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 GRANTING IN PART AND DENYING IN PART POULTON'S MOTION TO STRIKE AFFIDAVITS; ORDER DENYING POULTON'S MOTION FOR SUMMARY JUDGMENT; and ORDER SETTING SCHEDULING CONFERENCE**

BACKGROUND

Claim, Director's Report and Objection

John and Margaret Koyle, and later Clark and Tina Harman (or Harmon), filed a *Notice of Claim to a Water Right* in subcase 45-167A on August 23, 1988, 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.[1]

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, for irrigation of 1.6 acres from March 15 to November 15.

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

William A. Poulton filed an *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."

Poulton's Motion for 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." His statement of historical facts and arguments was as follows.

The recommended place of use, locally known as the "Church House Corner," was originally part of the Poulton Ranch owned by Thomas A. Poulton. Around 1930, Thomas Poulton gave permission to the LDS Church to build a church on the property with the proviso that when the church was abandoned, the land would revert back to him. The church building

occupied the land from 1930 to 1945 when it was moved and the property left vacant.[2] The Church sold the property to John and Margaret Koyle who later filed the original SRBA claim for .04 cfs from Willow Creek to irrigate 1.9 acres. In 1989, the Koyles sold the land to Clark and Tina Harman who moved a mobile home onto the property. Willow Creek no longer abuts the eastern boundary of Ms. Rose's property because in 2002 the Idaho Highway Department moved the streambed 20-30 feet east off the Burley Highway District's right-of-way.

Mr. Poulton argued that Ms. Rose's property has not been irrigated since at least 1947, and there has never been a diversion works. Even when the church was on the land, there was no water or electricity on the property and no lawn or vegetation to water. After the Church abandoned the property, it sat vacant and full of weeds and sagebrush. Even though the Koyles, the Harmans and now Ms. Rose all claimed an irrigation water right out of Willow Creek, "there has never been any irrigation on the 1.6 acres, whether when the Harmons owned it or since its purchase by Rose."

Mr. Poulton concluded that by his affidavits, he rebutted the *prima facie* weight accorded the *Director's Report*; the presumption in favor of Ms. Rose shifted requiring her to offer evidence that her claim is valid; and she offered no evidence of diversion or beneficial use. Therefore, Mr. Poulton argued that he is entitled to judgment as a matter of law.

Rose's Reply to Memorandum

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." She argued that the affidavits Mr. Poulton submitted are anecdotal and do not amount to "scientific evidence such as that provided in the Supplemental Director's Report." Ms. Rose suggested that in various cases, the affiants did not walk the property to look for diversion works; their view of the property was obscured by large trees; the affiants did not reside in the area; they share water interests with Mr. Poulton; they are related to him; they were misinformed; they may have a personal interest

[2] The issue of Thomas A. Poulton's possible reversionary interest, and that of his successors in interest, in Ms. Rose's property was laid to rest in court during the June 1, 2006, summary judgment hearing on the record when William A. Poulton disclaimed any ownership interest in the land.

in his case; they were too young and did not live on the property; or the affiants simply did not want to cause problems.

To rebut Mr. Poulton's version of several key facts, Ms. Rose offered a deed, dated September 26, 1914, wherein Sarah and William Poulton, husband and wife, sold the Church House Corner property to "Charles H. Smith, Bishop of Pella Ward, Cassia Stake of the L.D.S. Church" for one dollar. Then, on December 19, 1972, the "Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, a Utah corporation, sole" executed a special warranty deed conveying the property to John and Margaret Koyle.

Ms. Rose said that when Mr. Poulton grazed his cattle on her property, that would suggest the property was irrigated as a pasture and not just with waste water or stray water. She wrote that she was not consulted when the Burley Highway District re-routed Willow Creek away from the east boundary of her property. She did not intend to abandon the water right and she is concerned that large trees along that property line are dying from lack of subirrigation. Ms. Rose closed her arguments by saying she and her predecessors have been prevented from exercising her right to divert water from Willow Creek by Mr. Poulton, and her well alone does not provide enough water to irrigate her pasture.[3]

Poulton's Motion to Strike Affidavits

Mr. Poulton filed his *Motion to Strike Affidavits in Reply to Motion for Summary Judgment* on May 23, 2006, requesting that all or parts of certain affidavits and exhibits submitted by Ms. Rose be stricken. Mr. Poulton cited various grounds for inadmissibility: lack of proper foundation, lack of personal knowledge, irrelevance, immateriality and hearsay.

Poulton's Reply Memorandum

Mr. Poulton lodged his *Reply Memorandum* on May 25, 2006. He argued first that Ms. Rose, who decided to represent herself, must be held to the same standards and rules as those represented by an attorney. Mr. Poulton concluded:

> Water Right No. 45-00167A should not be decreed as recommended. If it is determined that the right is valid, then the right was either abandoned when the

[3] Ms. Rose has a pending late claim (45-14018) for .04 csf from groundwater for year-round domestic and stockwater uses on her land with a priority date of January 1, 1988, based on beneficial use. Her motion to file the late claim will be heard by the SRBA Presiding Judge on September 19, 2006.

