

**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) **Subcases 74-250, 74-735, 74-739,**
) **74-741 (74-741A & 74-741B) and**
Case No. 39576) **74-7147**
) **(Herbst)**
)
) **SPECIAL MASTER REPORT**
) **AND RECOMMENDATION**

Findings of Fact

Director's Reports and Objections

The Director of the Idaho Department of Water Resources filed his *Director's Report, Reporting Area 23, IDWR Basin 74* on January 23, 2006. The Director recommended claim 74-741 to Lynn and Robin Herbst, P.O. Box 21, Tendoy, Idaho, 83468, for 4.3 cfs from the Lemhi River for year-round stockwater use and to irrigate 143.1 acres in Lemhi County from March 15 to November 15 with a priority date of January 8, 1908, based on a decree.¹ The Herbsts filed an *Objection* in subcase 74-741 on June 6, 2006, objecting to priority date alleging the date should be May 26, 1873.

On August 22, 2007, the Herbsts were granted leave to file a *Motion to File Amended Notice of Claim* claiming an 1873 priority date. IDWR filed an *Amended Director's Report, Subcase No. 74-741* on October 12, 2007, recommending no change from the original *Director's Report*. The Herbsts filed a second *Objection* on November 27, 2007, again objecting to priority date.

¹ IDWR identified subcases 74-250, 74-735, 74-739 and 74-7147 as the Herbsts' uncontested overlapping claims. Only subcase 74-741 is at issue here.

IDWR's Supplemental Director's Report

In preparation for trial, IDWR filed a *Supplemental Director's Report Regarding Subcase No. 74-741* (I.R.E. 706 Report) on July 11, 2008. The *Report* stated that water right 74-741 was decreed to John and Emma Herbst in the Lemhi Adjudication to irrigate 143.1 acres with a priority date of January 8, 1908 – the same priority date claimed by John and Emma Herbst in the SRBA.² It said that IDWR did not change its recommended priority date in the *Amended Director's Report* because the legal doctrine of *res judicata* bars reconsideration of the nature and extent of all water rights previously adjudicated, citing I.C. § 42-1420. The *Report* concluded that even if reconsideration of the Herbsts' claim were not barred by *res judicata*, it would still recommend the claim as decreed in the Lemhi Adjudication.

IDWR reasoned that the place of use associated with water right 74-741 was originally developed by J.B. Pattee, the first user of water from Agency Creek. By June 22, 1886, Mr. Pattee exchanged his diversion from Agency Creek for a diversion from the Lemhi River.³ Then, in 1907 or 1908, the point of diversion from the Lemhi River was changed. To IDWR, that suggested two development periods of the same water right, but “[g]iven the uncertainty regarding how much water was developed when, the Department cannot recommend altering the priority date for water right no. 74-741.” The issue is uncertain quantities:

If it could be known how much water was beneficially used by Pattee from the Lemhi River after the 1886 exchange with the government, and how much water was beneficially used when the 1908 point of diversion was developed, the Department could recommend splitting water right no. 74-741 into two rights with priority dates of June 22, 1886 and January 8, 1908. The relative quantities would be limited to a combined total not to exceed the amount decreed by the Lemhi Court: 4.30 cfs. But since the Department does not know the extent of beneficial use prior to development of the 1908 point of diversion, the Department cannot

² The Herbsts' son, Lynn A. Herbst, was added as a claimant on the amended SRBA *Notice of Claim* filed March 2, 2007.

³ IDWR wrote:

In 1886, Pattee entered into an agreement with government officials associated with the Lemhi Indian Reservation. The agreement provided that in exchange for Pattee's interest in water from Agency Creek, the government would construct a ditch that would deliver water to Pattee's place of use from the Lemhi River.

recommend splitting water right no. 74-741 because there is no basis upon which to recommend quantity prior to 1908.

Trial

Trial was held on July 31, 2008, at the SRBA Courthouse in Twin Falls, Idaho. Paul L. Arrington appeared for the Herbsts, along with Lynn and Robin Herbst, and Chris M. Bromley appeared for IDWR, along with senior water resource agent Nathaniel Arave.

