

RECEIVED
MAY 25 2006
DEPARTMENT OF
WATER RESOURCES

Roger D. Ling, ISB No. 1018
Michael P. Tribe, ISB No. 6816
LING, ROBINSON & WALKER
Attorneys at Law
P.O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804

Attorneys for Objector,
William A. Poulton

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 No. 45-00167A
	)	
Case No. 39576	)	<u>REPLY MEMORANDUM</u>
	)	

COMES NOW William A. Poulton, the objector in Water Right No. 45-167A, by and through his attorneys of record Ling, Robinson & Walker, and files this *Reply Memorandum* pursuant to Idaho Rule of Civil Procedure 56(c). Summary judgment is appropriate in this matter because 45-167A is not a lawful right due to a lack of historical beneficial use. Water Right No. 45-167A should not be decreed as recommended because it has been abandoned or forfeited for failure to put such right to beneficial use for a period of over five years.

I. Introduction

In this case, the Claimant, Leah Rose has made the decision to represent herself. She is therefore regarded as a *pro se* litigant, and *pro se* litigants are held to the same standards and rules as those represented by attorneys. *Golay v. Loomis*, 118 Idaho 387, 393, 797 P.2d 95,

LING, ROBINSON & WALKER
ATTORNEYS AT LAW
RUPERT, IDAHO 83350-0396

1
2
3 101 (1990). Rose has not responded to Poulton's objection or the legal arguments presented in
4 Poulton's *Memorandum in Support of Motion for Summary Judgment*. What Rose has presented
5 are hearsay-filled affidavits complete with conjecture and personal attacks on Poulton that do
6 nothing to establish a genuine issue of material fact. Rose has not presented any material
7 evidence that her predecessors in interest ever intentionally diverted the waters of Willow Creek
8 for irrigation. Rose cannot rest upon the Department's 706 Report but instead must set forth
9 specific facts showing that there is a genuine issue of material fact to be resolved at trial. *Idaho*
10 *Rule of Civil Procedure 56(e)*. Rose has failed to set forth any such facts making summary
11 judgment inappropriate in this case. Creating only a slight doubt as to the facts will not defeat a
12 summary judgment motion; a summary motion will be granted whenever, on the basis of the
13 evidence before the court, a directed verdict would be warranted or whenever reasonable minds
14 could not disagree as to the facts. *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691
15 P.2d 787 (Ct. App. 1984). Furthermore, when an action will be tried by the court without a jury,
16 the court is not required to draw inferences in favor of the party opposing a motion for summary
17 judgment. *Kaufman v. Fairchild*, 119 Idaho 859, 810 P.2d 1145 (Ct. App. 1991).
18

20 II. 45-167A Should Never Have Been Recommended

21 The only unclear issue in this subcase is why an Application was filed for 45-
22 167A to begin with. Based on the 706 Report, the Department of Water Resources and the
23 original applicants relied upon information contained in Robert and Betty Moncur's 1983
24 Application for Transfer of Water Right 45-166. In 1983, the Moncurs filed an Application for
25 Transfer of 45-166. In 1988, John and Margaret Koyle filed a Claim to water right no. 45-167A
26

1
2
3 for 0.04 cfs from Willow Creek for the year-round irrigation of 1.9 acres. As stated in the
4 Supplemental Director's Report Regarding SRBA Subcase No. 45-167A at page seven (7):

5 Attached to the original claim filed by the Koyles was a diagramed
6 map depicting the points of diversion in the SWNWSE of Section
7 26 and SESESE of section 9, along with depicted irrigation in the
8 SESE of Section 9. The diagramed map is substantially similar to
9 a diagramed map that was originally filed by Robert and Ruth
10 Moncur on April 1, 1983, with application transfer no. 2852.
Water right no. 45-166 was originally decreed to Thomas Poulton
in the *Poulton* decree. Ruth Moncur, also know as Ruth Koyle, is
presumably related to John and Margaret Koyle, original claimants
of water right no. 45-167A.

