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DISTRICT COURT-SRBA
TWINFALLS CO., IDAHO
FILED _____

6-10

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: 34-00182, 34-00381A, and
	)	34-02379F
Case No. 39576	)	
	)	ORDER GRANTING, IN PART, AND
	)	DENYING, IN PART, WATSON'S
	)	MOTION TO ALTER OR AMEND;
	)	AND DENYING STATE OF IDAHO'S
	)	MOTION TO ALTER OR AMEND

A *Special Master's Report and Recommendation* was issued for these three water rights February 12, 1998. *Motions to Alter or Amend* were filed by the claimant Lee Watson and by the State of Idaho. Watson's *Motion to Alter or Amend* requests the court amend its Findings and Conclusions to indicate: 1) the specific date on which these water rights were first resumed; 2) that applications were filed for four permits prior to resumption; 3) that at the time of resumption, proof of beneficial use had not been made and no licenses had issued; and 4) that IDWR interprets the law regarding forfeiture to require both a claim to water and a hydrological interconnection to defeat resumption. The State of Idaho stipulated to the dates the four licenses were issued. The State of Idaho did not stipulate to Watson's other facts, but did not oppose them. The court grants Watson's motions as to these four issues.

I. FACTUAL ISSUES RAISED BY WATSON

A. SPECIFIC DATE OF RESUMPTION AND DATES OF APPLICATIONS

The court finds that resumption of these three rights first occurred on August 7, 1991. (Exhibit 17 at 42.) Applications for four permits were filed prior to August 7, 1991 on July 31, 1990; October 25, 1990; June 4, 1991; and July 2, 1991. (Exhibits 9, 10, 11, and 12.)

B. PROOF OF BENEFICIAL USE AND ISSUANCE OF LICENSES OCCURRED AFTER RESUMPTION

Proof of beneficial use and the issuance of all four licenses, however, occurred after August 7, 1991. Proof of beneficial use was made on January 22, 1992; November 2, 1992; August 23, 1991; and June 24, 1992. (Exhibits 9, 10, 11, and 12.) The licenses were issued on December 26, 1994; September 6, 1994; June 3, 1994; and July 25, 1995. (Exhibits 9, 10, 11, and 12).

C. IDWR INTERPRETATION OF RESUMPTION

The court finds that IDWR requires both a claim to a water right and a hydrological interconnection to defeat resumption. At trial, IDWR did not lay adequate foundation to offer opinion testimony regarding hydrological interconnection.

II. LEGAL ISSUES RAISED BY WATSON – CONDITION ON LICENSE

Watson's *Motion to Alter or Amend* urges the court to add a finding that the four licenses contained a clause stating: "This right is subject to all prior water rights and may be forfeited by five years of non-use." (Exhibits 9, 10, 11, and 12.) Watson argues that this clause, by operation of law, prevents the use of the license as grounds for challenging Watson's prior rights. Watson's *Motion to Alter or Amend* at 3. The court presumes without deciding, that this clause merely states the law of prior appropriation. Although this clause is contained in each of the four licenses, it is unnecessary to reach that legal conclusion here, since there is insufficient proof of injury. The court denies Watson's *Motion to Alter or Amend* with regard to a finding on the condition of the license.

III. LEGAL ISSUES RAISED BY THE STATE OF IDAHO

The State of Idaho filed a *Motion to Alter or Amend* which challenges legal conclusions in the *Special Master's Report and Recommendation*. The State disagrees with the court's application of resumption, particularly the holding that a showing of injury or close interconnection is required to defeat resumption. The State argues there is no injury requirement and asserts that the mere filing of an intervening claim is sufficient to defeat resumption.

A. RESUMPTION IS A DEFENSE TO FORFEITURE

The State of Idaho concedes that resumption is a defense to forfeiture, but points out that it has never been applied in the context in which Watson asserts resumption here. The Idaho Supreme Court has repeatedly affirmed that resumption is a defense to forfeiture. *Matter of Permit No. 65-12842*, 122 Idaho 59, 831 P.2d 527 (1992); *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952); *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945); *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937). Although some of the cases discuss resumption in dicta, the Court has given repeated instruction on resumption. The SRBA Court should recognize resumption as a defense to forfeiture.

B. STATUS OF THE INTERVENING WATER RIGHT AT THE TIME OF RESUMPTION

The cases recognizing resumption as a defense to forfeiture describe the nature of an intervening right with different language. *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992) indicates that resumption must occur "before any third parties make a claim in the water." *Id.* at 62 (quoting *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982)). *Application of Boyer* states resumption must be "prior to a claim of right by a third party." 73 Idaho 152, 160, 248 P.2d 540 (1952). *Wagoner v. Jeffery*, 66 Idaho 455, 460, 162 P.2d 400 (1945) indicates resumption must occur "prior to the initiation of any right therein." The case later uses the language "before any intervening right had attached." *Id.* at 461. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937) indicates that resumption must be "prior to respondents' appropriation." 57 Idaho 707, 68 P.2d 50 (1937).

