

MAY-2-97 FRI 15:53

TWIN FALLS, 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

Subcases: 34-00182, 34-00381A and
34-02379F

ORDER ON SUMMARY JUDGMENT

I. PROCEDURAL BACKGROUND

Water rights 34-00182, 34-00381A, and 34-02379F were not included in the initial *Director's Report for Reporting Area 34 (Basin 34) (Director's Report)* because these claims were not filed on a timely basis. Late claims were permitted by order of the District Court. *Order Granting Motion to Lift Stay to File a Late Claim and Order Granting Motion to File a Late Claim* (Oct. 14, 1994). Because these rights were not included in the *Director's Report*, they were also omitted from interim administration. *Permanent Order for Interim Administration in Reporting Area 1* (Dec. 20, 1995). Claimant Lee Watson filed a *Motion to Amend Administration Order in Reporting Area 1, Basin 34 (Motion to Amend)* which was heard by Presiding Judge Daniel C. Hurlbutt, Jr. At hearing October 15, 1996, Judge Hurlbutt denied the *Motion to Amend* referring the matter to this Special Master because the *Motion to Amend* could be heard prior to the 1997 irrigation season. *Order Denying Motion to Amend Administration Order in Reporting Area 1* (Oct. 16, 1996). These cases proceeded on an expedited basis. A *Director's Report* was filed November 1, 1996, recommending all three rights be disallowed.¹ The property to which these three rights are appurtenant is frequently referred to as the "Reynolds property" after the prior owner. All references to the Reynolds Property are used here to indicate the place of use for 34-00182, 34-00381A, and 34-02379F.

¹ Notice of filing the *Director's Report* for these three rights was included in the November 1996 Docket Sheet.

The *Director's Report* concludes that water rights 34-00182 and 34-00381A were decreed in the *Utah Construction Decree* and that water right 34-02379F is a groundwater right based on a portion of a water right license. The Director of the Idaho Department of Water Resources (IDWR) concluded, however, that these rights had been forfeited due to five years of nonuse. Mr. Watson filed a timely *Objection* to the *Director's Report* disputing the conclusion of forfeiture.

Mr. Watson filed a *Motion for Summary Judgment (Motion)* asserting that no genuine issues of material fact regarding forfeiture remain to be resolved at trial.

II. STANDARD OF REVIEW

A. GENERAL STANDARD FOR SUMMARY JUDGMENT

I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . ." to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). If the moving party properly supports the motion for summary judgment, the nonmoving party must then present opposing evidence.

The opposing party's case must consist of more than speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *G & M Farms v. Funk Irrigation*, 119 Idaho at 517. The burden of proving the absence of material fact rests upon the moving party. If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* Credibility determinations, weighing of evidence, and drawing of legitimate inferences from the facts are functions to be performed at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. CASES WITHOUT A NONMOVING PARTY

This *Motion* is unique in that it does not involve opposing parties. Here, the only party is the claimant/objector Lee Watson. There is no party opposing the *Motion*. The only dispute is between the *Director's Report* recommendation and the position advocated by Mr. Watson. IDWR is not a party. I.C. § 42-1401B(3) (1994); *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614, 624-625 (1995). Nevertheless, this court is charged with determining water rights where the only disagreement is with IDWR.

III. ANALYSIS

Resolving this *Motion For Summary Judgment* involves a detailed analysis of the record. Multiple motions to strike evidence were resolved prior to and during the hearing on the *Motion* and are recorded here for the purpose of clarifying the state of the record considered on summary judgment.

A. MOTION TO STRIKE 706 REPORT

This court previously granted a *Motion to Strike* the 706 Report. The court concluded the report did not assert actual expert opinions. To the extent such opinions could be inferred from the 706 Report, there was insufficient foundation. The court held that facts set forth in the 706 Report were inadmissible because they were not based on personal knowledge. Although an expert can rely on hearsay, such hearsay is only admissible to illustrate and explain the expert opinion. Since the 706 Report contained no expert opinions, any hearsay is inadmissible.

B. MOTION TO STRIKE AFFIDAVITS

Several affidavits were submitted on summary judgment. Mr. Watson submitted the *Affidavit of Patrick Brown* which placed in the record excerpts of deposition testimony in support of the *Motion For Summary Judgment*. In addition, the *Affidavit of Don Scarr*, *Affidavit of Barbara C. Hejmanek*, *Affidavit of Douglas Rosenkrance*, and *Affidavit of Ernest M. Carlsen* were filed supporting the *Director's Report*. The *Affidavit of Don Scarr* placed of record documents regarding distribution of water made by the Big Lost River Irrigation District (BLRID). Neither the *Affidavit* nor the BLRID reports attached to the *Affidavit* were challenged.

