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)**
Case No. 39576	)	
	)	**ORDER DENYING MOTION**
	)	**TO ALTER OR AMEND**

BACKGROUND

Special Master Report

On March 20, 2007, the Special Master entered a ***Report and Recommendation*** following summary judgment proceedings and trial concluding as a matter of law that claimant Leah G. Rose's water right had not been abandoned and she was entitled to a water right as recommended by IDWR. The Special Master found that despite compelling evidence of nonuse for at least 54 years, 1) use of the water was resumed before objector William A. Poulton instituted proceedings to declare a forfeiture and 2) nonuse resulted from circumstances beyond Ms. Rose's control and that of her predecessors in ownership.

Those conclusions were based on the following premises: "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 rights, equity leans against declaring a forfeiture in these unique circumstances." ***Report***, at 10. For those reasons, the Special Master recommended that Ms. Rose is entitled to .04 cfs from Willow Creek to irrigate 1.6 acres from March 15 to November 15 with a priority date of November 23, 1881, based on a 1908 decree.

Poulton's Motion to Alter or Amend

On April 10, 2007, Mr. Poulton filed a *Motion to Alter or Amend Special Master's Report and Supporting and Supporting Memorandum* "to allow the trial court to correct errors of both fact and law that had occurred in its proceedings." *Motion*, at 1. Mr. Poulton argued the following alleged errors:

Fact

1. The Special Master found that IDWR's senior water resource agent Jeanie Robertson sat through the trial[1], when she actually 1) heard only the opening motion concerning Mr. Poulton's expert, Jacob Mundt, and 2) listened to Mr. Mundt's testimony before giving her rebuttal testimony. Ms. Robertson did not hear the testimony of Mr. Poulton, his witnesses or Ms. Rose.

2. The Special Master found there was an old irrigation structure on Ms. Rose's property, but there was no admissible testimony that an old irrigation structure was ever on her property.

3. The Special Master referenced Ms. Rose's predecessors in ownership as assuring buyers that the land had "2 shares of water"[2] but failed to distinguish between "shares on paper" and water actually beneficially used.

4. The Special Master stated Mr. Poulton was a farmer and Ms. Rose is a teacher. In fact, Mr. Poulton "raised cattle and helped with his family's business but he was employed by Minidoka Irrigation District at all times during this litigation. [Ms.] Rose is an aid and not a teacher with the Cassia County School District." *Motion*, at 3.

5. Cattle grazing on the land is not evidence of irrigation as suggested by the Special Master. "Even if there were credible evidence that cattle grazed on the property that is not evidence of irrigation and should not be considered by the Court to find an absence of forfeiture or abandonment." *Motion*, at 3.

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[1] The Special Master found that "Ms. Robertson sat through the full-day of trial and at the conclusion was asked whether she stood by her recommendation – she responded, 'yes'." ***Report***, at 3-4

[2] ***Report***, at 10.

Law

1. **"**The Special Master did not properly apply the resumption of use doctrine. A resumption of use of only a portion of a water right, prior to a claim of right by a third party, will only prevent the forfeiture of that portion of the water right." *Motion*, at 4.[3]

2. The Special Master erred in concluding Ms. Rose's nonuse was due to circumstances over which she had no control.

3. Since intent to abandon a water right can be evidenced by a long period of nonuse, it was error to conclude that there was no evidence of intent to abandon.

4. Because there was no ditch or evidence of irrigation, it was error to conclude that the Highway District moved the point of diversion in 2002.

5. The Special Master erred in finding that no public interest is served by forfeiture of Ms. Rose's water right. The public interests are a) protecting other water users' rights to Willow Creek, b) encouraging prospective land purchasers to investigate their water rights and c) putting water to maximum beneficial use.

6. The Special Master failed to consider Grant Matthews' testimony that Ms. Rose's property was never irrigated until at least 1978.

