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 45-167A**
	)	**(Rose)**
	)	
	)	**SPECIAL MASTER REPORT**
Case No. 39576	)	
	)	

FINDINGS OF FACT [1]

Claim, Director's Report and Objection

On August 23, 1988, John and Margaret Koyle filed a *Notice of Claim to a Water Right* [2] in subcase 45-167A claiming .04 cfs from Willow Creek for year-round irrigation of 1.9 acres in Cassia County with a priority date of November 23, 1881, based on a decree.[3]

The Director of the Idaho Department of Water Resources filed his *Director's Report for Irrigation and Other, Reporting Area 10, IDWR Basin 45* on September 7, 2004. The Director recommended the claim as filed, but to Leah G. Rose, 994 South 150 East, Burley, Idaho, 83318, to irrigate 1.6 acres from March 15 to November 15.[4]

[1] For the convenience of the reader, many of the facts herein are repeated from the Special Master's August 22, 2006 ***Order Denying Poulton's Motion for Summary Judgment***.

[2] At trial, Margaret Koyle recalled that she and her husband sold the property to Clark and Tina Harman in 1987 (the Warranty Deed from the Koyles to the Harmans is dated May 8, 1989). The Harmans filed an identical but "Amended" *Notice of Claim* on May 23, 1989.

[3] ***Decree*** of the Idaho Fourth Judicial District, Cassia County, *Thompson v. Poulton*, entered March 17, 1908, by District Judge Edward A. Walters.

[4] Ms. Rose bought the property from Clark and Tina Harman on August 14, 1998.

William A. Poulton filed the only *Objection* on January 3, 2005, alleging the water right should not exist: "This water right has been abandoned for over 5 years prior to making her claim and has been forfeited pursuant to I.C.S. 42-222(2)."

Supplemental Director's Report

IDWR filed a *Supplemental Director's Report Regarding Subcase No. 45-167A* on April 14, 2006. The *Supplemental Director's Report* concluded: "The Department's recommendation for water right no. 45-167A is based on historical evidence of beneficial use and reasonable conclusions." IDWR Senior Water Resource Agent Jeanie Robertson recommended that the claim be decreed as originally stated in the *Director's Report* in part based on certain dated aerial photographs:

> 1962 and 1968 – "small pond in the area of the claimed place of use along with evidence of irrigation."
>
> 1976 – "small striations . . . indicative of irrigation ditches, along with evidence of irrigation."
>
> 1987 – "reddish tint in the claimed place of use . . . indicates that the claimed place of use has been irrigated as of the commencement of the SRBA."
>
> 1992 – "shows areas of irrigation in the claimed place of use after commencement of the SRBA and filing of the original claim by the Koyles."
>
> 2004 – "the channel of Willow Creek changed [and] no longer enters the claimed place of use at the . . . point of diversion or flows through the claimed place of use."

Summary Judgment

Mr. Poulton filed a *Motion for Summary Judgment* on May 2, 2006, alleging that claim 45-167A "is not a lawful right, as Leah Rose and her predecessors in interest never appropriated the waters of Willow Creek on the claimed place of use, and, if they did, that such right has been abandoned or forfeited."

Ms. Rose filed her *Reply to Memorandum in Support of Motion for Summary Judgment* on May 18, 2006. She relied on IDWR's conclusion that the recommendation for 45-167A is "based on historical evidence of beneficial use and reasonable conclusions" and wrote that Mr. Poulton's *Objection* "is based upon personal grievance."

A hearing on Mr. Poulton's *Motion for Summary Judgment* was held on June 1, 2006, and the Special Master entered an ***Order Denying Poulton's Motion for Summary Judgment*** on August 22, 2006. The *Motion* was denied because there existed genuine issues of material fact. Mr. Poulton offered compelling evidence that Ms. Rose's parcel ("Church House Corner property") was not irrigated out of Willow Creek (the claimed water source) as early as 1926, until well after the original SRBA claimants (the Koyles) filed their claim in 1988.