1. **Order striking portions of Affidavit of Hejtmánek.**

At hearing, Mr. Watson moved to strike portions of the *Affidavit of Barbara C. Hejtmánek*. The court ordered some sections of this *Affidavit* stricken while retaining others. Sections stating affiant is the Agriculture Credit Officer for the U.S. Farm Service Agency and is "familiar with" the Reynolds property were retained. The affiant's declaration that the U.S. Farm Service Agency acquired the Reynolds property on December 15, 1989 was also retained.

Sections of paragraph 4 were stricken:

Due to the disrepair of the property, FSA determined that it was not economically feasible to make the repairs necessary to conduct irrigated farming practices. Therefore, FSA did not lease the property for irrigation from 1989 through 1995. The Reynolds property also contained approximately 50 acres of wetlands area that was not irrigable pursuant to federal regulations.

This section of paragraph 4 was stricken because the *Affidavit* provided insufficient foundation to establish personal knowledge of the farming and leasing of the property and because it contained an inadmissible legal conclusion concerning federal wetland regulations.

2. **Order striking portions of Affidavit of Rosenkrance.**

Mr. Watson moved to strike the *Affidavit of Douglas G. Rosenkrance*. Rosenkrance, the watermaster in District 34, asserted that he personally observed the place of use described in water rights 34-00182, 34-00381A, and 34-02379F during the years 1986 through 1995 and that he did not observe irrigation on the Reynolds property during those years. The court retained portions of the *Affidavit* relating to personal observations. Certain portions of the *Affidavit* were stricken as speculative:

Therefore, had irrigation actually been taking place on the Reynolds property from 1986 through 1995, I would have questioned where the water was coming from and the propriety of such diversions. As watermaster, I would have investigated to determine where the water was being diverted from, the validity of the water rights being used on the property, and the reason why assessments were not being paid.

The above portion of paragraph 5 was stricken. Mr. Watson moved to strike references to the watermaster's reports for 1989 through 1995 because the *Affidavit* conceded the Reynolds account was not included in the reports for 1989 through 1995. Since the reports could not contain information about these water rights, those portions of the *Affidavit* were stricken as irrelevant. Portions of the *Affidavit* conveying opinions about the availability of water during certain years were stricken on the basis of insufficient foundation. The court held that opinions concerning the availability of water are matters of hydrology and require expert foundation absent from the *Affidavit*. Additional portions of the *Affidavit* establishing that annual watermaster reports were prepared and maintained by the BLRID were retained.

3. **Order striking portions of Affidavit of Carlsen.**

Mr. Watson moved to strike the *Affidavit of Ernest M. Carlsen*. Portions of the *Affidavit* which assert that Carlsen determined the water rights to be forfeited for failure to apply the water to beneficial use were stricken based on lack of foundation. Sections of the *Affidavit* asserting that Carlsen observed the place of use on numerous occasions and that the property did not appear to have been irrigated from 1990 through 1995 were retained. Sections of the *Affidavit* stating six new water rights were licensed by IDWR between 1990 and 1995 were retained. However, portions of the *Affidavit* asserting that these new appropriators would be injured if 34-00182, 34-00381A, and 34-02379F were resumed were stricken for lack of foundation.

C. **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. *Jenkins*, 103 Idaho at 389.

The evidentiary weight given *Director's Reports* in I.C. §§ 42-1411(4)-(5) is less than "clear and convincing." The *Director's Reports* are merely given "*prima facie*" weight. The long-held standard of proof for forfeiture is the higher standard of "clear and convincing" evidence. That standard of proof is not abrogated by I.C. §§ 42-1411(4)-(5). This court has considered

forfeitures on previous occasions. In *Order Granting Summary Judgment* (Subcase 34-02395, April 30, 1996), the bare conclusion of forfeiture or disallowance contained in the *Director's Report* was insufficient, as a matter of law, to support forfeiture. *Id.* at 7. The presumption of *prima facie* weight given the *Director's Report* is insufficient by itself to establish the "clear and convincing" evidence upon which a finding of forfeiture must be based. However in this case, evidence in addition to the *Director's Report* creates an issue of fact as to forfeiture. The *Affidavits* of Carlsen and Rosenkrance set forth evidence of nonuse which creates a "genuine issue of material fact" as to forfeiture. Mr. Watson argues it is undisputed that the groundwater right, 34-02379F has not been forfeited. He asserts that documents upon which IDWR asserted nonuse are irrelevant to the groundwater right. Indeed, IDWR conceded that records of groundwater rights were never kept until 1993. Thus, the records do not create a genuine issue of material fact as to forfeiture of the groundwater right. However, Mr. Watson's assertion that "there is no showing of nonuse on the groundwater right" fails to account for the *Affidavits* of Rosenkrance and Carlsen. Those *Affidavits* assert that affiants observed no irrigation on the place of use. That seems sufficient to create a genuine issue of material fact even as to the groundwater right. The court understands the *Affidavits* to assert that no irrigation of any kind was observed on the property, and such evidence would apply to the groundwater right. The court finds these are genuine issues of material fact as to forfeiture.