LDS Church moved from the place of use or it was forfeited at several different periods based on non-use. Rose has failed to raise a material issue of fact. The evidence presented to the Court by the Department also does not present a material issue of fact, including the inconclusive aerial photographs in the Report and Agent Robertson's conclusions.

Hearing on Motions and Briefing Schedule

A hearing on Mr. Poulton's *Motion for Summary Judgment* and *Motion to Strike Affidavits* was held on June 1, 2006, at the SRBA Courthouse in Twin Falls, Idaho. Leah G. Rose appeared *pro se*; Michael P. Tribe appeared for William A. Poulton; and Chris M. Bromley appeared by telephone for IDWR. At the conclusion of arguments, the Special Master entered an ***Order Setting Deadlines*** for the parties to lodge final pleadings.

When the parties submitted consecutive briefs over procedural matters, on June 27, 2006, the Special Master entered an ***Order Granting Motion for Extension of Time and Setting Deadline*** requiring the parties to file "all remaining relevant documentation, including affidavits" no later than July 21, 2006, after which the matters would be deemed fully submitted for decision.

Post Hearing Briefing

Rose:

June 12, 2006 – *Claimant's Opposition to Objector's Motion to Strike Affidavits* and *Supplemental Memorandum in Opposition to the Motion for Summary Judgment*.[4]

June 23, 2006 – *Reply Brief to Response Brief of Objector*.

July 21, 2006 – *Memorandum*.

[4] The filing also included Ms. Rose's *Motion to Strike Affidavit of William Poulton* but that was denied as untimely. See ***Order Granting Motion for Extension of Time and Setting Deadline***, dated on June 27, 2006.

Poulton:

June 16, 2006 – *Response Brief to Claimant's Opposition to Objector's Motion to Strike Affidavits*.

July 21, 2006:

Second Affidavit of Michael P. Tribe.
Second Affidavit of William A. Poulton.
Affidavit of Norma Poulton Edgar.
Affidavit of Roy N. Green.

DISCUSSION

I.R.C.P. 56

Idaho Rules of Civil Procedure 56(e) states that "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." In other words, the court must find that "material facts are actually and in good faith controverted." I.R.C.P. 56(d). In this subcase, if the court finds that the pleadings and affidavits show that there is no genuine issue as to any material fact and that Mr. Poulton is entitled to judgment as a matter of law, his *Motion for Summary Judgment* must be granted. I.R.C.P. 56(c).

Material Facts

Mr. Poulton's *Motion for Summary Judgment* examined two material facts at the heart of this matter: 1) did Ms. Rose and her predecessors in interest appropriate the waters of Willow Creek on her property, the Church House Corner, and if so, 2) has that right been abandoned or forfeited? But claims of abandonment and forfeiture raise a third possible issue: did Ms. Rose allege a cognizable exception or defense to Mr. Poulton's claim of abandonment or forfeiture?

Law of the Case

IDWR's Jeanie Robertson correctly observed that IDWR cannot consider evidence of nonuse that may occur *after* a claim is filed in the SRBA. The five-year statutory period of nonuse for establishing forfeiture tolls upon the filing of a claim in the SRBA until a partial decree is issued. Therefore, unless a five-year period accrued *prior to* the filing of the claim

(August 23, 1988), a cause of action for forfeiture does not exist. Once a partial decree is entered, the statutory period for nonuse begins to run anew. *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.

Abandonment Versus Forfeiture

Early on in Idaho, it was established that mere nonuse of a water right is not enough to establish abandonment – one must *intend* to abandon a water right. "Whether a water right has actually been abandoned 'depends upon the facts and circumstances surrounding each particular case, tending to prove the essential elements of abandonment, viz., the intent and the acts of the party charged with abandoning such right.'" Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, vol. II, 262, citing *Joyce v. Murphy Land & Irr. Co.*, 35 Idaho 549, 555, 208 P. 241, 243 (1922).

Forfeiture, unlike abandonment, does not require intent to abandon a water right by nonuse. The involuntary loss of all or a portion of one's water right is triggered simply by continuous nonuse for five consecutive years. I.C. § 42-222(2); also see *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944).

The Idaho Court of Appeals framed the distinction between abandonment and forfeiture this way:

> Forfeiture of water rights is conceptually distinct from common law abandonment. Abandonment is predicated upon the elements of intent and conduct. It requires an intent to abandon and the actual surrender or relinquishment of water rights. Statutory forfeiture focuses instead upon time and conduct. Idaho Code § 42-222(2) provides that all rights to water are lost where the appropriator fails to make "beneficial use" of the water for a continuous five year period regardless of intent [citations omitted].

McAtee v. Faulkner Land & Livestock, Inc., 113 Idaho App. 393, 396, 744 P.2d 121, 124, (1987).

Exceptions or Defenses to Forfeiture

By statute, Idaho recognizes that "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." I.C. § 42-223(6). In addition, Idaho courts recognize a common law defense to the five-year forfeiture statute:

> 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, 842, 70 P.3d 669, 680 (2003).