At trial, IDWR and the Herbsts agreed to “supplement” Attachment B to IDWR’s *Supplemental Director’s Report*. The original Attachment B repeated IDWR’s original recommendation in subcase 74-741. The supplemental attachments, marked IDWR Attachments B1 and B2, are drafts of how IDWR would now recommend 74-741 be split into 74-741A (June 22, 1886 priority date) and 74-741B (January 8, 1908 priority date) if the Herbsts’ amended claim is not barred by *res judicata*. The Herbsts agreed with all the elements as described in Attachments B1 and B2. The sole issue, then, was whether the portion of the Herbsts’ amended claim described as 74-741A should have a priority date of 1886 or 1908, as decreed in the Lemhi Adjudication.

The Herbsts agreed with IDWR that its *Supplemental Director’s Report* would be admitted in lieu of agent Arave’s direct testimony, but agent Arave was available for cross examination.

Lynn Herbst testified that he has lived on his parents’ land, the Herbst Ranch, since 1970, except for a brief absence. He began leasing the ranch from his parents in 1980, and finally bought the land in 1993. It was then that he first discovered evidence that at least some portion of water right 74-741 should have an earlier priority date than claimed by his parents in the Lemhi Adjudication and the SRBA. He told his father about the discovery but he did not know whether his father acted on the information.

Mr. Herbst discovered from Lemhi County records that in 1873, J.B. Pattee claimed all the water of Agency Creek via the “old Fort Lemhi ditch”; Mr. Pattee applied for a homestead patent in 1894; and in 1886, he traded “an equivalent” Agency Creek water to the Indian Department for 10,000 inches out of the Lemhi River “for agricultural

and other purposes.” As part of the trade, the government agreed to build a ditch, called the “Indian Ditch,” from the Lemhi River to Mr. Pattee’s homestead.⁴

Mr. Herbst did not know the circumstances of why his parents twice claimed a 1908 priority date for water right 74-741 – they are both now deceased.⁵ But he agreed 1886 is the earliest date he can prove with reasonable certainty that some water was diverted to the Herbst Ranch for stockwater and irrigation uses.

The 143.1 acres covered by water right 74-741 are both hay fields and pasture. Mr. Herbst said with a 1908 priority date for the whole parcel, he sometimes loses water in May and August forcing him to lease additional ground for his livestock and crops.

Conclusions of Law

Under I.R.C.P. 60(b)(6), a court may relieve a party from a final judgment for any reason justifying relief from the operation of the judgment, but any motion for relief must be made within a reasonable time. On December 30, 1982, District Judge Arnold T. Beebe entered his ***Partial Decree Pursuant to Rule 54(b), I.R.C.P.*** in the Lemhi Adjudication awarding water right 74-741 to John and Emma Herbst with a priority date of January 8, 1908.

In the matter now before the SRBA Court, Lynn and Robin Herbst seek relief from Judge Beebe’s final judgment. They seek a June 22, 1886 priority date for a portion of their water right 74-741. IDWR agrees that, but for its legal conclusion that the earlier priority date is barred by the doctrine of *res judicata*⁶, it would recommend a portion of

⁴ There is corroborating evidence that Mr. Pattee was irrigating his homestead out of the Indian Ditch in 1888, and the carrying capacity of the ditch in 1910 was 500-600 inches of water “when put in proper condition.”

⁵ On the 1971 *Notice of Claim* filed by John and Emma Herbst in the Lemhi Adjudication, they wrote: “Priority claimed is based on evidence as indicated valid license #74-2023. Source is now the Lemhi River rather than Agency Creek.” Then they checked the basis of their claim: “Right based on diversion and beneficial use.” There is no evidence the Herbsts were aware of Lemhi County records discovered by their son in 1993. License 74-2023 was not offered into evidence and its current status is unknown. The basis for the 1990 SRBA *Notice of Claim* filed by John and Emma Herbst was the Lemhi Adjudication ***Partial Decree***.

⁶ “A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.” *Black’s Law Dictionary* 1174 (5th ed., West 1979).

the Herbsts' claim as 74-741A (1.7 cfs) with an 1886 priority date and the remainder as 74-741B (2.6 cfs) with a January 8, 1908 priority date.

