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2006 JUN 13 PM 4:21 DEPARTMENT OF
WATER RESOURCES

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	)	Subcases 45-10480, 45-10481 and 45-12906
	)	(Symers)
	)	
	)	ORDER DENYING CROSS MOTIONS FOR
Case No. 39576	)	SUMMARY JUDGMENT AND ORDER
	)	SETTING SCHEDULING CONFERENCE

BACKGROUND

IDWR Director's Recommendations

45-10480 – The Director of IDWR filed his *Director's Report for Irrigation and Other, Reporting Area 10, IDWR Basin 45* on September 7, 2004. The Director of IDWR recommended claim 45-10480 to Kevin Smyer for 1.05 cfs from Spring Creek and an unnamed stream to irrigate 54 acres with a priority date of March 18, 1910, based on beneficial use.

45-10481 – The Director recommended claim 45-10481 to Kevin Smyer for .14 cfs from a spring to irrigate 6.8 acres with a priority date of March 18, 1910, based on beneficial use.

45-12906 – The Director recommended claim 45-12906 to Norman and Delores Smyer for .14 cfs from Spring Creek and an unnamed stream to irrigate 4.6 acres with a priority date of March 18, 1910, based on beneficial use.

Warthen's Objections

On January 3, 2005, Earl Warthen filed the only *Objections* to claims 45-10480, 45-10481 and 45-12906 alleging in each subcase that the water right should not exist: "No lawful appropriation."

Supplemental Director's Report

IDWR filed its *Supplemental Director's Report Regarding Subcase Nos. 45-10480, 45-10481, 45-10502, 45-12906, and 45-13669* on February 8, 2006.¹ It said that claims 45-10480, 45-10481 and 45-12906 were recommended as claimed based on historic diversions since their development in the early 1900s despite questions concerning the claimed source, Spring Creek, and its historic channel: "At no time was the Department able to find that water right no 10480 [, 45-10481 and 45-12906] had been abandoned or forfeited." *Supplemental Director's Report*, at 8, 9 and 11.

Smyers' Motion in Limine²

Kevin Smyer and Norman and Delores Smyer filed their *Motion in Limine to Exclude Memorandum Decision and Evidence from Administrative Hearing for Water Right No. 45-0292 in any Proceedings Regarding Subcase Nos. 45-10480, 45-10481, 45-12906 and Supporting Memorandum* on February 22, 2006. They conceded that an IDWR administrative decision in 1991,³ found that no water had been diverted from Howell Creek under water right 45-292 in recent history and no land now claimed under 45-10480 and 45-10481 had been irrigated from Howell Creek for more than five years. Hence, water right 45-292 was declared forfeited.

However, the Smyers argued that evidence from the 1991 administrative decision has no probative value in the current proceedings and would unfairly prejudice the Smyers, confuse the issues and constitute a waste of time:

The forfeited right of Kevin Smyer was for Howell Creek water with diversion points from Howell Creek. The rights currently pending for both Kevin and

¹ The *Supplemental Director's Report* was filed in five subcases because they were proceeding together. Subcase 45-10502 (Warthen) will now likely proceed separately under a *Motion for Leave of the Court to File a Late Claim* yet to be determined by the SRBA Presiding Judge. Subcase 45-13669 (Warthen) was removed from the grouping pending IDWR's report on amendments to the claim. See Special Master's *Orders*, subcases 45-10480, 45-10481, 45-10502, 45-12906 and 45-13669, filed March 3, 2006.

² The Smyers' *Motion in Limine* was argued before the Special Master on March 2, 2006, and "held in abeyance pending any subsequent trial." See Special Master's *Orders*, subcases 45-10480, 45-10481, 45-10502, 45-12906 and 45-13669, filed March 3, 2006. The issue is discussed here to frame the issues of forfeiture and abandonment.

³ IDWR Hearing Officer Gary Spackman's *Proposed Memorandum Decision and Order*, In the Matter of Application for Transfer of Water Right No. 45-00292 in the Name of Kevin Smyer, dated January 14, 1991. See *Affidavit of Michael P. Tribe in Opposition to Earl Warthen's Motion for Summary Judgment on All Claims and Withdrawing Objection to Subcase No. 45-10502*, Exhibit B, filed March 1, 2006.

Norman Smyer are for beneficial use of the waters of Spring Creek and a spring located wholly on Kevin Smyer's property. They have no relationship to the forfeited right. . . . The prior decision was for a different stream and a different right.

Smyers' *Motion in Limine*, at 3.