11 It appears that the Koyles, in their 1988 Notice of Claim merely copied the Moncurs' map
12 attached to their 1983 Application for Transfer of Water Right. *Affidavit of Michael P. Tribe*,
13 Exhibit A. The Koyles did shade-in a place of use in the SESESE of Section 9, which Rose now
14 claims as a point of diversion and place of use. This still does not establish that the Koyles or
15 their successors in interest ever actually diverted the waters of Willow Creek. In fact, there is no
16 evidence that these parties ever put to beneficial use the waters of Willow Creek on Rose's 1.6
17 acre claimed place of use. As stated by the Koyles' son, Dennis Koyle, "water was never
18 diverted for use on the property prior to being sold by" his parents, John and Margaret Koyle.
19 *Affidavit of J. Dennis Koyle*, par. 6.
20

21
22 No diversion generally means that no right exists, because Idaho law requires
23 certain elements for a valid claim to a water right. This includes a lawful diversion:

24 Idaho water law generally requires an actual diversion and
25 beneficial use for the existence of a valid water right. *See, e.g.,*
26 *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*,
101 Idaho 677, 679, 619 P.2d 1130, 1132 (1980); *Olson v. Bedke*,
27 97 Idaho at 829-30, 555 P.2d at 160- 61; *Maher v. Gentry*, 67

Idaho 559, 566, 186 P.2d 870, 875 (1947); *Nielson v. Parker*, 19 Idaho at 731, 115 P. at 489. Only two exceptions to the diversion requirement exist. No diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering. In addition, State entities acting pursuant to statute may make non-diversionary appropriations for the beneficial use of Idaho citizens. (citations omitted).

State v. U.S., 134 Idaho 106, 996 P.2d 806 (2000). Neither of these exceptions has been claimed by Rose nor would they cover Rose's because her claim is for irrigation. Again, there is no evidence that water has been diverted for beneficial use on Rose's claimed place of use and any right that 45-167A may have conferred upon its owner has long been forfeited or abandoned.

III. Rose Reply Affidavits

Rose has filed multiple affidavits purporting to establish that 45-167A is a valid water right. However, the affidavits of Leah Rose, John Anderson, Garth Osterhout, and Blane K. Rose are filled with statements that are not based on personal knowledge, do not state facts that would be admissible in evidence, and fail to show affirmatively that the affiants are competent to testify to the matters stated therein as required by Idaho Rule of Civil Procedure 56(e). In order to be considered on a summary judgment motion, affidavits must be based on personal knowledge, set forth facts that would be admissible in evidence at trial, and show that the affiant is competent to testify on the stated matters. I.R.C.P. 56(e). *R Homes Corp. v. Herr*, 142 Idaho 87, 123 P.3d 720 (Ct.App.2005).

An affidavit's presentation of statements of a third party may be inadmissible if it does not set out with sufficient specificity the statements that were made or present a sufficient foundation as to when they were made. *See Casey v. Highlands Ins. Co.*, 100 Idaho 505, 508, 600 P.2d 1387, 1390 (1979). In *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 85 P.3d 667 (2004), for

1
2
3 example, the Idaho Supreme Court held that the lower court
4 correctly struck an affidavit regarding the statements and actions of
5 the opposing party's agents because it contained hearsay,
6 unfounded assertions, and "rambling, nonspecific, inaccurate and
7 unsupported statements." *Sprinkler Irrigation Co.*, 139 Idaho at
8 697, 85 P.3d at 673.

9 *R Homes Corp. v. Herr*, 142 Idaho 94, 123 P.3d at 727. The majority of the affidavits offered
10 by Rose contains hearsay, unfounded assertions and rambling, nonspecific, inaccurate and
11 unsupported statements. Through his *Motion to Strike*, Poulton has moved to strike the majority
12 of the affidavits offered by Rose and the statements contained therein. However, if the Court
13 allows the affidavits and statements by Rose and her affiants, Poulton responds as follows.

14 a. Affidavits of Leah Rose

15 Rose has filed what appears to be two affidavits: One is eight (8) pages in length
16 and will be referred to as the first Rose affidavit, and the second is a one-paragraph affidavit that
17 discusses a 1978 aerial photograph and will be referred to as the second Rose affidavit. Both
18 Rose affidavits should be stricken based on the Idaho Rules of Civil Procedure and the Idaho
19 Rules of Evidence as laid out in Poulton's *Motion to Strike*. Without waiving such objection,
20 Poulton responds to the affidavits as follows.

21 1. First Rose Affidavit

22 In her first affidavit, Rose has simply cited to or reproduced large portions of the
23 706 Report. Paragraphs 3-5 simply restate the findings of the Report and Agent Robertson. The
24 706 Report is prima facie evidence, and the facts contained therein are presumed to be correct
25 until such time as an objector produces sufficient evidence to rebut the presumption. Through
26 the eight (8) affiants provided by Poulton that state that no water has ever been intentionally
27

1
2
3 diverted from Willow Creek to Rose's place of use, that presumption has been rebutted.