Genuine Issues of Material Fact

The first material fact to be reviewed is whether Ms. Rose and her predecessors in interest appropriated the waters of Willow Creek on the Church House Corner property. The answer is obviously, yes, based on the 1908 *Thompson v. Poulton* ***Decree***. The second material fact, then, is the key question: has the right been abandoned or forfeited? Since there is no credible evidence that Ms. Rose or her predecessors in interest *intended* to abandon the water right, has the water right been forfeited by continuous nonuse for five consecutive years?

To establish a claim of forfeiture in this subcase, Mr. Poulton must have presented evidence to prove some period of continuous nonuse for five consecutive years between March 17, 1908 (entry of *Thompson v. Poulton* ***Decree***) and August 23, 1988 (filing date of John and Margaret Koyle's SRBA claim). Assuming Mr. Poulton met his burden of proving forfeiture, did Ms. Rose set forth specific facts showing that there is a genuine issue for trial; i.e., an exception or defense to forfeiture. The Special Master believes there exist genuine issues of material fact and, therefore, Mr. Poulton's *Motion for Summary Judgment* must be denied.

Mr. Poulton offered compelling evidence that the Church House Corner property was not irrigated out of Willow Creek beginning as early as 1926 (*Affidavit of Norma Poulton Edgar*) until well after the Koyles filed their claim in the SRBA in 1988 (*Affidavit of Cory King*). That being said, there remain the aerial photographs relied upon by IDWR's Jeanie Robertson as "historical evidence and beneficial use" as early as 1962, showing a "small pond in the area of the claimed place of use along with evidence or irrigation." 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 (*Affidavit of John Anderson*).[5]

The above disparate facts show there exist genuine issues of material fact warranting a trial on the merits. But there remains the issue of exceptions or defenses to a claim of forfeiture.

Ms. Rose offered no evidence that the previous owners' nonuse of water resulted from "circumstances over which the water right owner has no control" – at least not *before* the Koyles filed their claim in the SRBA in 1988, when the five-year statutory period of nonuse for establishing forfeiture was tolled. But there is credible evidence supporting a resumption-of-use defense to a claim of forfeiture; i.e., use of the water resumed prior to a claim of right to the water by a third party.

Given that Mr. Poulton first instituted proceedings to declare Ms. Rose's water right forfeited when he filed his *Objection* in the SRBA in 2005, and given that there is "historical evidence of beneficial use" as early as 1962, noted in IDWR's *Supplemental Director's Report*, it is apparent that Ms. Rose *may* be entitled to invoke the resumption-of-use defense. In other words, Ms. Rose may be able to prove that even if the previous owners failed to make beneficial use of the water from Willow Creek for five continuous years before 1962, its use was resumed before Mr. Poulton instituted proceedings to declare a forfeiture in 2005.

It is yet to be determined at trial whether Mr. Poulton will be entitled to invoke either of the two remaining exceptions to the resumption-of-use defense noted in *Sagewillow* – that he "[1] has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, or [2] has used the water pursuant to an existing water right."

Mr. Poulton's one claim for water from Willow Creek, 45-00167B was split from the same base right as Ms. Rose's claim and has the same priority date, November 23, 1881. It remains at issue in the SRBA as an uncontested overlapping claim. Mr. Poulton's other claim to water from Willow Creek, 45-13666, was partially decreed on May 13, 2005, as an enlargement of 45-167B with a priority date of March 15, 1980.

There is no record that Mr. Poulton obtained a valid water right authorizing the use of water decreed to Ms. Rose's property before 1962, but has he used the water pursuant to an

[5] The Special Master is also mindful that when the Koyles, and later the Harmans, signed the *Notice of Claim to a Water Right Under State Law* in the SRBA claiming a right to divert water from Willow Creek based on the 1908 *Thompson v. Poulton* decree, they swore or affirmed that the statements in the *Claim* were true and correct.

existing water right? To prove that, Mr. Poulton would have to admit that he used more water than his land was decreed in 1908, or argue that his enlargement claim, 45-13666, is the "existing water right", in which case the partially decreed priority date is too late. Perhaps there are other exceptions to the resumption-of use doctrine which may apply, but that will be for a trial on the merits

In light of the above discussion, it is clear that Mr. Poulton's *Motion to Strike Affidavits* must be granted in part and denied in part because, while many of Ms. Rose's affidavits and exhibits were inadmissible in whole or part for various reasons, there remained portions that were admissible. For that reason, it would not be useful to parse through each document because only admissible portions have been considered above; the remaining portions were disregarded.

ORDER

THEREFORE, IT IS ORDERED that:

1. Mr. Poulton's *Motion to Strike Affidavits* is **granted in part** and **denied in part**;
2. Mr. Poulton's *Motion for Summary Judgment* is **denied**; and
3. A scheduling conference shall be held on **Thursday, September 14, 2006, 10:00 a.m.** The Parties may participate by telephone by dialing the number 1-225-383-1099 and when prompted entering code 654400. If you have any difficulty connecting to this call, call the SRBA Court immediately at 208-736-3011.

DATED August 22, 2006.

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