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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

**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	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION
Case No. 39576	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	FOR WATER RIGHT: 63-07035C

I. PROCEDURAL BACKGROUND

This water right claim is a portion of root right 63-07035 which was claimed in the SRBA. The Director of the State of Idaho Department of Water Resources (IDWR) investigated each portion of the root right, including this water right, and submitted its recommendation in a *Director's Report*.

There were two objections to water right 63-07035C. The United States Forest Service filed an objection to the point of diversion. However, the Forest Service objection was withdrawn prior to trial. *Notice by the United States of Withdrawal of Objections* (Dec. 6, 1999). The United States was dismissed as a party, and its objection was dismissed with prejudice. *Order Granting Motion to Withdraw* (Jan. 31, 2000). Jeffrey A. Maxey filed the other objection to this water right, asserting that the right should not exist because forfeiture had occurred from 1989 to the present.

A trial was held January 26, 2000. The trial focused on two issues. The first issue was whether Mr. Nestorick had acquired any portion of the root right when he bought one of the four lots to which the original right was appurtenant. The second issue was whether this water right

was forfeited by five years of non-use. The claimant Richard A. Nestorick and the objector Jeffrey A. Maxey each participated at trial and presented evidence.

II. STANDARD OF REVIEW

A. DIRECTOR'S REPORT

The *Director's Report* recommended this right essentially as licensed. IDWR considered the original licensed quantity of .0067 cfs and recommended a division of the water quantity proportionate to the division of the property. Thus, the *Director's Report* recommended one-fourth of the quantity to each of the four lots, resulting in a quantity of .001675 cfs for 63-07035C.¹ The objector, Jeffrey A. Maxey disagreed with the recommendation in the *Director's Report*. The trial of this subcase focused on two theories proposed by Mr. Maxey. Mr. Maxey argued that no water rights were transferred with the real property purchased by Mr. Nestorick at T04N R03E S24 SWNW, Lot 2, Block 4, Pines Subdivision #1. In the alternative, Mr. Maxey argued that this water right was forfeited by five years of non-use beginning in 1989.

B. PRIMA FACIE WEIGHT

The *Director's Report* has *prima facie* weight as set forth in I.C. § 42-1411(4)-(5). The term *prima facie* evidence is an alternative label for a rebuttable presumption. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409, 418 (1997); *State v. Hebner*, 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985). Thus, giving evidence *prima facie* weight confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. Giving evidence *prima facie* weight does not shift the burden of persuasion on an issue. *Reddy v. Johnson*, 77 Idaho 412, 293 P.2d 945 (1956); D. Craig Lewis, IDAHO TRIAL HANDBOOK §§ 1.4-12.7 (1995). When rebutted, the presumption disappears, and the party with the benefit of the presumption retains the burden of persuasion on the issue. *Hagerman Water Right Owners* at 745.

The *Director's Report* as *prima facie* evidence draws a conclusion as to particular elements of a water right. A presumption exists until the objector presents "substantial evidence" that the element is other than as recommended. If the objector asserts forfeiture, however, that must be

¹ The printout in the *Director's Report* shows a quantity of .001 for this right. Roxanne Brown testified that IDWR's computer generated printout could only print three digits past the decimal point. However, IDWR's complete recommendation for this right is .001675 cfs.

shown by "clear and convincing" evidence. *Jenkins v. Idaho Dept. Of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). If the objector presents such evidence, the presumption disappears. Nevertheless, the facts upon which the presumption is based are to be weighed with all other facts that may be relevant. *Hagerman Water Right Owners* at 745.

C. WATER RIGHTS PASS WITH LAND UNLESS RESERVED IN THE DEED

When water rights become appurtenant to the land on which they are used, they pass with the land unless reserved in the deed. "[I]t is well established that a water right is an appurtenance to the land on which it has been and will pass by conveyance of the land." *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911). The Idaho Supreme Court has consistently recognized that appurtenant water rights pass with the deed, unless the instrument of conveyance says otherwise.

This conveyance would carry with it the water right appurtenant to the land at the time of the conveyance, unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed.

Id. at 501.