On the other hand, Ms. Rose alleged a cognizable exception or defense to Mr. Poulton's claim of abandonment or forfeiture: the resumption-of-use doctrine (use of the water resumed prior to a claim of right to the water by a third party). She referenced the aerial photographs IDWR's Jeanie Robertson relied upon to show "historical evidence of beneficial use" showing a "small pond," "small stiations" and "reddish tint" in the area of the claimed place of use showing evidence of irrigation as early as 1962 and as late as 1992. In addition, Ms. Rose offered credible evidence that 1) the Poultons grazed their cattle on the property between 1971 and 1987 or 1988, suggesting some irrigation, and 2) trees along the property line and curves in the adjacent road may have impeded passersby from observing whether the property was being irrigated.

Trial

Trial was held on January 11, 2007, at the SRBA Courthouse in Twin Falls, Idaho. Ms. Rose appeared *pro se*; Michael P. Tribe appeared for Mr. Poulton; and Chris M. Bromley appeared for IDWR, along with Jeanie Robertson and Vicki Kelly.

IDWR

Jeanie Robertson, an IDWR senior water resource agent with 16 years of experience and 1,500 – 1,800 water right recommendations, testified in support of IDWR's recommendation. In her *Supplemental Director's Report*, she concluded: "The Department's recommendation for water right no. 45-167A is based on historical evidence of beneficial use and reasonable conclusions." She restated her recommendation that Ms. Rose's claim be decreed as originally described in the *Director's Report*. Ms. Robertson never visited the property, but because Ms. Rose's claim was based on a decree, a routine "desk top review" of the record was sufficient to confirm the claimed elements. She found no evidence of five consecutive years of non-use. Ms.

Robertson sat through the full-day of trial and at the conclusion was asked whether she stood by her recommendation – she responded, "yes."

Poulton

Jacob Mundt, an Ada County GIS supervisor, was called by Mr. Poulton as his expert witness in computer mapping, remote sensing and cartographic analysis. Mr. Mundt did not visit Ms. Rose's parcel, but reviewed IDWR's imagery and *Supplemental Director's Report*. He interpreted "stiations" in the photos as possibly natural undulations and ancient stream drainages and the "small pond" as a catchment basin for finer grain materials. He could not find evidence of ditch work from the scale of the aerial photos and suggested that the "reddish tint" may be photosynthetic properties caused by seasonal runoff.

Grant Matthews, an 80 year old, lived along Willow Creek 2 miles east of Ms. Rose's property until 1978. He attended LDS Church services in a small church on the property in the 1930's and 1940's – the church has since been removed. Back then, the land around the church was wide open and everyone's cattle watered on Ms. Rose's property and along Willow Creek – it was part of a cattle corridor. Mr. Matthews said the parcel was never irrigated but received flood water and spring run-off about every year. He could not explain how or why the land was decreed a water right in 1908.

Margaret Koyle said she and her husband bought the Rose property in 1972, but she never went there. She didn't believe anyone irrigated the land although sometimes water was on the property, especially the northeast portion. She and her husband filed the SRBA claim for .04 cfs from Willow Creek, but she had no idea why the particular point of diversion was chosen. Her husband, John Koyle, signed the SRBA *Notice of Claim*. Ms. Koyle said they sold the property to Clark and Tina Harman in 1987, and told them it had "2 shares of water."

Cory King has lived 2½ miles northwest of the Rose property since 1985, and manages the Double C Farm in the Willow Creek area. He drives by the Rose property dozens of times each week. He's never seen the parcel irrigated and the only vegetation is trees and sagebrush. He said Willow Creek used to cross under the county road along the east boundary of the Rose property and then flow north. He's never seen a headgate at the claimed point of diversion.

William Poulton is 53 years of age and lives ¼ mile east from Ms. Rose – his land surrounds hers. Since the age of ten, he remembered finding tadpoles in run-off water on the Rose property, especially when the culvert under the county road plugged. Ditch banks along

the north side of her property overran "pretty regularly." He never intentionally grazed his cattle on Ms. Rose's property; he never prevented anyone from diverting water from Willow Creek; he never saw a headgate at Ms. Rose's claimed point of diversion; and he never saw her ground irrigated. Finally, Mr. Poulton said that if Ms. Rose is awarded any water from Willow Creek, his water would be reduced.