4 Paragraphs 6-10 of Rose's first affidavit are a mixture of personal attacks,
5 statements ostensibly made by Poulton and irrelevant assertions that Poulton has grazed cattle on
6 the place of use. Rose also asserts that Poulton is objecting to her claim for personal reasons.
7 Poulton's reasons for objecting to Rose's claim are immaterial as is the claim that Poulton may
8 have grazed livestock on the claimed place of use. If Poulton ever grazed livestock on the
9 claimed place of use, it does nothing to establish that a valid water right exists. When the place of
10 use was unoccupied, Poulton occasionally grazed his livestock on it in the early spring until the
11 natural grasses died from a lack of water. Grazing cattle on unirrigated land does not establish
12 that a water right existed nor does it change the fact that the land was never intentionally
13 irrigated with the waters of Willow Creek. At paragraph 10, Rose makes further unsubstantiated
14 claims that the place of use was "used by other owners, and because Mr. Poulton's cattle grazed
15 on the property [he] would have reason to irrigate said property." *Rose Affidavit*, par. 10. Rose
16 concludes paragraph 10 with additional attacks on Poulton by claiming that other witnesses may
17 not have come forward because they did not "want Mr. Poulton to cause trouble for them." *Id.*
18 These statements do nothing to establish that a valid water right existed or that it was not
19 forfeited for failure to put such to beneficial use.
20
21

22 In paragraph 13, Rose again attacks Poulton by stating that Poulton may be
23 misrepresenting the facts to Don Green and Florence Poulton Gibson. Poulton would simply
24 point to the fact that Green and Gibson both made sworn statements to facts based upon their
25 own personal knowledge.
26
27

1
2
3 In paragraph 16, Rose directly contradicts one of her own affiants, Clark Harmon.
4 (There is discrepancy in the spelling of Clark Harmon's name. Rose spells it Harman and
5 Poulton has used the spelling provided by the Department in its 706 Report – Harmon.) Rose
6 states: "Mr. Harman recalls Mr. Poulton allowed irrigation of the property for some time, but
7 later decided not to let Mr. Harman have any water. *Rose Affidavit*, par. 16. However, in the
8 affidavit of Clark Harman, Harman states, "I approached Bill Poulton several time during those
9 years about using the water. He did not allow me to use the water during that or any other time."
10 *Affidavit of Clark Harman*. Mr. Harmon clearly states he never used Willow Creek water to
11 irrigate his property and any claim by Rose to the contrary should be given no weight by this
12 Court. If Harmon had a valid claim to the Creek, he simply could have used his diversion point
13 instead of trying to use Mr. Poulton's. Paragraphs 17 through the end of the affidavit are filled
14 with added hearsay statements that contain nothing to support Rose's claim to the waters of
15 Willow Creek nor do they raise any issue of material fact.
16
17

18 2. Second Rose Affidavit

19 In her second affidavit, Rose has attempted to interpret a 1978 aerial photo that
20 she claims is proof that water was diverted onto the property on more than one occasion. Again,
21 Poulton does not believe that Rose is qualified to testify as to what the photograph does or does
22 not show. However, even if Rose's affidavit is permitted, it still does not establish what years
23 water was on the place of use and how the water got on the place of use: i.e., whether it was from
24 flood water or intentionally diverted. In short, the 1978 photograph and the photographs
25 presented in the 706 Report do not demonstrate that water was ever diverted for beneficial use
26
27

1
2 from Willow Creek.

3
4 **c. Affidavit of John Anderson**

5 The Affidavit of John Anderson does not establish an issue of material fact.
6 Anderson claims to have witnessed Poulton's cattle feed "on the Rose acreage all the time during
7 the years prior to the Harman's purchasing the property." *Affidavit of John Anderson*. Anderson
8 makes additional irrelevant statements regarding his beliefs that it is Rose's "right to fight for her
9 water, no matter how small that amount may be." *Id.* Again, the affidavit fails to raise any issue
10 of material fact as to why 45-167A should not be declared forfeited.
11

12 **d. Affidavit of Garth Osterhout**

13 The affidavit of Garth Osterhout also fails to raise any issue of material fact as to
14 why 45-167A should not be declared forfeited by the Court. The fact that Osterhout pastured his
15 horses on the Rose property in the early summer simply lends support to the fact that if Poulton
16 had livestock in the claimed place of use it was during the spring and early summer when grass
17 and vegetation naturally grow due to precipitation. Osterhout adds nothing to aid in determining
18 whether Rose has a valid water right.
19