Warthen's Objection to Motion in Limine

Mr. Warthen filed his *Objection to Motion in Limine* on February 24, 2006. He argued:

The Department in its Supplemental Report for its recommendations on 45-10480 and 45-10841 expressly relied upon decreed water right 45-292 as a basis for its recommendations, and since the right has previously been deemed forfeited as it applies to the same property at issue in these claims, the earlier proceedings are absolutely relevant to the Department's recommendations on water right claims 45-10480 and 45-10481. This case is about how the Smyers are now attempting to divert water in the same area the Department had previously found had not been irrigated since at least 1932.

Warthen is not attempting to convince the Court that a forfeiture of water right 45-292 equates to or requires a forfeiture of the claimed water rights. On the contrary, Warthen is merely stating that the Department should be held to its previous decision that no water had been used to irrigate the land since 1932 (as opposed to its recent finding that the land was irrigated since 1910).

Warthen's *Objection*, at 2-3 and 6.

Kevin Smyer's Motion for Summary Judgment

On February 22, 2006, claimant Kevin Smyer filed his *Motion for Summary Judgment and Supporting Memorandum* in subcase 45-10481. Mr. Smyer asked that his claim be decreed as recommended by the Idaho Department of Water Resources.

Mr. Smyer alleged there is no genuine issue of fact and he is entitled to judgment as a matter of law because: 1) the spring source and irrigated acreage are wholly within his property; 2) no third party had permission to divert water from the spring; 3) there is no proof of abandonment or forfeiture; and 4) even if there was forfeiture, Mr. Smyer lawfully resumed use of the water since he and Norman and Delores Smyer purchased the property in 1985.

In his *Affidavit* attached to the *Motion*, Mr. Smyer said that water from the spring is tributary to sinks and does not leave his property. He also said that there were existing ditch works from the spring when he purchased the property.

Warthen's Motion for Summary Judgment

Objector Earl Warthen filed his *Motion for Summary Judgment on All Claims and Withdrawing Objection to Sub-Case No. 45-10502* on February 24, 2006, in subcases 45-10480, 45-10481, 45-10502 and 45-12906. In the text of his *Motion*, Mr. Warthen asked for summary judgment in subcases 45-10480 and 45-10481 "for the reason that the water right upon which the Department based its recommendation for priority, points of diversion, and source was declared forfeited to the property owned by Kevin Smyer in a 1991 Order issued by the Idaho Department of Water Resources." Mr. Warthen then added: "The water right upon which the Department based its recommendation in sub-case number 45-12906 [Norman and Delores Smyer] has also been forfeited through years of non-use." So, presumably, Mr. Warthen intended to pursue summary judgment in all three subcases (45-10480, 45-10481 and 45-12906) claimed by the Smyers.

Mr. Warthen noted that the three Smyers' claims derive from water right 45-292 decreed in *Wood v. Stokes*, 4th Judicial District, Cassia County, March 11, 1892 (*Supplemental Director's Report*, Exhibit B), and in 1991, IDWR "held that water stemming from water right number 45-292 had been forfeited for use on the claimants' [Smyers'] property due to years of non-use." Warthen's *Motion for Summary Judgment*, at 1-2.

Smyers' Brief in Answer to Warthen's Motion for Summary Judgment

The Smyers lodged their *Brief in Answer to Warthen's Motion for Summary Judgment on All Claims and Withdrawing Objection to Subcase No. 45-10502* on March 1, 2006. They also attached affidavits of Michael P. Tribe, Helen Anderson, Bennie Smyer and Norman Smyer. The Smyers argued that there remain genuine issues of material fact precluding Mr. Warthen's *Motion for Summary Judgment*.

First, they argued that IDWR has not determined that all three of the Smyers' claims are derivative of water right 45-292. Second, the Smyers argued that IDWR Hearing Officer Spackman's finding that there is no record of delivery of water to certain land claimed under 45-10480 and 45-10481 is mere dicta – the finding only applies to water from Howell Creek (not Spring Creek, the unnamed stream sometimes called the "east channel" or the spring located on Kevin Smyer's land). Third, the Smyers argued that there is evidence that water from Spring Creek and the unnamed stream have been beneficially used on land now owned by Kevin Smyer

since the early 1940s. Finally, they argued that land now owned by Norman and Delores Smyer has been irrigated from Spring Creek and the unnamed stream when water was available and needed since 1954.