Where a sale of land conveys a portion of the original land holding, a proportional division of the water right is conveyed. "A division of the land would divide the appurtenant water right in the same proportion as it divided the land." *Id.*

The appellate decisions in Idaho which held that water rights pass with the land as an appurtenance have dealt most often with irrigation rights. Nevertheless, this Special Master holds that domestic water rights are generally appurtenant to domestic lots.²

²

Although one state has rejected the notion that non-irrigation water rights are appurtenant to the land on which they are used, it is doubtful that Idaho would follow suit. In *KRM, Inc. v. Caviness*, 122 N.M. 389, 925 P.2d 9 (Ct. App. 1996), the Court of Appeals of New Mexico determined that a statutory exception to the appropriations doctrine provided that only water used on land for irrigation purposes is considered appurtenant to land so as to pass with title to land by operation of law. Thus, New Mexico does not recognize water rights as appurtenant to land unless they are irrigation rights. New Mexico's common law and water law statutes differ significantly from Idaho's. Our courts have used language which generally recognizes water rights as appurtenances to land. The rationale for allowing irrigation rights to pass with land is equally compelling for domestic rights. Domestic wells are usually thought of as appurtenances to domestic lots. Severing domestic water rights from domestic lots unless specifically included in a deed would wreak havoc with property conveyances. This Special Master has considered the conclusion of the New Mexico Court of Appeals, but finds it unpersuasive.

D. FORFEITURE

Statutory forfeiture is based on the legislative declaration in I.C. § 42-222(2) that water rights may be lost if they are not applied to a beneficial use for five continuous years. *Jenkins v. Idaho Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). Forfeiture is disfavored under Idaho law, and the Idaho Supreme Court has consistently held that forfeiture must be proven by "clear and convincing evidence." *Id.* at 389.

III. FINDINGS OF FACT

A. APPLICATION AND LICENSING OF ROOT RIGHT

The root right from which this claim originated, 63-07035, was licensed to Maurice H. Faubion by the Idaho Department of Water Resources on November 25, 1969. (Exhibit 5). The place of use in the license included four lots described as Lots 1, 2, & 3, Block 1 and Lot 2, Block 4 all in T04N R03E S24. (Exhibit 5). The diversion works include a buried perforated pipe which collects spring flow and pipes it underground to four cabin sites. (Exhibit 4). Prior to the time IDWR approved the license for 63-07035, a domestic water supply was "in use" on all four cabin sites, including Lot 2, Block 4. (Exhibit 4).

In 1989, Maurice H. Faubion filed two notices of claim in the SRBA for this water right. (Exhibits 21 and 6). The Idaho Department of Water Resources sent the first claim (Exhibit 21) back to Mr. Faubion asking for clarification (Exhibit 23) because the claim exceeded the license.

Mr. Faubion returned the original claim (Exhibits 21 and 14) and in addition, filled out a second claim (Exhibit 6). The Idaho Department of Water Resources considered both documents prior to making its recommendation in the *Director's Report*. (Testimony of Roxanne Brown).

B. SALE OF INDIVIDUAL LOTS

Sometime after the root right was licensed, the four lots were sold. This portion of the water right was numbered 63-07035C, and relates to Lot 2, Block 4. Mr. Nestorick purchased Lot 2, Block 4 in July 1996 from Richard R. Faubion, and a warranty deed was executed conveying the property. (Exhibit 1). The warranty deed conveyed the following real property to Mr. Nestorick: "Lot 2 Block 4 The Pines Subdivision No. 1, According to the Official Plat thereof, filed as Instrument No. 72506, Records of Boise County, Idaho." (Exhibit 1). The warranty deed conveyed "the said premises, with their appurtenances unto the said Grantee, and Grantee heirs and assigns forever. . . ." (Exhibit 1, emphasis added).

Jeff and Jan Maxey purchased the other three lots from Maurice Faubion in August 1996, and a warranty deed was executed conveying the property. (Exhibit 2). The warranty deed conveyed the following real property to Mr. Maxey: "Lots 2, 3 and 4 in Block 1 of the Pines Subdivision No. 1, according to the Official Plat thereof on file and of record in the Recorder's office, Boise County, State of Idaho, as Instrument No. 72506." (Exhibit 2). The warranty deed for the Maxey property conveyed "the said premises, with their appurtenances unto the said Grantee(s), and Grantee(s) heirs and assigns forever. . . ." (Exhibit 2).