7. The Special Master failed to hold Ms. Rose (*pro se*) to the same standard as a party represented by a lawyer.

> At trial, the Court allowed the claimant to give direct testimony without asking questions over the objections of the objector. When the claimant was directed to do so and it became difficult for her to question herself, the Court asked questions for the claimant over the objection of the objector's counsel. *Motion*, at 8.

Rose's Response

Ms. Rose filed her *Response for Motion to Alter or Amend Special Master Report and Supporting Memorandum* on June 8, 2007. She argued that it's true that Mr. Poulton farms and she teaches:

> He grows hay for his cattle and waters and tends his acreage in addition to his other job and I teach kindergarten children how to read all day. I am a teacher, and I challenge anyone who tells me I am not. Whether my job

[3] In his *Motion*, Mr. Poulton concluded that "there must be a new hearing so the claimant can present evidence as to the amount of water she diverted based on a partial resumption of use." *Motion*, at 8.

> title is educational aide or teacher is irrelevant to this case. It just means the taxpayer pays me less for doing the same thing the teacher does in our classroom. The fact remains that I do not have the knowledge of the land as Mr. Poulton did. *Response*, at 2-3.

Ms. Rose argued that Mr. Poulton admitted he had cattle on her property which "would provide more evidence to irrigation than proof that there was no irrigation…." *Response*, at 3.

Ms. Rose suggested that the amount of water she claims, .04 cfs, is only about "a cup of water" and downstream users along Willow Creek will not be harmed by her claim. She recalled that "Cory King, in answer to Special Master's question in trial as to how much water flows down Willow Creek, gave evidence of the abundance of water that flows down Willow Creek year round – well beyond the needs of its users." *Response*, at 4.

Regarding whether Ms. Rose sat on her hands and did nothing to access Willow Creek, Ms. Rose argued that Mr. Poulton admitted at trial that he discussed moving the creek with the Highway District before the actual move. Ms. Rose recalled speaking with the District beforehand too, but the final decision was made without her knowledge.

> It is ludicrous to suggest that I would not want the water or would not have any motivation to secure that right. Knowing large trees lining my property would die without continued access to the Willow Creek stream was sufficient motivation to pursue the water issue in addition to the necessity for that water to irrigate my pasture. *Response*, at 4.

Finally, on the matter of *pro se* litigants, Ms. Rose argued that since forfeiture is akin to taking a vested property right, the Court "has power to construe pleadings, affidavits and memoranda in such a way as to ensure that justice is served despite deficiencies in form." *Response*, at 6.

Hearing

A hearing on Mr. Poulton's *Motion to Alter or Amend* was held on June 14, 2007, at the SRBA Courthouse in Twin Falls, Idaho. Ms. Rose appeared *pro se*; Michael P. Tribe appeared for Mr. Poulton, along with his client; and Chris M. Bromley appeared for IDWR.

DISCUSSION

Mr. Poulton's arguments will be reviewed here, generally in the order they appear in his *Motion* – first, the alleged errors of fact.

Fact

Mr. Poulton was correct in pointing out that IDWR's Jeanie Robertson, who investigated and recommended Ms. Rose's claim, did not sit through the testimony of Mr. Poulton, his non-expert witnesses and Ms. Rose. Ms. Robertson carefully listened to the testimony of Mr. Poulton's expert, Jacob Mundt, after which she was asked whether she stood by her recommendation. Her answer was, "yes."

It was no surprise that Ms. Robertson asked to be excused when she did, both because of her work load at IDWR's southern office and the fact that she heard and considered virtually the same evidence before preparing her recommendation. And there was essentially no new (non-cumulative) evidence presented at trial that was not presented during earlier summary judgment proceedings.[4] The one new bit of evidence was Mr. Mundt's expert testimony concerning his review IDWR's imagery[5] and IDWR's April 14, 2006 *Supplemental Director's Report Regarding Subcase No. 45-167A*. After hearing that evidence, Ms. Robertson remained firm in her recommendation that Ms. Rose be adjudicated a water right. It is highly unlikely that cumulative testimony by Mr. Poulton's witnesses essentially to the same points already considered by Ms. Robertson would have altered her opinion.