Rose

John Anderson lived a mile from Ms. Rose's property and farmed his land from 1971 until 1988. He drove by Ms. Rose's property maybe three times per week and saw cattle grazing there. He never saw the parcel irrigated but recalled that his view of the property was obstructed by a line of poplar trees along the east boundary where a 90 degree turn in the county road distracted his attention.

Leah Rose bought the 1.9 acre parcel as her residence and moved there in 1998. She thought the land had a valid surface water right out of Willow Creek partly because the sellers, Clark and Tina Harman, had filed an SRBA claim for .04 cfs. She never irrigated the land herself, but planned to use a sump pump out of the Creek to irrigate the pasture. She probably would not have purchased the property without such a water right. Ms. Rose has a domestic well with enough water for her lawn and garden, but not enough for her pasture. [5]

Sometime after Ms. Rose bought the property, William Poulton told her the parcel was a "dry piece of ground" because it had no appurtenant water right to Willow Creek. She has pastured her friends' horses and a couple of Mr. Poulton's calves during wet spring months. There is an old irrigation structure on the property, but the claimed point of diversion is unusable since the Highway District moved Willow Creek to the far side of the county road in 2002. Before the Creek was moved, Ms. Rose bucketed water out of the Creek in the summer to water her garden, plants and trees, but gave up because it was too hard. She is concerned that her 80' tall poplar trees are dead or dying because they are no longer sub-irrigated by Willow Creek. Ms. Rose agrees with IDWR's recommendation of .04 cfs to irrigate 1.6 acres.

[5] On September 21, 2006, Ms. Rose was granted leave to file a late claim (45-14018) for .04 cfs from groundwater for year-round domestic and stockwater uses with a priority date of January 1, 1988, based on beneficial use. Her late claim has been forwarded to IDWR for its recommendation.

Closing Arguments

At the conclusion of trial, the parties agreed to submit closing arguments in writing. Mr. Poulton lodged his *Objector's Closing Arguments* on January 26, 2007. Ms. Rose lodged her *Summary* the same date.

Poulton

Mr. Poulton argued there was no evidence the decreed water right was ever used on Ms. Rose's land and because of this non-use for over 90 consecutive years, the right should be decreed abandoned or forfeited. He argued that Ms. Rose presented no defenses to forfeiture and the "clear and convincing evidence" of forfeiture rebutted the *prime facie* weight accorded IDWR's recommendation. Finally, Mr. Poulton noted that any water awarded to Ms. Rose would harm the "delicate balance of sharing, which has developed over the course of decades amongst the users of Willow Creek."[6]

Rose

Ms. Rose agreed that IDWR's recommendation of her claim is accurate because she is "familiar with the area water patterns because of the time I have lived on the property."

> I believe the property was irrigated as the aerial photos, provided by IDWR, depicted and that they are 'reasonable conclusions.' Conversely, I do not think that Mr. Tribe, attorney for Mr. Poulton, proved by fact, that there was no irrigation on the property, but only attempted to discount the presence of irrigation by anecdotal evidence.

CONCLUSIONS OF LAW

Material Facts

In the previous summary judgment proceedings and at trial, there was credible evidence supporting certain basic facts in the matter, reviewed here chronologically. First, according to the doctrine of *res judicata*,[7] there existed a right to divert some amount of water from Willow Creek appurtenant to Ms. Rose's parcel beginning with entry of the *Thompson v. Poulton* ***Decree*** in 1908. Arguments that such a water right never existed have no merit.

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[6] William and Margaret Poulton have a pending unobjected to overlapping claim (45-167B) for 3.14 cfs from Willow Creek to irrigate 217 acres with the same priority date (November 23, 1881) claimed by Ms. Rose based on the *Thompson v. Poulton* decree.

[7] "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." *Black's Law Dictionary* 1174 (Henry Campbell Black, 5th ed., West 1979).

Second, there was credible evidence that no water from Willow Creek was applied to the land between 1908 and 1962. The earliest evidence of possible beneficial use following the ***Decree*** is a 1962 aerial photograph of the property showing a "small pond in the area of the claimed place of use along with evidence of irrigation."