20 **e. Blane K. Rose**

21 The affidavit of Blane K. Rose fails to raise an issue of material fact as to why
22 45-167A should not be declared forfeited by the Court. The only statement that remotely
23 addresses whether the right ever existed or had ever been used is found in the seventh full
24 paragraph of Mr. Rose's affidavit. He states:
25

26 Mr. Poulton's ditch goes around the back and follows the boundary
27 of the property and bisects the subject property on their northwest

1
2
3 corner. As the ditch goes all the way around next to the west of the
4 property, the ditch has opened up on may occasions through the
5 years and has provided us with much irrigation water. It would
6 have easily been a way to irrigate the land prior to the Harmon's
7 home being placed there.

8 *Affidavit of Blane K. Rose*, p. 2. This statement, even if true, does not establish a water right.
9 Mr. Rose does not state what years the ditch 'opened up' or if he and Ms. Rose intentionally
10 diverted the water as required by Idaho law. It is unclear what Mr. Rose means when he says the
11 ditch "opened up". An actual diversion and beneficial use is required for the existence of a valid
12 water right. *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677,
13 679, 619 P.2d 1130, 1132 (1980); *State v. U.S.*, 134 Idaho 106, 996 P.2d 806 (2000). The
14 affidavit is an attempt at legal argument and fails to raise any issue of material fact as to why
15 45-167A should not be declared forfeited by the Court. Furthermore, any right Rose may claim
16 from water overflowing the banks of an irrigation ditch would require a new diversion point and
17 priority date, which Rose has not sought.

18 **f. Affidavit of Clark Harmon**

19 The affidavit of Clark Harmon does not raise any issue of material fact as to why
20 45-167A should be decreed as recommended. Harmon never states that he irrigated the property.
21 It is clear that if there ever were a way to divert the waters of Willow Creek, Harmon would have
22 done so instead of seeking Poulton's permission to presumably use Poulton's point of diversion
23 or diversion works.

24
25 Harmon's statements regarding the attempted sale of his claimed water right can
26 in no way establish a valid right. The contemplated transaction between Harmon and Poulton

1
2
3 was nothing more than a way for neighbors to resolve a dispute. It may be viewed as a
4 settlement negotiation, and settlement negotiations are generally not admissible under the Idaho
5 Rules of evidence.

6 VI. Forfeiture by Clear and Convincing Evidence

7 Idaho law requires that actions for forfeiture be proven by clear and convincing
8 evidence. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 87, 982 P.2d 917, 922
9 (1999). Clear and convincing evidence is defined in the Idaho jury instructions as requiring the
10 fact finder to be persuaded by the evidence to a degree "that it is highly probable that such
11 proposition is true". I.D.J.I. 1.20.2. If this Court concludes that 45-167A ever existed, it then
12 must find that such right was forfeited by non-use for the statutory period.
13

14 The affidavits and the time periods provided in Poulton's *Memorandum in*
15 *Support of Motion for Summary Judgment*, together with a lack of admissible material from
16 Rose, establish forfeiture by clear and convincing evidence. The periods of non-use from 1930-
17 1945, 1963-1973 and 1974-1986 demonstrate that it is highly probable the right has been
18 forfeited for the statutory period.
19

20 VII. Abandonment

21 Abandonment of a water right requires 1) an intent to give up the right, and 2) an
22 actual relinquishment or surrender of the right. *Gilbert v. Smith*, Idaho 735, 738, 552 P.2d 1220,
23 1223 (1976). The standard of proof must be established by clear and convincing evidence of
24 unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se
25 abandonment." *Jenkins v. State Dep't of Water Resources*, 103 Idaho 382, 388-89, 647 P.2d
26

1
2
3 1256, 1260-61 (1982). Such intent may be evidenced by non-use for a substantial period of time,
4 but mere non-use is not per se abandonment. *Gilbert v. Smith*, 97 Idaho at 738, 552 P.2d at
5 1223.

