

**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 36-00035E
)	
Case No. 39576)	ORDER ON CHALLENGE
)	(Brown)
_____)	

I.

APPEARANCES

Dana Hofstetter and Josephine P. Beeman, Beeman & Hofstetter, P.C., Attorneys for Challenger North Snake Ground Water District (“NSGWD”).

Lloyd Brown, *pro se* (“Claimant” or “Brown”).

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

This Court having heard oral arguments on the challenge on Tuesday, May 9, 2000. On May 10, 2000, counsel for NSGWD sent a letter to the Court advising of other subcases having the same related issues. Since no party has sought additional briefing and the Court has requested none, the matter is deemed fully submitted for decision on the next business day, or May 11, 2000.

III.

BRIEF PROCEDURAL AND FACTUAL BACKGROUND

1. The above-captioned water right claim was filed in 1988 by a Harold Smith under claim A36-00033A. The basis for the claim is the decree entered in *New Int’l Mortgage Bank v. Idaho Power Co.*, District Court of the United States for the Southern

Division of the District of Idaho, In Equity No. 1602 (1932) (“New Int’l Decree”). The Smith claim in the SRBA has subsequently been split and includes the subject claim 36-00035E.

2. The Director’s Report for 36-00035E recommended an irrigation water right of 0.1 cfs to be used in conjunction with water right 36-00034E on a total of 8 acres.

3. On May 3, 1993, Lloyd Brown, successor in interest to Harold Smith, filed an *Objection* to the Director’s Report as to quantity on the basis that the recommended amount would not be sufficient to irrigate by furrow (i.e. gravity or flood irrigation).

4. On August 31, 1993, IDWR filed a *Response to the Objection*¹ stating that the recommendation was based on the amount being beneficially used.

5. On November 12, 1997, IDWR and Brown, in settlement of the *Objection*, entered into a Standard Form 5 (“SF5”) agreeing to 0.21 cfs as the quantity element.

6. Also on that date, (November 12, 1997), Special Master Dolan issued a *Special Master’s Report* in accordance with the SF5.

7. On December 26, 1997, NSGWD filed a *Motion to Alter or Amend* asserting that IDWR’s recommended diversion rate was based on gravity irrigation but that the Claimant was actually using sprinkler irrigation, that sprinkler irrigation typically uses less water than gravity, and that the decree should contain “qualifying language to ensure that in the event of a water call, the water right associated with actual beneficial use will apply instead of the decreed amount.”

7(1). The *Affidavit of David R. Tuthill* was filed in support of the motion.

The affidavit explained the quantity agreed to in the SF5 was based on a “gravity”

¹ IDWR was a party to the SRBA at the time the response was filed. In 1994, IDWR’s status in the SRBA was changed by statute. See I. C. § 42-1401B (1996).

irrigation analysis. The analysis supported a surface diversion rate of 0.27 cfs, plus 0.04 cfs conveyance loss for a total of 0.31 total irrigation for the 8 acres, with 0.10 cfs under the overlapping 36-00034E right, leaving 0.21 cfs as agreed upon in the SF5.

7(2). The *Affidavit of Steve Clelland* was also filed, and states that on August 16, 1990, he “observed sprinklers as being the sole mechanism for irrigation of the associated place of use.”

7(3). The *Affidavit of Jeff Peppersack* was also filed explaining that he had performed a surface (“gravity”) irrigation diversion rate analysis for the subject water right, and determined that a .027 cfs diversion rate would be reasonable for gravity irrigation on the place of use. The affidavit also explained the process for the gravity irrigation diversion analysis and how he arrived at his result.

8. On September 23, 1998, in an attempt to resolve NSGWD’s *Motion to Alter or Amend*, NSGWD, IDWR and Brown signed an *Amended SF5*, agreeing to have the quantity element qualified by the following language:

The volume or rate of water diversions allowed for irrigation designated under this right is based on the reasonable amounts that would be needed to supply a surface or “gravity” irrigation system. However, the actual means of irrigation may involve sprinklers or another irrigation method which requires a smaller rate or volume of diversions. In the event of a water shortage, a delivery call for water, or other action to administer water rights, the water right holder shall be entitled to divert no more than the quantity reasonable necessary for the method of irrigation actually employed. This quantity may be less than, and shall never be greater than, the quantity of water designated in the SRBA decree.

9. On July 23, 1999, Special Master Dolan entered an Order requesting that IDWR submit an affidavit regarding whether the qualifying language was necessary to define, clarify or administer water right 36-00035E.

10. On August 10, 1999, pursuant to the Order, IDWR filed the *Affidavit of David R. Tuthill, Jr.* The affidavit stated *inter alia* that IDWR had a policy of recommending a quantity based on gravity irrigation where the water user is presently using sprinkler irrigation to provide sufficient water in the event the water user elected to convert back to gravity irrigation. The affidavit also stated that the qualifying language was essentially a restatement of Idaho law and was not necessary to define, clarify or administer the water right. Further, the affidavit explained that IDWR did not object to the language because it essentially was a restatement of the law and the language was necessary to facilitate settlement.

11. On August 16, 1999, Special Master Dolan entered an *Order Denying the Motion to Alter or Amend* finding that the qualifying language was not necessary to define, clarify or administer the water right pursuant to I.C. § 42-1411(2)(j). Thus, the ***Special Master's Report*** recommended the 0.21 cfs based on the gravity analysis without the qualifying language.