Third, in 1988, John and Margaret Koyle filed the *Notice of Claim* in subcase 45-167A claiming the right to divert .04 cfs from Willow Creek based on the *Thompson v. Poulton* ***Decree***. In signing the *Notice of Claim*, John Koyle swore or affirmed "that the statements contained in the foregoing document are true and correct." Clark Harman swore or affirmed likewise when he signed the Amended *Notice of Claim* in 1989.

Fourth, sometime in 1998, after Ms. Rose bought the property from the Harmans, Mr. Poulton told her the parcel was a "dry piece of ground" because it had no appurtenant water right to Willow Creek. Even so, during the summer, Ms. Rose "bucketed" water out of the Creek to water her garden, plants and trees.

Fifth, in 2002, the Highway District moved Willow Creek and Ms. Rose's claimed point of diversion 20-30 feet east away from her property line to the far side of the county road and onto Mr. Poulton's property – without Ms. Rose's consent.

Sixth, Mr. Poulton filed his *Objection* to Ms. Rose's SRBA claim on January 3, 2005, alleging: "This water right has been abandoned for over five years prior to making her claim and has been forfeited pursuant to I.C. S. 42-222(2)." There is no evidence that Mr. Poulton or anyone else initiated forfeiture proceedings before that date.

Issues

Since there was no evidence of intent to abandon[8], the questions are 1) whether Ms. Rose's claim to a water right has been forfeited by continuous nonuse for five consecutive years and, if so, 2) whether Ms. Rose has proven an exception or defense to Mr. Poulton's allegation of

[8] Common law abandonment requires an intent to abandon and actual surrender or relinquishment of water rights; statutory forfeiture focuses instead upon time and conduct. *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho App. 393, 744 P.2d 121 (1987).

forfeiture; i.e., nonuse resulted from circumstances over which the water right owners had no control [9] or the resumption of use doctrine.[10]

Evidence of Nonuse

Mr. Poulton offered compelling evidence that Ms. Rose's parcel, the Church House Corner property, was not irrigated out of Willow Creek beginning as early as 1908 until at least 1988 when the Koyles filed their claim in the SRBA and the five year statutory period of nonuse for establishing forfeiture was tolled.[11] Weighed along with that are IDWR's conclusions that there was some irrigation of the land as early as 1962. Hence, the record supports Mr. Poulton's claim that no water from Willow Creek was beneficially used to irrigate Ms. Rose's property for at least 54 years. But that leaves the issue of whether Ms. Rose is entitled to invoke and has proven an exception or defense to the claim of forfeiture.

Guidelines

Before proceeding to consider the issue of exceptions or defenses to forfeiture, the parties should be reminded of two guidelines by which the Special Master is bound in this matter.

Prima Facie Evidence

First, elements of water rights recommended by the IDWR Director are presumed to be true unless disproved by some evidence to the contrary. The Idaho Legislature put it this way in their amendment of I.C. § 42-1411(4):

> [T]he director's report . . . shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law. The unobjected to portions of the director's report shall be decreed as reported.

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[9] "No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from circumstances over which the water right owner has no control. Whether the water right owner has control over nonuse of water shall be determined on a case-by-case basis." I.C. § 42-223(6).

[10] "Under the resumption-of-use doctrine, statutory forfeiture is not effective if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party. A third party had made a claim of right to the water if the third party has either instituted proceedings to declare a forfeiture, or has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, or has used the water pursuant to an existing water right [citations omitted]." *Sagewillow v. Idaho Dept. of Water Res.*., 138 Idaho 831, 70 P.3d 669 (2003).

[11] See former SRBA Presiding Judge Roger S. Burdick's May 9, 2002 ***Memorandum Decision and Order on Challenge; and, Order of Partial Decree***, subcase 65-5663B, at 8-22. The Court may not consider periods of nonuse after the filing of the SRBA claim.

Since passage of that amendment, the Idaho Supreme Court has put its stamp of approval on the legislation:

> The Legislature's direction that the contents of the Director's report shall constitute prima facie evidence of some water right claims was a permissible exercise of the authority, recognized in I.R.E. 301, to create an evidentiary presumption. Unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the Director's report are established.

In Re SRBA Case No. 39576, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995).