[4] During summary judgment proceedings, the parties submitted approximately 16 affidavits and 25 exhibits and attachments. Five of the affiants testified later at the trial and most of the exhibits and attachments were admitted into evidence.

[5] "[Mr. Mundt] 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." ***Report***, at 4.

Mr. Poulton's argument that there was no admissible testimony that an old irrigation structure was ever on Ms. Rose's property is belied by Ms. Rose's testimony to that effect[6] and Ms. Robertson's findings:

> Next, Agent Robertson reviewed aerial photography of the place of use from 1962, 1968, 1976, 1987, and 1992 to determine whether the place of use had historically been irrigated. The 1962 and 1968 aerial photographs show a small pond in the area of the claimed place of use along with evidence of irrigation. . . . Small stiations appear in the 1976 aerial photography, which are indicative of irrigation ditches, along with evidence of irrigation. . . . The reddish tint in the claimed place of use in the 1987 NAPP photograph indicates that the claimed place of use had been irrigated as of the commencement of the SRBA. . . . Finally, the 1992 NAPP photograph shows areas of irrigation in the claimed place of use after commencement of the SRBA and filing of the original claim by the Koyles on August 23, 1988. . . . NAPP photography from 2004, however, shows that the historic channel of Willow Creek has changed since the aerial photography was taken in 1992, 1987, 1976, 1968, and 1962. . . . In 1992 and earlier, aerial photography demonstrates that Willow Creek entered the claimed place of use in the SESE of Section 9 at the marked point of diversion and continued its flow north along the property line. Sometime between 1992 and 2004, after the Koyles filed their original claim, the channel of Willow Creek changed. . . . Presently, Willow Creek no longer enters the claimed place of use at the marked point of diversion or flows through the claimed place of use in the SESE of Section 9. . . . Instead, Willow Creek bypasses the SESE of Section 9 as it flows through the SWSW of Section 10 before it reenters its historic channel to the north of the claimed place of use. *Supplemental Director's Report*, at 5-7.[7]

Mr. Poulton was concerned about the Special Master's failure to distinguish between paper water ("2 shares of water," referring to an appurtenant water right when Ms. Rose's property was sold by previous owners) and water actually beneficially used. It is common knowledge that paper water rights are occasionally referenced, especially during land sales. But such evidence is relevant when considered as part of a larger body of evidence.

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[6] Ms. Rose's testimony was paraphrased by the Special Master as follows: "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." ***Report***, at 5.

[7] While the *Supplemental Director's Report* prepared by Ms. Robertson was not "testimony", she verified its contents at trial and it is an elemental part of the Court's record.

In this subcase, it was likely common knowledge that Ms. Rose's property was decreed a water right in 1908, and according to IDWR, there was evidence (aerial photos) of irrigation as early as 1962. Then, the very people who said their property had "2 shares of water" (John and Margaret Koyle), filed the original claim in the SRBA for .04 cfs from Willow Creek based on the 1908 decree. In their *Notice of Claim*, John Koyle swore or affirmed "that the statements contained in the foregoing document are true and correct." After the Koyles sold the property to Clark and Tina Harman, Clark Harman likewise swore or affirmed that the claim was true and correct.

The Special Master wrote that Mr. Poulton is a farmer and Ms. Rose is a school teacher, but Mr. Poulton was concerned that such titles were less than accurate. Ms. Rose's *Response* quoted herein addresses the issue adequately. Besides, Mr. Poulton's argument that he raised cattle and helped with the family farm while working full time for the Minidoka Irrigation District only reinforces the parties' disparate knowledge of farming, irrigation practices and general water law.

Whether cattle grazing on Ms. Rose's property is evidence of irrigation is a unique fact to be weighed in the context of all the evidence. Standing alone, the fact carries little weight, but when considered along with the complete record, it is relevant and worthy of mention.