1. Resumption

Mr. Watson asserts he is entitled to summary judgment because even if the *Affidavits* of Carlsen and Rosenkrance initially create a genuine issue of material fact as to forfeiture, there is undisputed proof of resumption. The Idaho Supreme Court has recognized certain defenses to forfeiture including resumption. *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 389 647 P.2d 1256 (1982). If the use of a water right is resumed after any period of nonuse greater than five years and prior to any third party claim to the water, there is no forfeiture. *Id.*

Resumption is an affirmative defense to a claim of forfeiture, and therefore, the asserting party has the burden of proving resumption. If there are genuine issues of material fact as to resumption, summary judgment must be denied. The query here then is whether genuine issues of material fact exist as to resumption.

The record contains the following evidence of resumption:

- a. The records of the BLRID indicate use of these water rights resumed in 1991, 1993, and 1994. (*Deposition of Don Scarr*, p 42, Ll. 5-25, p. 43, Ll. 1-14, p. 44, Ll. 10-23.)
- b. Mr. Watson attempted to use the water during the irrigation season of 1996, but IDWR did not deliver the water because these rights were not included in the *Permanent Order For Interim Administration in Reporting Area 1* (Dec. 20, 1995).
- c. Water right licenses were issued in Basin 34 after the possible forfeiture and prior to resumption: water right 34-07545 issued July 31, 1990; water right 34-07547 issued October 25, 1990; water right 34-07554 issued June 4, 1991; and water right 34-07555 issued July 2, 1991. (*Affidavit of Ernest M. Carlsen*, Exhibits A1, A2, A3, and A4.)

IDWR considered resumption before making its recommendation in the *Director's Report* and reasoned that even if Mr. Watson resumed use of these rights in 1991, resumption was ineffective because several licenses for new water rights were issued prior to resumption.

IDWR apparently determined that the mere issuance of a license prior to resumption was sufficient to defeat resumption. The case law on resumption may be somewhat unclear and could be interpreted as requiring merely a claim on the water before resumption in order to defeat this defense. This court understands the cases on resumption differently and that injury to juniors is required to defeat resumption.

The Idaho case which discusses resumption most thoroughly is *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). *Jenkins* initially seems to require only an intervening claim to defeat resumption:

[I]f use of the water right is resumed after the five year period, but before any third parties make a claim in the water, then the courts will decline to declare a forfeiture.

Jenkins at 389.

But a thorough reading of the case appears to require a showing of injury.

[I]t is clear that when a water right is sought to be transferred and protestors allege that it has been abandoned or forfeited, and that to allow resumption of that right would cause some injury, a determination of

abandonment or forfeiture is necessary for the performance of [the Director of IDWR's] powers of determining injury.

Id. at 387.

Some might argue that *Jenkins* held that evidence of an intervening claim alone is sufficient to defeat resumption because reinstating the priority date of the forfeited water right is injury.

If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. Other parties may then perfect a water right in those waters. Hence a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right. If a senior right has been abandoned forfeited, the priority of the original appropriator is lost, and the junior appropriators move up the ladder of priority. If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior appropriators. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.

Id. at 387-388 (citations omitted).

However, the facts of *Jenkins* indicate that an injury is required. Looking at *Jenkins* in context, it is clear that the Supreme Court found injury, and the injury was premised upon a showing that the claims were interrelated. IDWR listed only licenses in Basin 34 to oppose resumption. There was no showing of interrelatedness of water rights in Basin 34 or of the interrelatedness of the licensed rights to the rights at issue here. However, the court holds that intervening claims are insufficient proof of injury. *Jenkins* requires a showing of injury to defeat resumption. That injury must require more than a showing of intervening claims.