Forfeiture Not Favored

The second guideline is that forfeiture of water rights is not favored under the law, is not to be presumed and all intendments are to be indulged in against forfeiture. *Hodges v. Trail Creek Irrigation Company*, 78 Idaho 10, 297 P.2d 524 (1956). Forfeiture must be clearly established. *Ada County Farmers' Irr. Co. v. Farmers' Canal Co.*, 5 Idaho 793, 51 P. 990 (1898). Clear and convincing evidence is required to support a claim of forfeiture. *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943). Very convincing and satisfactory proof is required to support forfeiture of a real property right. *Perry v. Reynolds*, 63 Idaho 457, 122 P.2d 508 (1942). Forfeiture is abhorrent and all intendments are to be indulged in against a forfeiture. *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952). The courts abhor forfeiture and where no public interest is favored thereby, equity leans against declaring a forfeiture. *Hurst v. Idaho Iowa Lateral & Res. Co.*, 42 Idaho 436, 246 P. 23 (1926) and *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938).

Circumstances of Use and Nonuse

Mr. Poulton clearly established non-use of Willow Creek water between 1908 and 1962 when IDWR found some evidence of irrigation on Ms. Rose's property. Whether there was sufficient evidence of nonuse after that date to overcome the *prima facie* weight accorded the IDWR Director's recommendation and declare forfeiture may be moot because of the confluence of unique circumstances. The weight of evidence is that 1) some use of the water was resumed before Mr. Poulton instituted proceedings to declare a forfeiture and 2) some nonuse resulted from circumstances beyond Ms. Rose's control.

Resumption of Use

IDWR's finding of irrigation on the property as early as 1962 is credible and consistent with the parcel having a decreed water right, a matter of public record, and common use of the property as part of a "cattle corridor" or stock driveway. Bolstering that evidence is the fact that the Koyles, who owned the property for 15 years (1972-1987), sold it to the Harmans and assured them the land had "2 shares of water." On top of that, the Koyles (and later, the Harmans) filed a claim in SRBA for .04 cfs from Willow Creek year-'round based on the *Thompson v. Poulton* decree. Their sworn statements that the claim was true and correct cannot be ignored.

Finally, there was evidence that Ms. Rose herself resumed use of Willow Creek water before Mr. Poulton instituted proceedings to declare a forfeiture of her water right by filing his SRBA *Objection* in 2005. Ms. Rose drew water from the Creek by bucket sometime between 1998 and 2002, and, however futile in the end, can only be considered a resumption of use.

Nonuse

Then, there is the matter of nonuse resulting from circumstances beyond Ms. Rose's control. The first instance was in 1998, when Mr. Poulton told Ms. Rose that her newly acquired property was a "dry piece of ground." Given their respective professions (school teacher versus farmer), local knowledge, land ownership and standing in the community, it is not unreasonable to conclude that Ms. Rose would rely on Mr. Poulton's statement and not investigate the matter further.

The second instance of nonuse resulting from circumstances beyond her control was when the Highway District moved the channel of Willow Creek away from Ms. Rose's property line to the other side of the county road in 2002. Not only could Ms. Rose no longer access her claimed point of diversion, she could not even draw buckets of water for her garden, plants and trees. There was conflicting testimony whether Mr. Poulton instigated the move across the road and onto his property, but it was clear that Ms. Rose was not consulted and did not approve.

Given that Idaho's courts do not favor forfeiture of water rights and that no public interest is served by forfeiture of Ms. Rose's water right, equity leans against declaring a forfeiture in these unique circumstances. The record herein requires indulgence in two principle intendments: 1) some use of the Willow Creek water was resumed before Mr. Poulton instituted

proceedings to declare a forfeiture of claim 45-167A and 2) some nonuse resulted from circumstances beyond Ms. Rose's control.

Therefore, Mr. Poulton's *Objection* that Ms. Rose's water right "has been abandoned for over 5 years prior to making her claim and has been forfeited pursuant to I.C.S. 42-222(2)" must be denied. Ms. Rose is entitled to a partial decree adjudicating a water right under claim 45-167A as recommended by IDWR and as described in the attached ***Special Master Recommendation of Partial Decree of Water Right 45-167A***.

DATED March 20, 2007.

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TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication