with this approach, even if this Court were to adopt Clear Lakes' position, is that the historical conditions become crucial for defining the scope of the respective rights so

that each can be administered accordingly. The respective quantities which flowed down the two channels during seasonal fluctuations and dry years would have to be determined. Suppose during dry years 75% flowed down the west channel and 25 % flowed down the east channel. The administration of the respective rights would have to take these factors into consideration. Since there is very little evidence of the historical conditions, the Court would have no way of making these determinations. There is a complete failure of proof as to these factors.

Lastly, even if Clear Lakes' partial decree indicated a different source than Clear Springs' partial decree, the source element contained in the partial decree would not necessarily be dispositive as to whether Clear Springs could make a call. Clear Lakes' may be able to hold up its decree indicating a separate source as a starting point for a defense, but Clear Springs could still demonstrate that its senior right was being affected by Clear Lakes' diversion. Again, this is determined administratively.

D.

THE TESTIMONY OF JEFF EASTMAN DOES NOT SUPPORT THE CLAIM OF INDEPENDENT SOURCES.

Clear Lakes also argues that this Court failed to consider the testimony of Jeff Eastman. Clear Lakes argues that Mr. Eastman's testimony "unequivocally establishes that the eastern stream and its tributary springs have never been part of the source for Clear Springs' water rights." Important to the Court's decision was the historical conditions in existence prior to the modifications. The Court found the testimony of Earl Hardy to be the most probative and illustrative of the historical conditions. The testimony of Mr. Eastman is consistent with the testimony of Mr. Hardy in that Mr. Eastman's testimony also established factually that the water flowing from the series of springs flowed around various islands prior to flowing into the separate channels. *Tr*. pp. 401-402. Mr. Eastman also testified that the source for both streams was the Snake River Aquifer, which he considered to be one source. *Tr*. pp. 400-401. Thus, Mr. Eastman's

testimony, although not as illustrative as the testimony of Mr. Hardy, nonetheless supports the Court's ruling.[9]

E.

ISSUES PERTAINING TO POINTS OF DIVERSION ARE NOT PROPERLY BEFORE THE COURT.

Clear Lakes has also raised the issue of the "Court's erroneous finding that Clear Springs' water rights include points of diversion that have never existed. . . ." Although in the Court's view Clear Lakes has attempted to blur the distinction between the point of diversion and source elements, issues pertaining to points of diversion were not properly before the Court on Challenge and therefore will not be addressed pursuant to the instant motion. The Court previously discussed this issue in the ***Memorandum Decision*** and will defer to its prior ruling on the matter.

IV.
CONCLUSION

For the reasons set forth above, Clear Lakes' motion to alter or amend the judgment or in the alternative to reconsider the ***Memorandum Decision***, is hereby DENIED.

IT IS SO ORDERED:

DATED: August 15, 2000.

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BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication

[9] Because of the *prima facie* presumption accorded the Director's Report, the burden for any lack of factual clarity clearly rests with Clear Lakes.