Warthen's Memorandum in Opposition to Smyer's Motion for Summary Judgment

Earl Warthen lodged his *Memorandum in Opposition to Kevin Smyer's Motion for Summary Judgment* on March 1, 2006. He asked: "If the Department's unchallenged determination in 1991 was that no water had been used to irrigate the land since 1932, how can Smyer now argue that he, or his predecessors, had been using the water since 1910?" Mr. Warthen also argued that the spring source claimed by Kevin Smyer to be water "located or situated wholly or entirely upon [his] lands" is actually seep water from Howell Creek and/or Spring Creek; hence, Kevin Smyer cannot claim the source is "private waters" protected by I.C. § 42-212. Finally, Mr. Warthen argued that since the right to irrigate Kevin Smyer's lands under water right 45-292 has been forfeited, Kevin Smyer cannot now be allowed to resume use from the overappropriated water system: "The junior appropriators [Warthen] would be harmed if there would not be sufficient water to fill their water rights due to the senior appropriator [Smyer] being permitted to resume his use." Warthen's *Memorandum in Opposition*, at 5-6, citing *Sagewillow v. Idaho Dept. of Water Res.*, 138 Idaho 831, 837, 70 P.3d 669, 675 (2003).⁴

Hearing

A hearing on the cross motions for summary judgment was held on March 2, 2006, at the SRBA Courthouse in Twin Falls, Idaho. Michael P. Tribe appeared for Kevin Smyer and Norman and Delores Smyer; Shelley M. Davis appeared for Earl Warthen; David L. Negri appeared for the United States of America, Department of Agriculture, Forest Service, along with Steve Spencer; and Chris M. Bromley appeared for IDWR.

⁴ Whether Mr. Warthen is a junior appropriator out of Spring Creek depends on his yet to be determined priority date for his claim 45-10502. He claimed a priority date of August 31, 1874, but IDWR recommended May 26, 1964. IDWR recommended Kevin Smyer's claim 45-10480 out of Spring Creek and an unnamed stream for a priority date of March 18, 1910.

DISCUSSION

It is evident from the pleadings, affidavits, memoranda and arguments of counsel that there exist genuine issues of material fact which preclude granting either *Motion for Summary Judgment*. A fundamental fact at issue concerns Spring Creek and its historic channel (45-10480 and 45-12906). IDWR noted that an early adjudication of water rights in the Marsh Creek drainage decreed water rights to Spring Creek, but no channel in the area is identified as Spring Creek by the United States Geological Survey – IDWR typically recommends sources as they are identified by the USGS. *Supplemental Director's Report*, at 6. That being the case, and for consistency, IDWR based its recommendations on a related water right already decreed from Spring Creek (45-517D). Then, because IDWR found that historic diversions have existed since their development in the early 1900s and because the diversion system was historically part of the original diversion system for water right 45-292, it recommended 45-10480 and 45-12906 with a priority date of 1910.

Over the years, it is likely that the water channels have been altered and various names have been used. But the record is not clear that the channel designated as Spring Creek by IDWR is the same channel assigned by the District Court in *Wood v. Stokes* in 1892. That is crucial because it provides the key link to the Smyers' claim to a 1910 priority date for 45-10480 and 45-12906. If, on the other hand, a source for both rights is Howell Creek as Mr. Warthen contends, then the water rights may have been partially or wholly forfeited.

Another material fact at issue concerns the spring located on Kevin Smyer's property and recommended by IDWR as the source for 45-10481. Is that source "private water" protected by state law or seep water from Howell Creek and/or Spring Creek as claimed by Mr. Warthen? That, in turn, leads to the issues of whether the water was forfeited and then appropriated by Mr. Warthen or whether Kevin Smyer resumed use in a timely manner. From the record, it is not clear whether the recommended source of 45-10481 is indeed "private water" and only a trial on the merits will clarify the issue.⁵

One final material fact at issue is worth mentioning and that concerns IDWR's 1991 administration decision that land claimed under 45-10480 and 45-10481 had not been irrigated for more than five years. It seems reasonable that the decision meant no water from Howell

⁵ For a lengthy discussion of spring water ("private water") and streams, see *Special Master Report*, subcase 51-10199, filed November 19, 2001.

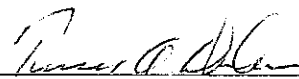
Creek had been used for more than five years. But it is equally plausible that no water from any source had been applied to the land for that period. Until that issue is clarified, both claims 45-10480 and 45-10481 are suspect.

ORDER

THEREFORE, IT IS ORDERED that:

1. Kevin Smyer's *Motion for Summary Judgment* is **denied**;
2. Earl Warthen's *Motion for Summary Judgment on All Claims* is **denied**; and
3. A scheduling conference by telephone shall be held on **Thursday, June 22, 2006, 9:00 a.m.** Parties may participate by telephone by dialing the number 1-225-383-1099 and when prompted entering code 654400. If you have any difficulty connecting to this call, call the SRBA Court immediately at 208-736-3011.

DATED June 13, 2006.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT AND ORDER SETTING SCHEDULING CONFERENCE was mailed on June 13, 2006, with sufficient first-class postage to the following:

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