12. On August 30, 1999, NSGWD filed a *Notice of Challenge*, and a *Motion to Correct and Remand Special Master's Reports Pursuant to Rule 53(3)(2) I.R.C.P.*, seeking to have the clarifying language included in the partial decree. Also on that date NSGWD filed the *Affidavit of David R. Tuthill, Affidavit of Jeff Peppersack, and Affidavit of Steve Clelland* in support of its Motion.

13. On September 28, 1999, NSGWD lodged a *Brief in Support of Notice of Challenge*. On October 19, 1999, NSGWD lodged a *Supplemental Brief in Support of Notice of Challenge*.

IV.

ISSUES RAISED ON CHALLENGE

In its *Notice of Challenge*, NSGWD states the following issues:

1. The recommended diversion rate is based on a “gravity” irrigation analysis but the claimant’s water right is actually exercised through sprinkler irrigation which generally utilizes less water than gravity

irrigation. Therefore, this should be addressed by qualifying language or by another legal means in the Special Master's recommendation and in the decree to ensure that in the event of a water call, the water right quantity associated with the actual beneficial use will apply.

2. Did the Special Master err by deciding that the qualifying language in the Amended Standard Form 5 should not be included in the Partial Decree?
3. Did the Special Master err by deciding that the qualifying language in the Amended Standard Form 5 is "not necessary for definition of 36-00035 E, for clarification of any element of the right, or for administration of the right by the Director"?
4. Did the Special Master err by deciding that "the partial decree should describe the statutory elements of the Browns' water right as defined in Idaho Code § 42-1411, and nothing more"?
5. Did the Special Master err by issuing a Report and Recommendation based on the Standard Form 5 alone?
6. Did the claimants satisfy the burdens of proof (production and persuasion) with respect to quantity element?

The majority of the foregoing procedural issues were previously addressed at length by this Court in the *Memorandum Decision and Order on Challenge*, subcases 36-00061, 36-00062 and 36-00063 (Sept. 9, 1999) ("*Morris Decision*") issued on a challenge also previously filed by NSGWD. In both briefing and at oral argument before this Court, NSGWD consolidated the issues raised into one main underlying issue. *See Brief in Support of Notice of Challenge* at 2, *Transcript of Proceedings* at 4-5 (May 9, 2000). NSGWD asserts that IDWR's policy ("sprinkler-flood policy") of recommending irrigation water rights with a quantity necessary for gravity irrigation when the claimant is presently using sprinkler irrigation violates SRBA and IDWR statutory mandates. NSGWD argues that since the quantity of water necessary for gravity irrigation generally exceeds that of sprinkler irrigation, the recommendation contained in the *Director's Report* is not reflective of the actual quantity of water presently being put to beneficial use and therefore IDWR failed to comply with its statutory duty to recommend water

rights based on beneficial use.² As a result, NSGWD's contends that the Court should place no evidentiary value on IDWR's concurrence on the SF5 and recommit the matter for a trial on the merits.

Also at issue is whether the SRBA partial decrees entered in this subcase should include qualifying language to the effect that although the decreed amount is based on gravity irrigation, the actual delivery system may involve sprinklers, and in the event of a call only the amount necessary for the actual method of irrigation used at the time of the call will be delivered by the watermaster.

V.

STATEMENT OF RELATED SUBCASES

The underlying consolidated issue raised in this subcase 36-00035E ("*Brown*") is also the underlying issue raised in subcase 36-00077D ("*Gisler*"). Since the underlying issue is identical in both subcases and the facts and procedural history are similar, the analysis contained in the *Gisler* memorandum decision, issued contemporaneously herewith, is crafted to address both subcases. Accordingly, in this subcase (*Brown*) the Court has issued a truncated order.

VI.

ORDER

As stated in Section five of this Order, the underlying issues in this subcase are identical to the issues raised in the *Gisler* subcase. Therefore, rather than reiterating here

² The sprinkler-flood policy being challenged by NSGWD is stated in the August 10, 1999 *Affidavit of David R. Tuthill, Jr.*, filed in this subcase, wherein it provides: "[i]n this, and similar, subcases where the water right holder (1) is presently irrigating by sprinkler or similar method, but (2) the right which the water right holder is claiming was previously for an irrigation diversion rate of greater than one miners inch per acre (0.02 cfs) for gravity irrigation, and (3) the water right holder has claimed the higher quantity in the SRBA, then IDWR will recommend a reasonable diversion rate for gravity irrigation to provide sufficient water should the water right holder choose in the future to convert back to a gravity irrigation system. *Affidavit of Dave Tuthill* at ¶3. Thus, the instant subcase is a "similar" subcase to the *Brown* subcase, and Mr. Tuthill's affidavit therefore is applicable in the instant subcase.

The result of this policy, according to Mr. Tuthill, is that: "Accordingly, the recommended quantity does not constitute the quantity which the water right holder is presently placing to beneficial use." *Affidavit of Dave Tuthill* at ¶3 (emphasis in original). It is not clear to the Court whether this statement is meant as a generality which may apply to any water right subject to the sprinkler-flood policy, or if Mr. Tuthill's statement is intended to specifically apply to water right 36-00077D. If it is the latter, it is unclear from his affidavit as to how Mr. Tuthill reached this conclusion.

the reasoning set forth in therein, , the Court hereby incorporates the *Gisler* decision by reference. Accordingly, NSGWD's challenge IS HEREBY DENIED. Water right 36-00035E will be decreed as recommended by Special Master Dolan in the *Special Master's Recommendation* dated November 12, 1997.

IT IS SO ORDERED:

Dated: Friday, June 30, 2000.

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