Although the court holds the intervening licenses are insufficient, by themselves, to create a genuine issue of material fact as to resumption, there is other evidence which must be considered. The *Affidavits* of Rosenkrance and Carlsen assert facts which go to the issue of resumption as well as to the issue of forfeiture. The *Affidavits* assert that Rosenkrance

observed no irrigation between 1986 and 1995 and that Carlsen observed no irrigation between 1990 and 1995. Mr. Watson has presented proof regarding irrigation during 1991, 1993, and 1994 to show the rights were resumed. Thus, a genuine issue of material fact exists as to resumption since the *Affidavits* of Rosenkrance and Carlsen squarely dispute irrigation occurred in 1991, 1993, and 1994.

D. ACREAGE

Mr. Watson also asserts there are no genuine issues of material fact as to whether the place of use for the surface water rights 34-00182 and 34-00381A includes 312 acres as claimed. IDWR recommended no acreage since it recommended disallowance. However, IDWR agrees it would recommend 212 acres for the surface water rights in the event there is no forfeiture. (*Deposition of Ernest M. Carlsen*, p. 9, l. 17- p. 10 l. 2; Deposition Exhibits 2 and 3.) The reduction in acreage involves two parcels which IDWR concluded cannot be included in the place of use. Mr. Watson did not dispute that the two parcels are contained in a "conservation easement" placed on the property. Mr. Watson argues, however, that since the conservation easements have been in place for less than the statutory period of forfeiture, the easement cannot, as a matter of law, be sufficient to support the reduction in acreage.

1. The northern parcel.

The conservation easement applies to the northern parcel. IDWR apparently relied on the conservation easement and aerial photographs from the Agricultural Soil Conservation Service (ASCS) in determining the northern parcel should be deleted from the place of use. IDWR likely reasoned that although the conservation easement has only been in effect for two years, it would prevent Mr. Watson from using the parcel in the future. IDWR apparently believed the ASCS photographs supported deletion of the northern parcel because they failed to show crops were grown on the land. But IDWR concedes the photographs do not indicate the ground was not irrigated for pasture or grazing. (Carlsen Deposition, p. 20, l. 13 - p. 21 l. 12.)

2. The southern parcel.

The southern parcel is also subject to a conservation easement. IDWR relied on the easement in determining the southern parcel should be deleted from the place of use. In addition, IDWR maintains the southern parcel should not be included because the water rights formerly appurtenant to the property were transferred to another place of use. Mr. Watson

maintains IDWR's second reason for deleting the southern parcel is faulty. The water rights originally appurtenant to the southern section were admittedly transferred from the property. However, Mr. Watson asserts these rights were transferred off the property before other rights were transferred onto the property.

3. **The conservation easement and ASCS photographs.**

Mr. Watson argues the conservation easement is insufficient to show forfeiture as a matter of law. The conservation easement only went into effect in 1995, and the statutory period for forfeiture has not yet expired. IDWR apparently believed that even though the conservation easement has not been in place for the required period of five years, it was reasonable to infer Mr. Watson would not be able to use the water in the future. This court is unaware of any cases in which a statutory forfeiture was found prior to the expiration of the five-year period. The court is unwilling to find forfeiture based on the conservation easement which has not been in effect the required five years.

The ASCS photographs cannot prevent summary judgment on the issue of acreage since they admittedly do not show there was no irrigation of pasture or for grazing.

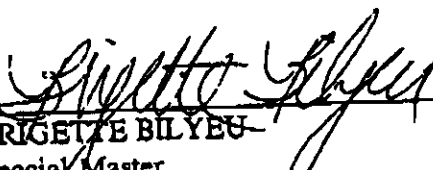
4. **The overlapping rights problem.**

Mr. Watson argues that deleting the southern parcel from the place of use cannot be supported by IDWR's position that the initial water rights were transferred to some other property. Mr. Watson asserts IDWR approved of the transfer of water rights 34-00182 and 34-00381A after the previous rights had been transferred off of the property. Unfortunately, the record is extremely sparse regarding this issue. Since no evidence of either the first transfer or the second transfer is of record (other than testimony from Mr. Carlsen indicating that the first transfer did not overlap with the second transfer) there is insufficient evidence to create a genuine issue of material fact.

IV. CONCLUSION

Summary judgment is denied on the issues of forfeiture and resumption for water rights 34-00182, 34-00381A, and 34-02379F. Summary judgment is granted, in part, as to the acreage issue.

DATED May 2, 1997.

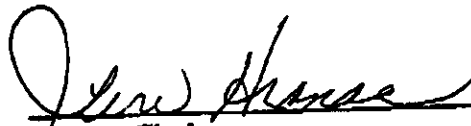

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on May 2, 1997, with sufficient first-class postage to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

Patrick Brown
Hepworth, Lezamiz & Hohnhorst
PO Box 389
Twin Falls, ID 83303-0389


Deputy Clerk