C. EVIDENCE REGARDING FORFEITURE

Although a delivery system conveying water to each of the four lots was constructed, no house or other dwelling has ever been built on any of the lots including Mr. Nestorick's lot. (Testimony of Richard A. Nestorick). However, water was actually used at each lot. (Exhibit 4). The Idaho Department of Water Resources did not investigate whether this water right was forfeited. (Testimony of Roxanne Brown).

Mr. Maxey attempted to admit several documents to prove forfeiture, but the documents were not admitted because they contained inadmissible hearsay.³

1. Exhibit 11, an Out-of-Court Statement From Richard R. Faubion

An *Affidavit of Richard R. Faubion* (Exhibit 11) was offered which contained an out-of-court statement from Richard Faubion asserting that the property was used occasionally for camping during vacation and that the water to the lot was last used in the summer of 1987. The *Affidavit* also contained an out-of-court statement asserting that the water rights on the property were never owned by Richard Faubion, but were owned by Maurice Faubion. (Exhibit 11). The court sustained a hearsay objection to Exhibit 11.

2. Exhibit 12, an Out-of-Court Statement From Maxine Faubion

The court also rejected Exhibit 12, a letter from Maxine Faubion. The letter contained out-of-court statements from Maxine Faubion asserting that the water rights sold to Jeff and Jan Maxey were owned by Maurice H. Faubion and that any other water used by any other parties in the Pines Subdivision was done "by permission of Maurice Faubion, not by a legal right to the water." (Exhibit 12). The court sustained a hearsay objection to Exhibit 12.

³ Exhibits 10, 15, 18, 19 and 23 were marked prior to trial, but were not offered.

3. Exhibit 17, and Out-of-Court Statement from Dorothy Faubion

Mr. Maxey offered Exhibit 17, a notarized letter from Dorothy M. Faubion which contained an out-of-court statement that "water on the Richard Faubion lot at the Pines Subdivision #1, Boise County, Idaho, has not been utilized since October of 1989." (Exhibit 17). The court sustained a hearsay objection.

4. Exhibit 20, an Unsigned, Out-of-Court Statement.

The court also rejected Exhibit 20, an unsigned letter from Dorothy M. Faubion to the SRBA court dated December 13, 1999. The letter contained an out-of-court statement that the 1996 sale of Maurice Faubion's property to Jeff and Jan Maxey transferred all water rights to Jeff and Jan Maxey. The letter attempted to testify that the water has been cut off to Mr. Nestorick's lot for more than five years. (Exhibit 20). The court sustained a hearsay objection.

5. Exhibit 22, an Out-of-Court Statement From Richard Faubion

Mr. Maxey offered Exhibit 22, a letter from Richard Faubion to Jeff Maxey. The letter contained an out-of-court statement that water had not been used on Lot 2, Block 4 for more than 5 years. (Exhibit 22). The court sustained a hearsay objection.

IV. CONCLUSIONS OF LAW

A. WATER RIGHT PASSED TO LOT 2, BLOCK 4

The Idaho Department of Water Resources investigated this water right. IDWR made a determination as to ownership and quantity in the *Director's Report*. The *Director's Report* concluded the owner is Richard Nestorick. The *Director's Report* has *prima facie* weight, and its conclusion as to ownership is presumed correct until substantial evidence is presented to rebut the conclusion. Mr. Maxey argued that Maurice Faubion was the owner of the entire water right, and that a proportional share of the original right was not transferred with the sale of Lot 2, Block 4 from Richard Faubion to Mr. Nestorick. However, there was insufficient evidence to support that conclusion.

IDWR's recommendation for this water right was based on the legal description contained in the license for 63-07035 and claimed in the SRBA. Mr. Nestorick purchased Lot 2, Block 4, which was included in the place of use in both the license and the claim. The *Director's Report* concluded that a proportionate share of 63-07035 passed as an appurtenance with the deed.

Maurice Faubion filed a claim in the SRBA for water right 63-07035. Mr. Faubion filed, and IDWR considered, two documents, Exhibits 6 and 21. Both documents list Mr. Faubion as

the claimant. Both exhibits describe the purpose of use as domestic. Both documents describe the place of use as "Four households (summer cabins) served." The Warranty Deed attached to Exhibit 1 shows a transfer of Lot 2, Block 4 from Richard and Roberta Faubion to Richard A. Nestorick "with their appurtenances." (Exhibit 1).

Documents marked Exhibits 11, 12 and 20 asserted the prior owner of Lot 2, Block 4 never owned or transferred a water right with Lot 2, Block 4. These documents were rejected at trial as inadmissible hearsay. However, even if competent evidence regarding Mr. Faubion's intent to transfer water rights had been offered, it would likely have been rejected. Where the language of a deed is plain and unambiguous, the intention of the parties must be determined from the deed, and parol evidence is not admissible. *Hall v. Hall*, 116 Idaho 483, 777 P.2d. 255 (1989).

IDWR's recommendation that a portion of water right 63-07035 passed with Lot 2, Block 4 was not rebutted. Furthermore, this Special Master finds that a proportional division of 63-07035 passed as an appurtenance when Lot 2, Block 4 was sold to Mr. Nestorick.

B. FORFEITURE

1. The Period of Non-Use Alleged is Insufficient as a Matter of Law

Mr. Maxey asserted that this water right was forfeited by five (5) years of non-use beginning in 1989. "This right was not used from 1989 to present. Therefore, this right has been forfeited because of more than five years of continuous non-use." *Objection*. Mr. Maxey offered documents marked Exhibits 11, 12, 17, 20, and 22 to show five years of non-use. All five documents were rejected as inadmissible hearsay.

Even if the court had admitted Exhibits 11, 12, 17, 20, and 22 asserting non-use beginning in either 1987 or 1989, that evidence would be insufficient to prove forfeiture. The five-year period for forfeiture is tolled once a claim has been filed in the SRBA. *Order on Challenge of "Facility Volume" Issue and "Additional Evidence" Issue* (Subcases 36-02708 *et seq.*, (Dec. 29, 1999)). Presiding Judge Barry Wood has held that the period of non-use is tolled once a claim is filed in the SRBA.

Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right,) any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture.

Id. at 28.

The claim for 63-07035 (Exhibits 6 and 21) was received by IDWR March 3, 1989. Therefore, a period of non-use beginning in either 1987 or 1989 could, at most, show a forfeiture period of two years from the beginning date to the time the forfeiture period was tolled.

2. Failure to Build Housing Structure is Insufficient

There was some evidence probative of the forfeiture issue. Specifically, evidence that no house or cabin was ever built at Lot 2, Block 4 is probative. However, that evidence did not rise to the level of "clear and convincing" evidence considering the context of the evidence relating to this water right. Mr. Maxey essentially argued that this right)and by implication the other rights related to 63-07035) were forfeited because the water delivery system was never connected to a house or cabin.

Quantification of a water right based on the completion of a delivery system rather than the commencement of beneficial use of water is referred to by IDWR as the "stubbing-in" method. This method has been used by IDWR for many years in the licensing process, and has been applied in recommendations in the SRBA. (*Affidavit of David Tuthill*).

Idaho Courts have not yet decided whether IDWR's "stubbing-in" policy complies with Idaho's forfeiture statutes.⁴ However, that issue need not be decided here because this right was

⁴ Our sister state of Washington recently addressed the validity of water rights which were based on the mere completion of a delivery system rather than putting the water right to beneficial use. The Washington Department of Ecology had recognized this practice for more than 40 years, referring to it as a "pumps and pipes" method of quantification. The Washington Supreme Court rejected the "pumps and pipes" method because it failed to require that the water right be applied to a beneficial use.

Read together, the statutes contemplate, in addition to construction of a water system, that an applicant will estimate the time needed to actually apply appropriated water to beneficial use, the Department will establish a time period in which water shall actually be applied to beneficial use, extensions of time will be available depending upon the circumstances, and a final certificate of water right will be issued upon a showing that the appropriation has been perfected.

State v. Theodoratus, 135 Wash.2d 582, 957 P.2d 1241 (1998). The Washington Supreme Court rejected the pumps and pipe method because its application rendered that state's forfeiture statutes meaningless.