Although some of the language referring to intervening rights talks in terms of **claims** to water rights, even the State does not propose that a mere application for a water right which never vests could prevent resumption. Clearly, something more than a mere claim must occur. Thus, *Wagoner v. Jeffery* emphasized that the intervening right must "attach" before it can defeat resumption. *Zezi v. Lightfoot* emphasized that the intervening right must be "appropriated" to defeat resumption. A claim should be accompanied by either the complete vesting of a water right or at least proof of beneficial use in order to defeat resumption. This Special Master therefore presumes without deciding, that a mere application for permit filed prior to resumption would be insufficient to defeat resumption. However, the court need not reach this issue since a necessary element of interconnectedness or injury is absent.

C. INJURY REQUIRED TO DEFEAT RESUMPTION

In its *Special Master's Report and Recommendation*, the court previously cited *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), for the proposition that injury is required to defeat resumption. That analysis was based on the following passage from *Jenkins*:

[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 (emphasis added).

The State asserts that the mere existence of an intervening claim is sufficient to defeat resumption, arguing the Special Master's reliance on *Jenkins* is misplaced. The State argues that *Jenkins* does not require an injury analysis unless forfeiture and resumption are determined in the context of a transfer, and since the SRBA is a general adjudication rather than a transfer proceeding, no injury is required.

The State persuasively argues that this passage from *Jenkins* discussed injury in the context of IDWR's jurisdiction to determine injury in a transfer proceeding. The other appellate cases which discuss resumption give little guidance on whether injury is required. This court holds, nevertheless, that Idaho's long-standing policy against forfeiture requires a showing of close interconnectedness or injury to defeat resumption. Interconnectedness and the relationship of water rights to one another are critical for conjunctive management, or in determining which rights to shut off in a call. *A & B Irrigation Dist. v. Idaho Conservation League*, 1997 WL 612633 (Idaho, 1998) (Basin-Wide Issue 5 re: Conjunctive Management). Similarly, the SRBA court should require a showing of interconnectedness or injury to defeat a claim of resumption. Failure to require injury or close interconnection would lead to absurd results. For example, if this court were to follow the rule proposed by the State, it would mean that a mere intervening application for a permit in Lewiston could defeat the resumption of a water right in Mackay. Unless the court requires some showing of interconnectedness or injury to defeat resumption, this absurd result would be required by law. Idaho's policy of abhorring forfeiture, *Wagoner v. Jeffery*, 66 Idaho at 459, weighs heavily in favor of requiring injury.

D. BURDEN OF PROOF

The State asserts that if there is an injury element to resumption, the burden should be on Watson to prove that no intervening rights will be injured. This is a question of first impression in Idaho. In the absence of special considerations, the "preponderance of the evidence" standard controls in civil cases. The burden of proof normally falls on the party who is asserting a claim or relying on an affirmative defense. *Dick v. Reese*, 90 Idaho 447, 412 P.2d 815 (1966). Thus, Watson had the burden of proving resumption, and the court found he met that burden. Once Watson met his burden of going forward with evidence of resumption, the burden should then shift to the party trying to defeat resumption by asserting injury to an intervening right.

It is appropriate to place the burden of proof on the party asserting injury. Courts often consider the differentials in the parties costs' of gathering information when assigning a burden of proof. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 413, 415, 419 (1997). A party asserting injury would have far greater access to evidence about the impact on his right. On the other hand, it might be impossible for a water user to prove a lack of injury to all other rights. It would place an extremely high cost of gathering evidence of lack of injury on the resuming water user. Placing the burden of proof on Watson would thwart Idaho's policy disfavoring forfeiture. The burden of proving injury should be placed on the party asserting injury to his intervening right.¹ The party asserting injury would have greater access of evidence at less cost.

Thus, this Special Master recommends that: 1) resumption be recognized as a defense to forfeiture; 2) resumption may be defeated if an intervening right is injured; and 3) the burden of proving injury be placed on the party asserting injury.

IV. SUMMARY

The court grants Watson's *Motion to Alter or Amend*, in part:

1. The court finds Watson's rights were resumed on August 7, 1991;
2. The court finds applications for four permits were filed prior to Watson's resumption;

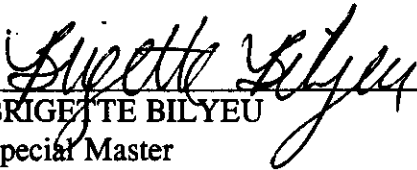
¹ Here, none of the four licensees participated in the subcases, filed *Motions to Alter or Amend*, or otherwise asserted that reviving Watson's rights would cause them injury.

3. The court finds that proof of beneficial use for the four applications was not made prior to resumption, and no licenses were issued prior to resumption; and
4. The court finds that IDWR requires both an intervening claim and a hydrological interconnection to defeat resumption.

The court **denies** Watson's *Motion to Alter or Amend*, in part, declining to decide that the "prior rights" condition contained in the four licenses prevents any claim of injury by Watson's rights.

The court **denies** the State of Idaho's *Motion to Alter or Amend* on the legal issues regarding resumption.

DATED June 10, 1998.



BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

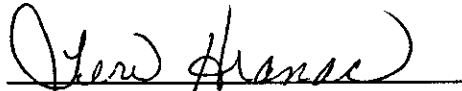
CERTIFICATE OF MAILING

I certify that a true and correct copy of ORDER RE: MOTIONS TO ALTER OR AMEND was mailed on June 10, 1998, with sufficient first-class postage prepaid to the following:

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