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 Nos. 36-02080, 36-15127**
Case No. 39576	)	**(36-15127A and 36-15127B), 36-15192,**
	)	**36-15193 (36-15193A and 36-15193B),**
	)	**36-15194 (36-15194A and 36-15194B),**
	)	**36-15195 (36-15195A and 36-15195B),**
	)	**36-15196 (36-15196A and 36-15196B)**
	)	**(A & B Irrigation District)**
	)	
	)	**MEMORANDUM DECISION AND**
	)	**ORDER DENYING MOTION FOR**
_____	)	**RECONSIDERATION**

Appearances:
Roger D. Ling, Jason D. Walker; Ling, Robinson & Walker, Rupert, Idaho, attorneys for A & B Irrigation District ("A & B").

Jeffery C. Fereday, John Marshall; Givens Pursley, LLP, Boise, Idaho, attorneys for Magic Valley Ground Water District, *et al* ("Ground Water Users").

David Gehlert; Environmental and Natural Resources Division, U.S. Dept of Justice, Denver, Colorado, attorney for United States Bureau of Reclamation ("BOR").

I.
PROCEDURAL BACKGROUND

1. On April 25, 2003, this Court entered an ***Order on Challenge*** (***Order***) denying the A & B's challenge to the Special Master's recommendation.

2. On May 7, 2003, the Court issued ***Partial Decrees*** for each of the subject enlargement claims.

3. On May 21, 2003, A & B timely filed a *Motion to Reconsider Order on Challenge* and brief in support. On June 13, 2003, the Ground Water Users filed a *Response to A & B's Motion to Reconsider.* The BOR also filed a *Response* on that same date.

II.
7(b)(3) NOTICE OF COURT'S INTENT

On May 29, 2003, pursuant to I.R.C.P. 7(b)(3), this Court provided notice to the parties of its intent to decide the pending *Motion* on the briefs, without oral argument.

III.
MATTER DEEMED FULLY SUBMITTED

The last filing on this matter having occurred on June 13, 2003, and with no party requesting additional briefing and the Court requiring none, this matter is deemed fully submitted for decision the next business day on June 14, 2003.

IV.
ISSUES RAISED

A & B raises the following issues in its *Motion for Reconsideration*:

1. The evidence before the Court does not support the Court's conclusion that the only source of water supplying the "B" rights is ground water originating from licensed right 36-02080;

2. The facts and the law of the state of Idaho do not support the conclusion that the source of the B rights is groundwater;

3. The captured drain water at issue in this matter is private water and is therefore not subject to the permit and licensing procedures applicable to waters of the state;

4. The case before the Court is the very situation not contemplated by the Supreme Court in *Fremont-Madison v. Ground Water Appropriation, Inc*., 129 Idaho 454, 926 P.2d 1301 (1996); and

5. Even if the Court is correct and all of the water at issue in this matter is characterized only as ground water and the Court concludes that injury results, the subordination date should be March 1, 1985, the effective date of I.C. § 42-1416.

The BOR is in agreement that the B rights should be subject to the application of I.C. § 42-1426, but asserts that the source element should more accurately reflect that the source is waste, seepage, return flow, etc., instead of "ground water."

V.
DISCUSSION

A & B has not raised any new issues in its *Motion* that were not already addressed by the Court in the April 25, 2003, ***Order.*** The Court has nonetheless briefly responded herein to each of the issues again raised by A & B.

However, prior to addressing the issues the Court is perplexed at A & B's failure to adequately address the issue concerning the fact that the acreage covered under the enlargement rights is also supplemented by water directly pumped under the 36-02080 right in addition to the reuse of drainage water. While reasonable minds may differ as concerns the application of I.C. § 42-1426 to the reuse of waste water, its unequivocal that any supplemental water directly pumped under the 36-02080 right to cover the additional acreage would be subject to subordination to existing junior rights. Because A & B makes no attempt to distinguish between the two "sources," this fact alone prevents the enlargement rights from being decreed without the inclusion of the subordination remark. It would seem that addressing this issue would be the very first step in the analysis.

1. A & B first argues that the evidence in the record does not support the Court's conclusion that the only source of water supplying the B rights (enlargement rights) is ground water originating from licensed right 36-02080.

For the reasons previously stated in the April 25, 2003, ***Order***, this Court disagrees. This Court's determination, based on the record, relied on a couple of different factors. The first was A & B's discovery responses wherein A & B admitted that the source for the B rights was water that was originally diverted under the 36-02080 right and failed to describe any other source.

Next, although A & B made the general argument in briefing and at oral argument that drain water "may flow upon the District's property from independent sources," no substantive facts were provided as to what independent water sources. Therefore this argument was only conclusory. Mere conclusions without substantive facts do not raise general issues of material fact for purposes of withstanding a motion for summary judgment. The only inference that could be drawn from the record is that the only source for the excess flow, seepage, return flow, etc. ("drainage water") is the 36-02080 water right. There is nothing in the record to suggest that the drainage water originates from another source diverted under a different water right. The water is diverted by A & B under the 36-02080 right and distributed to water users throughout the district. The drainage water is then collected in a drainage system where it's then applied to the acreage covered by the B rights. Nowhere in the record is it suggested that the water users in the district are irrigating with anything other than water diverted under the 36-02080 water right which is ultimately commingled in the drainage system. Accordingly, the Court treated the use of the drainage water as recaptured waste water originating under the 36-02080 right. The source of that right is ground water. Simply labeling the water as drainage, seepage, etc., does not change the ultimate source of the water, nor does it alter the limitations of where the water can be applied when reused by the original appropriator.

