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AUG 11 2006

DEPARTMENT OF
WATER RESOURCES

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13
14 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
15 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS
16

13	In Re SRBA	)	Subcase No. 45-294C&D
14	Case No. 39576	)	OBJECTORS' BRIEF
15		)	
16		)	

17
18 In 1892, the Wood-Stokes decree adjudicated 240 inches of Lake Cleveland water
19 which, after loss, was decreed as 150 inches appurtenant to certain real property then owned
20 by the Estate of John Parke, deceased, acting through its administrator, Andrew Parke, and 75
21 inches as appurtenant to certain real property owned by George Guiles. (Anderson Exhibit
22 C.) The Guiles water was eventually acquired by the Andersons but is not relevant to this
23 proceeding
24

25 On October 5th, 1892, the probate court of the State of Idaho, for the county of Cassia,
26 entered an order confirming the sale of 50 inches of the Lake Cleveland water to Ira C. Parke,
Sr. (Anderson Exhibit B.) It is this water that is disputed here and shall be referred to as the

1 “Lake Cleveland water.” Montgomerys claim the Lake Cleveland water is appurtenant to
2 their real property, as set forth in its Claim in the Department’s file. This property shall be
3 referred to throughout as the “Montgomery property.” Andersons have contested
4 Montgomerys’ claim and maintain the Lake Cleveland Water is appurtenant to their real
5 property as set forth in its Claim appearing in the Department’s file. This property shall be
6 referred to throughout as the “Anderson property.”
7

8 One thing is clear. After the Woods-Stokes decree there exists a rather remarkable
9 and extraordinary history of the Lake Cleveland water moving from person to person, and
10 from parcel to parcel with only the most vague of formalities, most of which were tied into
11 the genealogy of the Parke family. The first of those transfers, the court-approved sale of fifty
12 (50) inches to Ira C. Parke, Sr., treated the water as a separate and non-appurtenant asset
13 which could be freely sold and transferred independent of real property. That began the long
14 tradition of similar transfers which were the rule, not the exception.
15

16 Montgomerys base their claim on the Affidavit of Andrew Parke, dated July 25, 1934.
17 (Montgomery Exhibit 12.) The affidavit is not dispositive, however. First of all, as a hearsay
18 declaration made without notice and opportunity for cross-examination, it is of dubious value.
19 Secondly, its statements regarding the use of water end in 1934. It is the use after 1934 which
20 must determine the issue presented here.
21

22 Frederick L. Parke confirms in his deposition that Ira C. Parke, Sr. used the Lake
23 Cleveland water on the Montgomery property prior to 1834, though the use was not exclusive.
24 The question is what happened when Ira sold the Montgomery property. Did he leave the
25 water there, or did he take it with him? Keep in mind he purchased the Lake Cleveland water
26 independent of land ownership and he likely considered it as his portable asset until he died.

1 There is actually some very clear evidence in this regard. Montgomerys' chain of
2 title establishes that Lake Cleveland water was not deemed appurtenant to the Montgomery
3 property after 1926. (Note that this is not consistent with the Andrew Parke Affidavit which
4 maintains it was owned by Ira C. Parke, Sr. until 1934.) After Ira C. Parke, Sr. sold the
5 property it came to be owned Shelton Paine and Jenny M. Paine. Their interest was
6 foreclosed by the Federal Reserve Bank of San Francisco with a decree of foreclosure
7 entering April 22nd, 1926. (Montgomery Exhibit 4.) The decree of foreclosure specifically
8 identifies the water rights appurtenant to the Montgomery property as being "eighty-two
9 inches of the waters of Marsh Creek with priority dated July 1st, 1876, decreed to Ira C. Parke
10 on September 1st 1886, in that certain action in the district court of the third judicial district of
11 the Territory of Idaho, in and for Cassia County wherein Wm. R. Vaughn, et al., were the
12 plaintiffs and J.E. Harroun et al., were defendants." It was stipulated that this was not the
13 Lake Cleveland water. There is no reference in the decree to Lake Cleveland water. The
14 sheriff's deed of May 25th, 1926 (Montgomery Exhibit 5) similarly refers to the eighty-two
15 (82) inches of Marsh Creek water and, again, is completely silent as to Lake Cleveland water.

16
17
18 The Federal Reserve Bank of San Francisco, in turn, contracted to sell the
19 Montgomery property to Willis Sears by agreement dated the 29th day of October, 1925, and
20 which was recorded January 9, 1926. (Note this contract actually predates the foreclosure
21 decree.) (Montgomery Exhibit 6.) Again the deed specifically identifies eighty-two (82)
22 inches of the waters of Marsh Creek, using the same language quoted above. Again, the
23 contract is completely silent as to any Lake Cleveland water.
24

25 On August 6th, 1927, the Federal Reserve Bank of San Francisco executed and
26 recorded a quitclaim deed conveying the Montgomery property to H. E. Hemingway.

1 (Montgomery Exhibit 7.) Again, the deed continued to use the language quoted above,
2 identifying the Marsh Creek rights and remaining silent as to any water from Lake Cleveland.

3 On the 28th day of September, 1927, H. E. Hemingway and Isabel Hemingway
4 executed and recorded a quitclaim deed of the property to Willis Sears (Montgomery Exhibit
5 8). This deed continued to use the language identifying the Marsh Creek rights and, again, is
6 completely silent as to any water from Lake Cleveland.
7

8 From there followed the transfer of the Montgomery property from the Estate of Willis
9 Sears in December of 1956 (Montgomery Exhibit 9); the deed from the guardian of Lula P.
10 Sears to Arlo Montgomery in April of 1966 (Montgomery Exhibit 10); and a quitclaim deed
11 dated November 28th, 1983, conveying the property to George Montgomery and Gwen
12 Montgomery (Montgomery Exhibit 11). The latter three transfers omit the language
13 concerning the Marsh Creek water rights and continue to be silent as to Lake Cleveland water
14 rights as well.
15

16 Montgomerys' chain of title shows specific identification of the appurtenant water
17 rights in conveyances falling within the time frame of the Andrew Parke affidavit. It is
18 significant, and perhaps controlling, that there is absolutely no reference to Lake Cleveland
19 water. It is obvious that the appurtenant water rights were important to the parties and were
20 being expressly transferred. Presumably the Lake Cleveland rights would also have been
21 important to the parties and would have been specifically transferred as well, and yet the
22 deeds are silent. Further, there is the Affidavit of Julia Ballard (Anderson Exhibit O), which
23 directly contradicts the Affidavit of Andrew Parke. Julia Ballard was the surviving widow of
24 Anson Parke, son of Ira C. Parke, Sr.
25

26 The most illuminating evidence before the Court is the deposition of Frederick L.
Parke, "Mr. Parke". Mr. Parke has an encyclopedic knowledge of the Parke family history

1 and genealogy; of the transfers of the Lake Cleveland water from person to person; and of the
2 places where the Lake Cleveland water was used. The deposition is sufficiently detailed.
3 Paraphrasing it does not do it justice; it should be read in its entirety.

4 Since 1932, at least, when he was twelve (12) years old, Mr. Parke's testimony is
5 based on his personal knowledge or knowledge as the owner of the Anderson property and
6 Lake Cleveland water right. He helped his father, Ira C. Parke, Jr. farm the Anderson
7 property. He personally was involved in bringing down the Lake Cleveland water and
8 applying it to the land. He knows exactly where it has been used since that time.

10 While Ira C. Parke, Sr. owned the Montgomery property, he did use the Lake
11 Cleveland water there, but the use was not exclusive. He used the water in various place
12 throughout the valley where he farmed. When Ira C. Parke, Sr. sold the Montgomery
13 property, sometime before 1926, he took the Lake Cleveland water and began to apply it
14 exclusively to the "old Weatherburn ranch and Gray ranch." This is the Anderson property.
15 The water continued to be used exclusively there until it was sold to Andersons by Frederick
16 L. Parke.
17

18 Mr. Parke testified that Willis Sears and George Montgomery had both claimed
19 ownership of portion of the Lake Cleveland water but neither was allowed to use it by either
20 Mr. Parke or his father because the claims were without merit. Ultimately Frederick L. Parke
21 inherited the ranch from his father, Ira C. Parke, Jr., and continued the exclusive use of the
22 water in his own interest, both personally and through tenants.
23

24 The deposition of Frederick L. Parke was taken pursuant to proper order of a court of
25 competent jurisdiction. Montgomerys were given proper notice, attended, and cross-
26 examined. Mr. Parke's testimony is largely uncontradicted and is entitled to great weight.

1 Because of the manner in which the Lake Cleveland water rights were moved around
2 from parcel to parcel, and person to person, for many years, the right to the water must be
3 determined as an accomplished transfer within the meaning of Idaho Code § 42-1425. Use of
4 the Lake Cleveland water on the Montgomery property, along with other property, while it
5 was owned by Ira C. Parke, Sr. prior to 1932 is not the last use of the water. The largely
6 uncontradicted testimony of Frederick L. Parke established that the pattern of informal
7 transfers continued with the final and exclusive use of the water being on the Anderson
8 property. This testimony is corroborated by the chain of title of the Montgomery property and
9 by the Affidavit of Julia Ballard.
10

11 The two conditions of Idaho Code § 42-1426 have been met. No water rights existing
12 in 1932 were changed nor did it result in an enlargement of the original right. In applying
13 these tests, it is interesting to observe, once again, that the original right was sold independent
14 of land and was confirmed by an order of the District Court. (Anderson Exhibit E).
15

16 A couple of closing comments are in order. Ira C. Parke, Sr. bought 50" of water.
17 This is documented by a recorded court order (Anderson Exhibit E). The Andrew Parke
18 Affidavit cannot expand what Ira owned. The Lake Cleveland water at issue here is 50
19 inches, or 1.0 cfs, not the 1.07 cfs recommended by the Department. This error was
20 compounded by the Department's methodology. Kelly Christiansen testified he first
21 determined the recommendation for Montgomerys using the 1/3 referred to in the Andrew
22 Parke affidavit and gave Andersons what was mathematically left. Thus, .07 cfs was shifted
23 from Andersons' undisputed rights to Montgomerys.
24

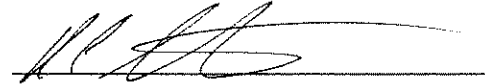
25 A second point is the imposition of a "volumetric limit" as testified to by Christiansen.
26 The Woods-Stokes decree did not have a volumetric limit. Imposing one in the SRBA is a
restriction on the adjudicated right and is inappropriate.

CONCLUSION

Andersons' Objections should be granted. Montgomerys should not receive Lake Cleveland water. The recommendation on the Andersons' claim should be amended to include the .07 cfs, which was inappropriately taken from its undisputed rights, and the 1.0 cfs owned by Ira C. Parke, Sr. used exclusively on the Anderson property since 1926.

DATED this 10th day of August, 2006.

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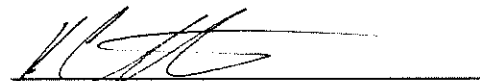
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