For example, if only one lot of 250 in a development having a completed water supply system ever actually used water, relinquishment could never be found of any part of the water right because system capacity would not change no matter how long water was not actually used with respect to the other 249 lots. We will not construe the statutory scheme in a way which renders these provisions of the relinquishment [forfeiture] statutes meaningless."

Id. at 135 Wash.2d 594, 957 P.2d 1247. This Special Master finds the analysis of the Washington Supreme Court compelling, and presumes without deciding, that the "stubbing-in" method of quantification would be rejected in Idaho. >

put to beneficial use. The Proof of Application of Water to Beneficial Use described the beneficial use and the place of use as:

Domestic water supply for cabin sites (4) in the Pines Subdivision, Boise County Idaho, adjacent to above described spring location. Cabin sites are lots 1, 2, and 3 Block 1 and lot 2 Block 4. One hydrant is now located and in use on each lot.

(Exhibit 4, emphasis added).

Water was actually used on Lot 2, Block 4. Thus, water right 63-07035C need not rely on the "stopping-in" policy of IDWR. Thus, there was no showing of a five year period of non-use. This Special Master finds that the record did not show forfeiture by contain "clear and convincing" evidence. IDWR's conclusion of quantity for this right is confirmed.

V. CONCLUSION

The *Director's Report* is afforded *prima facie* weight. This Special Master finds that considering the facts upon which the *Director's Report* was based and weighing the evidence at trial, the elements contained in the *Director's Report* are confirmed. Therefore, based on the findings and record herein, IT IS RECOMMENDED that water right 63-07035C be decreed with the elements as set forth in the *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 63-07035C*.

DATED February 29, 2000.



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

200 FEB 29 PM 2:40

In Re SRBA

Case No. 39576

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54 (b) FOR

WATER RIGHT 63-07035C

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED

NAME & ADDRESS: RICHARD A. NESTORICK
36 PONDEROSA CIR.
BOISE, ID 83706

SOURCE: SPRING TRIBUTARY: SINKS

QUANTITY: .001675 CFS

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED
13,000 GALLONS PER DAY.

PRIORITY DATE: 10-30-1967

POINT OF DIVERSION: T04N R03E S24 NWSW Within BOISE COUNTY

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Domestic ~~HOME~~ ^{AB}	01-01 to 12-31	.001675 CFS

PLACE OF USE: DOMESTIC Within BOISE COUNTY
T04N R03E S24 SWNW

OTHER PROVISIONS NECESSARY FOR THE DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION
OF HISTORICAL BENEFICIAL USE.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE
DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER
RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO
LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with
Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that
the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue
and an appeal may be taken as provided by the Idaho Appellate Rules.

RECOMMENDATION

FEB 29 2000

SPECIAL MASTER

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication

200 FEB 29 PM 2:40

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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)
Case No. 39576)
_____)

CERTIFICATE OF MAILING

Water Right(s): 63-07035C

CERTIFICATE OF MAILING

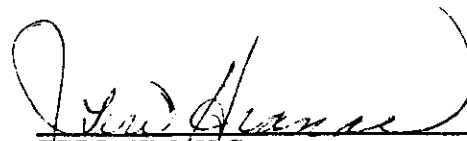
I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on February 29, 2000, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

RICHARD A NESTORICK
Represented by:
CHARLES L. HONSINGER
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

JEFFREY A MAXEY
HC 33
48 SPRING CANYON RD
BOISE, ID 83716
Phone: 208-364-1820

CERTIFICATE OF MAILING


TERI HRANAC
Deputy Clerk

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Department of Water Resources

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DISTRICT COURT-SRBA
TWIN FALLS, IDAHO

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)
Case No. 39576)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

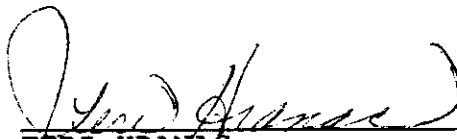
Water Right(s): 63-07035C

On February 29, 2000, Special Master BRIGETTE BILYEU issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (A01), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED February 29, 2000.


TERI HRANAC
Deputy Clerk