Because the source was found to be ground water, the Court applied the 1963 mandatory permitting and licensing requirements for ground water. Therefore, in order for A & B to perfect a water right for the additional acreage it had to rely on the amnesty provisions of I.C. § 42-1426.

2. A & B next asserts that after the water is distributed to the water users, it has relinquished control of water. Therefore, the Court erred in treating A & B's

use of the drainage water the same as recaptured waste water by limiting the reuse of the water to the same lands to which the 36-02080 right is appurtenant.

Again, this Court disagrees. The water users within the district are irrigating under the 36-02080 water right supplied by A & B and not under separate water rights. Without going into the legal intricacies of the relationship between the BOR, the irrigation district and the end water users, suffice it to say that the water users, not A & B, are actually beneficially using the 36-02080 water right. Therefore at least for purposes of a waste water analysis the water is still in control of the original appropriator while being used by the end water user.

3. A & B next argues that captured drain water is the same as private water and therefore not subject to the mandatory permitting and licensing requirements.

The Court will defer to the distinction between private and recaptured water set forth in the April 25, 2003, ***Order***, with the following comments. Private water and captured waste water are two distinct legal concepts that may share some similar attributes. The reuse of the 36-02080 water does not fit the definition of private water. *See e.g. Jones v. McIntire*, 60 Idaho 338, 352, 91 P.2d 373, 387 (1939)(defining private water concept). As previously discussed, the reuse of captured waste water is limited to use on those lands to which the water right that is the source of the waste water is appurtenant. That is not what is occurring in this case.

Lastly, the record is abundantly clear that A & B is not irrigating in a "closed system." The water is pumped from the Eastern Snake Plain Aquifer. A & B's argument and expert opinion relies on which method of handling the waste water arguably promotes the most effective recharge to the aquifer. By its own arguments A & B tacitly admits that the system is not closed. Furthermore any argument regarding a closed system must be evaluated in the context of the Court's order of partial decree on Basin-Wide Issue 5. *See* ***Memorandum Decision and Order, Connected Sources General Provision (Conjunctive Management) Basin-Wide Issue No. 5***, Subcase 91-00005, (Feb. 27, 2002).

4. A & B next argues that the circumstances in this case were not contemplated by the Supreme Court in *Fremont-Madison v. Ground Water Appropriation, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996).

The amnesty statutes provided amnesty for illegal enlargements to existing water rights through "conservation or other means" where the enlargement did not involve an increase in the rate of diversion. This Court found no distinction between water conservation practices and the application of recaptured waste water to lands not covered under the original right for purposes of applying I.C. § 42-1426. In either case, an enlargement to the existing right occurs and compliance with the permit and license requirements is mandatory. The injury to junior rights existing on the date of the enlargement is also the same. Namely, the illegal enlargement receives a senior priority date over existing junior rights on the same source. This Court reads the ruling in *Fremont-Madison* to stand for the proposition that the potential injury to junior rights is *per se* without some type of mitigation provision to assure there will be no potential injury to junior appropriators. Without such assurances it is a direct violation of the prior appropriation doctrine.

5. Lastly, A & B argues that even if the Court is correct and all of the water at issue in this matter is characterized only as ground water and the court concludes that injury results, the subordination date should be March 1, 1985, the effective date of I.C. § 42-1416.

The Court will defer to its prior decision on this issue with the following comment. I.C. § 42-1416 was declared unconstitutionally void for vagueness. In other words the Court could not apply the statute or determine what rights "vested" under its application. Giving retroactive effect to I.C. § 42-1416 after its subsequent repeal and the enactment of I.C. § 42-1426 fails to address the impact to junior rights that accrued subsequent to March 1, 1985.

6. The BOR argues that the source element for the B rights should accurately describe the source as excess flow, seepage, return flow, etc.

This Court disagrees for a couple of reasons. First, as explained above not all of the water used to irrigate the B rights is drainage water; some water is also directly pumped. Also labeling the source as excess flow, seepage, return flow, etc., does not alter the ultimate source of the water which is ground water.

VI.
CONCLUSION

In conclusion, A & B is not being denied water rights for its enlargement claims. Rather, the rights are being subordinated to any junior rights on the same source existing as of the effective date of I.C. § 42-1426. If, as A & B argues, there is in fact no potential injury to junior rights, then the subordination provision will not affect A & B's enlargement rights. Because of the complex interrelationship of ground water rights, this Court cannot find with any certainty which specific junior rights and to what extent those rights may be potentially affected in the future. *See generally,* ***Order on Cross Motions for Summary Judgment; Order on Motions to Strike Affidavits, Basin-Wide Issue 5*, Subcase 91-00005 (July 2, 2001)**. Therefore, without some type of mitigation plan to protect junior rights, the only means of protection is through the inclusion of the subordination language. Again, the essence of the water right under the prior appropriation doctrine is the priority date.

VII.
ORDER

For the above-stated reasons, A & B's *Motion for Reconsideration* is DENIED.

IT IS SO ORDERED.

Dated: July ____, 2003.

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ROGER BURDICK
Presiding Judge
Snake River Basin Adjudication