6 Around 1930, Thomas Arthur Poulton gave permission to LDS Church officials to
7 construct a church on the 1.6-acre parcel. When the church was on the property, there was no
8 water or electricity on the property, nor was there lawn or vegetation to water. *Affidavit of Don*
9 *W. Green*, par. 9. The church building was located on the 1.6 acres from 1930 until 1945.
10 *Affidavit of Grant M. Matthews*, par. 5. Eventually, the building portion of the church was
11 moved to a different location and all that remained was a basement with exposed walls. *Affidavit*
12 *of Florence Poulton Gibson*, par 7. After the removal of the church building, the property was
13 considered vacant and its only use was for a storage area for beehives. *Id.* at par. 8.

15 After the property was left vacant, Thomas Arthur Poulton did not re-fence the
16 ground back into his property because the church parcel was in an out-of-the-way area. After the
17 Church abandoned the property, it sat vacant and was full of weeds and sagebrush. *Affidavit of*
18 *Don W. Green* at pars. 9-10. In addition, the property was never cultivated or irrigated, but was
19 infested by tall sagebrush and "June grass." *Affidavit of William A. Poulton*, par. 7. Subsequent
20 to the abandonment of the property, local landowners John and Margaret Koyle bought the
21 corner 1.6 acres that the Church's building had stood on. *Affidavit of Don W. Green* par. 11.

23 Based on the period of non-use by the LDS Church and the physical removal of
24 its physical structure from the property, it is clear that if the LDS Church ever believed they had
25 a valid water right appurtenant to the property, the requisite intent to abandon can be established
26

1
2
3 when their meeting house was removed from the property and they failed to ever use any water
4 from Willow Creek or assign it to another. Rose claims that the 1972 Warranty Deed for the
5 LDS Church to John and Margaret Koyle is enough to transfer what right the Church ever had.
6 This is correct. However, any right the Church may have claimed had long been forfeited or
7 abandoned due to non-use. Therefore, there was no right to be transferred.

8 **VIII. Redirecting of Willow Creek by Burley Highway District**

9
10 The fact that the Burley Highway District moved the stream bed of Willow Creek
11 is irrelevant to this action except for the fact that the highway district moved Mr. Poulton's
12 diversion works when they moved the creek bed and would have moved Rose's diversion works
13 if she had any to move. The highway district did not move any diversion works for Rose
14 because there were none to move. Rose has not illustrated where she or her predecessors in
15 interest have ever taken water from Willow Creek nor have her affiants. There is no established
16 diversion point for her property.

17
18 The Department has recommended two points of diversion, one in Section 9 and
19 one in Section 26 for 45-167A. It appears that the Department may be insinuating that Poulton
20 irrigated the claimed place of use from his points of diversion. Poulton has never irrigated
21 Rose's property from his points of diversion. The diversion located in Section 26 is at a higher
22 elevation on a hillside near a splitter that divides Willow Creek from other water users.
23 Poulton's share of Willow Creek can be pushed to another water user's side of the splitter and
24 sent down a pipeline which is gravity pressurized, enabling Poulton to use sprinklers on more of
25 his property. The point of diversion in Section 26 is unique to Cory King and Poulton, and Rose
26

has never had permission nor has she or her successors in interest ever diverted from any point of diversion in Section 26, specifically from the pipe that Cory King and Poulton use. The pipe is the only way to get Willow Creek water from Section 26 to Poulton's property and the delivery point is approximately a 1/2-mile from Rose's west property boundary line. *Affidavit of William A. Poulton*, pars. 11-12. Therefore, the recommendation that Rose has a valid point of diversion from Section 26 should not be decreed as recommended nor should the diversion point in Section 9 be recommended because there has never been an established point of diversion for the claimed place of use.

IX. Conclusion

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 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.

Respectfully submitted this 24th day of May, 2006.

LING, ROBINSON & WALKER

By: 
Michael P. Tribe
Attorneys for Objector, William A. Poulton

1
2
3 CERTIFICATE OF MAILING

4 I hereby certify that on the 24th day of May, 2006, I served true and correct copies
5 of the foregoing *Reply Memorandum* upon:

6 Leah Rose
7 994 S. 150 E.
8 Burley, ID 83318

9 IDWR Document Depository
10 P. O. Box 83720
11 Boise, Idaho 83720-0098

12 Chief, Natural Resources Division
13 Office of the Attorney General
14 State of Idaho
15 P. O. Box 44449
16 Boise, Idaho 83711-4449

17 by depositing said document in the United States mail, postage prepaid, in envelopes addressed
18 to said persons/entity at the foregoing addresses.

19
20
21
22
23
24
25
26
27
28 
Michael P. Tribe