This subcase presents a unique set of circumstances. John and Emma Herbst twice claimed a priority date of 1908 in courts of competent jurisdiction and were decreed their water right as claimed in 1982. Yet there is solid evidence that at least some portion of their water right was beneficially used in 1873. The Herbsts' son, Lynn Herbst, first learned of the earlier priority date – 35 years earlier – in 1993 when he purchased the ranch. He told his parents of his discovery, but unfortunately there is no evidence his parents acted on the information. They had already filed their SRBA claim three years before. Lynn Herbst notified IDWR of the discrepancy in 1996, but in 2006, IDWR properly recommended the water right as decreed with a 1908 priority date and Lynn and Robin Herbst filed a timely *Objection*.

The first issue is whether the Herbsts' *Objections* and *Motion*, essentially a motion for relief under Rule 60(b)(6), was made within a reasonable time. The record and SRBA case history suggested the motion *was* made within a reasonable time. While we do not know why John and Emma Herbst did not move to amend their 1990 SRBA filing when they first learned of a possible earlier priority date, we know that Lynn Herbst conveyed that information to IDWR ten years before IDWR filed its *Director's Report* in Basin 74.⁷ Since the SRBA Court has held that forfeiture is tolled upon the filing of a claim, so it makes sense to suggest that timeliness is likewise tolled. After all, IDWR did not address the issue raised by Lynn Herbst for nearly a decade.

Next, the issue is whether Lynn and Robin Herbst have stated sufficient reason justifying relief from the Lemhi Adjudication *Partial Decree*. The record supports their motion for relief. John and Emma Herbst clearly were not aware of any evidence supporting a priority date earlier than 1908 when they filed their claims in the Lemhi Adjudication and the SRBA. They merely cited the bases of their claims as a license and then the decree.

While the Court's record is blank about such a license, there is abundant evidence in support of beneficial use as early as 1873, certainly by 1886, when J.B. Pattee traded

⁷ It should go without saying that the timeliness of the Herbsts' motion for relief from the 1982 Lemhi Adjudication *Partial Decree* begins in 1993 when Lynn Herbst discovered evidence of an earlier priority date, three years after his parents filed their SRBA claim.

his Agency Creek water to the Indian Department for water from the Lemhi River. But as noted before by IDWR, the problem was uncertain quantities. When IDWR agreed at trial to append supplemental Attachments B1 and B2 to its *Supplemental Director's Report*, that suggested that IDWR had enough evidence to split 74-741 and assign relative quantities but within the total amount decreed by the Lemhi Court. Perhaps the tipping point was IDWR's second look at the historical record and J.B. Pattee's trade of Agency Creek water for "an equivalent" water right from the Lemhi River. While the quantity may have been uncertain, the place of beneficial use over the years was more certain.

With those last pieces of the puzzle, the Court is left with the core issue of whether the Herbsts' claim to an 1886 priority date for some portion of their water right is barred by *res judicata*. The answer is, no. The Herbsts are entitled to relief from the operation of Lemhi Adjudication *Partial Decree*. The record supports their claim that some water has been, and continues to be, beneficially used on the Herbst Ranch since at least 1886, the same water right was developed further in 1908, and the water right should be split as described in Attachments B1 and B2 to IDWR's *Supplemental Director's Report*. It would not be fair to bar the Herbsts' amended claim in light of compelling evidence of public record that some portion of water right 74-741 was developed considerably earlier than 1908.

The Herbsts are entitled to partial decrees adjudicating water rights for uncontested overlapping claims 74-250, 74-735, 74-739 and 74-7147 as recommended by IDWR and as described in the attached *Special Master Recommendations for Partial Decrees for Water Rights 74-250, 74-735, 74-739 and 74-7147*. The Herbsts are also entitled to partial decrees adjudicating water rights for claims 74-741A and 741B as described in Attachments B1 and B2 to IDWR's *Supplemental Director's Report* and the attached *Special Master Recommendations for Partial Decrees for Water Rights 74-741A and 74-741B*. The Herbsts are **not** entitled to partial decrees for claim 74-741, the claim having been split.

Recommendation

THEREFORE, IT IS RECOMMENDED that claim 74-741 **not** be decreed a water right.

DATED September 3, 2008.

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