Law

Mr. Poulton correctly argued 1) that there can be a partial forfeiture of water rights by nonuse for five years and 2) that a resumption of use of only a portion of a water right prior to a claim of right by a third party will only prevent the forfeiture of that portion of a water right. *Sagewillow v. Idaho Dept. of Water Res.*, 70 P.3d 669, 138 Idaho 831 (2003). However, *Sagewillow* defined the term "claim of right" as when a third party has 1) instituted proceedings to declare a forfeiture, 2) obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use or 3) has used the water pursuant to an existing right.

Mr. Poulton does not qualify as a third party asserting a claim of right under any of the above three definitions. First, he did not institute proceedings to declare a forfeiture until January 3, 2005, when he filed his *Objection* while IDWR found some

evidence of irrigation as early as 1962.[8] Second, Mr. Poulton was partially decreed water right 45-167B on May 17, 2007 – again, well after the resumption of use of water right 45-167A. If Mr. Poulton were to argue he inherited a valid water right via the 1908 *Thompson v. Poulton* decree, that argument would not help because after the split of 45-167, his right was only to that portion of the base right. In other words, he did not thereby obtain a valid water right authorizing his use of Ms. Rose's water with a priority date prior to the resumption of use. And that leads to the third point – Mr. Poulton cannot claim he used Ms. Rose's water pursuant to an existing right because he would necessarily be claiming an illegal use of water beyond the split decreed right.

The remainder of Mr. Poulton's alleged errors of law are merely argumentative and go to the weight accorded the evidence by the Special Master.[9] But two more points deserve comment. Mr. Poulton wrote that long periods of nonuse of a water right (here, 54 years) can be evidence of intent to abandon (as opposed to statutory forfeiture) and it was error to conclude that there was no evidence of abandonment.

In Idaho, abandonment is a question of intent and must be evidenced by a clear and decisive act. *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938). Mere nonuse of a water right, standing alone, is not sufficient for a *per se* abandonment; intent to abandon is a question of fact to be decided by the trier of fact. *Jenkins v. State, Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). In this subcase, there was no clear and decisive act of abandonment, only nonuse.

The final point made by Mr. Poulton concerns the Special Master's alleged failure to hold Ms. Rose to the same standard as a party represented by a lawyer. The Special Master allowed Ms. Rose to give direct testimony without asking questions and the Special Master asked questions of her.

> Idaho Rules of Evidence provide authority for the Special Master's actions:
> Rule 611. Mode and order of interrogation and presentation.
> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as

[8] Mr. Poulton focused primarily on Ms. Rose's use of buckets to water her poplar trees and irrigate her pasture between 1998 and 2002, while ignoring IDWR's finding of irrigation on the property as early as 1962.

[9] For instance, as to the issue of whether Ms. Rose's nonuse was due to circumstances over which she had no control, Idaho's forfeiture statutes provide: "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).

> to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
> . . .
> Rule 614. Calling and interrogation of witnesses by court.
> . . .
> (b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.

In Idaho, the order of trial and presentation of evidence are within the sound discretion of the trial court, and any error may not be predicated on a variation from usual procedures in the absence of demonstrated prejudice. *Findley v. Woodall*, 86 Idaho 439, 387 P.2d 594 (1963).

In the trial in this matter, when Ms. Rose took the stand without an attorney, it was apparent that the Special Master had to allow her to give direct testimony and had to question her on relevant matters. Those were the only alternatives to ascertain the truth, avoid needless consumption of time and protect Ms. Rose from undue embarrassment. There was no prejudice to Mr. Poulton despite his counsel's objections.

CONCLUSIONS OF LAW

Mr. Poulton has not demonstrated any sound reason, whether in fact or law, to alter or amend the March 20, 2007 ***Special Master Report and Recommendation***.

ORDER

THEREFORE, IT IS ORDERED that Mr. Poulton's *Motion to Alter or Amend Special Master's Report* is **denied**.

DATED September 6, 2007.

_/s/ Terrence A. Dolan_____
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication