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DEPARTMENT OF
WATER RESOURCES

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Objector

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	)	MOTION TO ALTER OR AMEND
	)	SPECIAL MASTER'S REPORT AND
	)	<u>SUPPORTING MEMORANDUM</u>
_____	)	

COMES NOW William A. Poulton, the objector in Water Right No. 45-00167A, by and through his attorney of record Michael P. Tribe of the firm Ling, Robinson & Walker, and pursuant to SRBA A.O.1 Rules of Procedure, Rule 13, files this Motion to Alter or Amend the Special Master's Report in Subcase No. 45-00167A on the grounds and for the following reasons, to-wit:

I. Introduction

This Motion to Alter or Amend is filed to request certain relief from the *Special Master Report* in subcase 45-167A. The *Report* was issued as a result of the objection filed by the objector and the one-day trial held January 11, 2007. The purpose of motion [to alter or amend a judgment] is to allow the trial court to correct errors of both fact and law that had occurred in its proceedings. *First Sec. Bank v. Neibaur*, 98 Idaho 598, 603, 570 P.2d 276, 281 (1977); *Vega v. Neibaur*, 127 Idaho 606, 903 P.2d 1303 (1995).

II. Factual and Legal Errors

1. Errors of Fact

a. At pages 3-4 of the *Special Master Report*, the Court states that Idaho Department of Water Resource agent Jeanie Robertson sat through the “full-day of trial and at the conclusion was asked whether she stood by her recommendation.” This is an error, as Robertson did not sit through the full-day trial. She was present for the opening motion regarding the objector’s expert, which was raised by IDWR a non-party to the action. Ms. Robertson also listened to the testimony of the objector’s expert, Jacob Mundt, and then provided rebuttable testimony. Ms. Robertson did not sit through the testimony of the objector, his witnesses or the testimony offered by the claimant and therefore could not have been asked if she still stood by her recommendation after all of the testimony.

b. Second, at page five (5) of the *Special Master Report*, the Court found that there was “an old irrigation structure on the property, but the claimed point of diversion is unusable since the Highway District moved Willow Creek to the far side of the county road in 2002.” That is incorrect as there is no old irrigation structure on the property. There was no admissible testimony that an old irrigation structure was ever on the property. The only testimony regarding a structure on the property was the old church house structure. There was testimony by the objector and his witnesses that there never was a diversion structure at the claimed point of diversion or on the claimant’s property. A review of the testimony will show that there was never any admissible testimony as to a diversion work onto the claimant’s property.

The claimant did attempt to offer exhibits of what she felt were evidence of irrigation ditches, but were not admitted because of her failure to provide such exhibits in an exhibit list to the objector. Therefore, there was no admissible evidence of any irrigation structures.

c. The Court relies on the fact that the Koyles, who owned the property for 15 years (1972-1987), sold it to the Harmons and assured them the land had “2 shares of water.” *Special Master Report* at 10. The Court does not make the distinction of having shares on paper, based upon a decree and actually putting the water to beneficial use. Margaret Koyle specifically testified that neither she nor her husband ever irrigated the land. Rather, they were holding the

property for the possible purchase by a family member. At the same page, the Court states that the Koyles and subsequent purchasers filed a claim in the SRBA for .04 cfs from Willow Creek based on the *Poulton Decree*. “Their sworn statements that the claim was true and correct cannot be ignored.” The Court has failed to consider that these parties did not understand or even comprehend that the right may or may not have been forfeited or abandoned. All they knew was that they had a paper right to the water, they were the owners and that they had better file a claim or lose any potential right they had in the water. No one lied about the right, they simply reported what they understood they needed to file. A close reading of the decree merely establishes that the original owner had a right to one-fourth of the flow of Willow Creek for the designated ground. The existence of the decree on the described ground does not establish that water from Willow Creek was ever used on the Claimant’s recommended place of use.

d. The Court stated that the objector was a farmer and that the claimant was a teacher. The objector is not a farmer nor is Ms. Rose a teacher. *Report* at p. 10. There was no testimony given that the objector was a farmer. He has raised cattle and helped with his family’s business but he was employed by Minidoka Irrigation District at all times during this litigation. Rose is an aid and not a teacher with the Cassia County School District.

e. Cattle grazing on the proposed place of use is not evidence of irrigation. At page 3 of the *Report* the Court cited evidence for summary judgment that Poulton allegedly grazed his cattle on the claimant’s place of use. Also at page 5 of the *Report*, the Court cites the testimony of John Anderson that he said cattle grazing on the claimant’s place of use. Anderson’s testimony at trial was that he could not see the pasture because of trees blocking the way and never looked to see if the alleged cattle were Poulton’s. Even if there were credible evidence that cattle grazed on the property that is not evidence of irrigation and should not be considered by the Court to find an absence of forfeiture or abandonment.

2. Errors of Law

The Court ruled that the “weight of evidence is that 1) some use of the water was resumed before Mr. Poulton instituted proceedings to declare a forfeiture and 2) some nonuse resulted from circumstance beyond Ms. Rose’s Control. *Report* at pg. 9. The Court did not

determine how much water the claimant's buckets resumed and how much was because of the claimed circumstances beyond her control.

a. The Court did not properly apply the resumption of use doctrine. A resumption of use of only a portion of a water right, prior to a claim of right by a third party, will only prevent the forfeiture of that portion of the water right. *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); *Sagewillow, Inc. v. IDWR*, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003). Rose has not established how much water was used by her alleged resumption but it was not the full amount if any. The Court found she had taken some buckets out of Willow Creek between 1998 and 2002. At the most, she is entitled to a few buckets a year and the Court must determine what the claimant is entitled to. The Court found at page ten (10) that, "there was evidence that Ms. Rose herself resumed use of Willow Creek water before Mr. Poulton instituted proceedings to declare a forfeiture of her water right by filing his SRBA *Objection* in 2005. Ms. Rose drew water from the Creek by bucket sometime between 1998 and 2002, and, however futile in the end, can only be considered a resumption of use." There are two errors with this finding.

First, the Court did not make any findings that after the statutory period of nonuse and before the alleged resumption of use, whether any junior appropriator used water that was available because of continued nonuse by the LDS Church, Koyles or Harmons i.e., the subsequent purchasers of the land. The Court also did not make any finding that during such period any third party applied for and obtained a water right in the same or interconnected watercourse. The Court did not determine whether the Creek was over appropriated and that because of continued nonuse by the LDS Church and the subsequent purchasers of the land, junior users received water that they would otherwise not have received. *See generally Sagewillow v. Idaho Department of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003). There was testimony that the objector and the other downstream users often use all the available water of Willow Creek and that they would be harmed if the claimant was permitted to divert water from Willow Creek.

Second, if the Court recognizes the defense of resumption of the use, which it raised for the claimant, it failed to consider partial forfeiture. As stated above, the Court found that Ms.

Rose drew water from the Creek by bucket sometime between 1998 and 2002. Using a bucket clearly is not the same as irrigating 1.6 acres with a diversion rate of 0.04 cfs. The Court also made no findings as to the season of use, the point of diversion or what place of use the claimant watered with her bucket. Partial forfeiture is triggered by a reduction in beneficial use, which according to the Court's own findings occurred here because Rose only used a bucket to resume the use. If the court allows the defense of resumption of use it must by law find what amount was put to a beneficial use and the other required elements of a water right and the only way to do that is through a new hearing.

b. The claimant offered no evidence that the previous owners' nonuse of water resulted from circumstances over which they had no control. For the years 1914 through 1998 there was no testimony or circumstance over which the owners of the property had no control. This statutory defense is only available to those owners of the property prior to the time the Claim of Right was filed by the Koyles in 1988. The alleged circumstances beyond the claimant's control do not merit the objector being given the right to irrigate a piece of ground that has not been irrigated for over fifty years. It was unreasonable for the claimant to rely on the objector's statement that the property was a dry piece of ground. It is not what a reasonably prudent landowner would do in southern Idaho where water is so important. A reasonably prudent person would check with IDWR and other governmental agencies or higher a lawyer to investigate the claim. Furthermore, the "conflicting testimony whether Mr. Poulton instigated the move across the road onto his property," is not credible. The highway district does not act for the benefit of an individual. The Highway District moved the streambed because the claimant's culvert, her failure to maintain it, and the heavy spring water caused Willow Creek to flood the road. That is why the streambed was moved. The Highway District would have accommodated her interest in the diversion of Willow Creek if she would have asked and asserted the right. The claimant could have discussed the matter with the Highway District or asked the objector to use his diversion works and construct a system to irrigate her property. She did not and the court improperly cites this as a defense to forfeiture. Rose repeatedly offered out of court statements that the Highway District said they would move the stream back. This is

false, as the attorney for the Highway District has contacted the objector's attorney of record's office to clarify what it did and did not say to the claimant and her knowledge of their intent to move the Creek before it was moved. It may be appropriate for the Court to reconvene the trial and have a representative of the District testify. This would clarify the claimant's claims of circumstances beyond her control and erase the any doubt the Court may have about what happened and the objector's role in it and the claimant's false claims.

There was no admissible evidence presented that her nonuse was due to circumstances over which she had no control. Despite her subjective belief that Poulton prevented her from using it, the Claimant was not prevented from using the waters of Willow Creek it was the fact there was no way to divert the water onto the ground as none existed. The Claimant testified that Poulton told her that her parcel was dry. It was and has been since any living person can remember. That was the extent of the Claimant's admissible testimony as to her belief that the nonuse of the water was due to circumstances over which she had no control. In addition, there was no evidence of wrongful interference of the water right. The Claimant did not seek help from any governmental agency to investigate whether the water right was valid until IDWR came looking for her.

There was testimony that the Burley Highway District moved the streambed of Willow Creek. However, the period of forfeiture had occurred long before. The Claimant had the opportunity to resume any use she was entitled to, in the years she resided on the property before the ditch was moved. She did not; the claimant should not be able to sit on her hands for years and then claim that her nonuse of the water suddenly resulted from circumstances over which she had no control. If the Claimant had an existing diversion works the highway district would have moved it for her like they did for the objector

c. At page 7, the Court states that there was no evidence of intent to abandon. Pursuant to Idaho case law, intent can be evidenced by a long period of nonuse. The Court found that long period at trial. The actual relinquishment or surrender does not require a declaration or other affirmative act. Rather, it refers to the relinquishment of possession, i.e., the physical act of not using the water

To constitute abandonment, properly speaking, there must be a concurrence of act and intent, the relinquishment of possession, and the intent not to resume it for a beneficial use, so that the abandonment is always voluntary, and a question of fact. It has been said that to constitute an abandonment of a water right, there must be a concurrence of the intention to abandon it and the actual failure in its use.

Samuel C. Wiel, 1 Water Rights in the Western States § 567 (1911)(cited as authority in *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976)). The intention of a party to abandon a water right must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of the water, standing alone, is not sufficient for a per se abandonment. *Jenkins v. State Dep't of Water resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). However, intent may be evidenced by non-use for a substantial period of time and in this case the Court found the requisite period of non-use to find abandonment of the water right and no evidence of the amount claimant resumed.

d. At page 7, the Court found that “in 2002, the Highway District moved Willow Creek and Ms. Rose’s claimed point of diversion 20-30 feet east away from the property line.” The District did move the Creek but there was no diversion work to move. It was only a dot on IDWR’s map. If there had been a ditch or any evidence of irrigation, the District would not have moved the canal. Therefore, the point of diversion was not moved because there wasn’t one to move.

e. The Court found that no public interest is served by forfeiture of “Ms. Rose’s water right.” The public interest served is that Mr. Poulton and the downstream users of Willow Creek would get to divert their full quantity of waters in short years and it also promotes the early investigation into water rights by parties purchasing property with claims to the State’s water and the taking of all reasonable steps to put water to a beneficial use.

f. The Court only considered a portion of Grant Matthews testimony in its *Report*. At page 4 of the *Report*, the Court identified Mr. Matthews’ association with the property in the 1930’s and 1940’s. However the Court failed to mention or give consideration to his additional testimony that the property was never irrigated until at least 1978. After the church house

structure was removed from the property, Matthews continued to be familiar with the property as he drove cattle across it until 1978 when he moved from the area. Matthews testified that there was never irrigation of the property. Matthews grew up in a house one mile to the east of the property and attended church on the property in the 1930's and 1940's. Matthews' testimony was not challenged at the trial and the Court must weigh his testimony against the claimant's claim of irrigation. This eyewitness account rebuts the IDWR interpretation of aerial photographs and strengthens the testimony of Jacob Mundt who also found no evidence of irrigation as well as the objector.

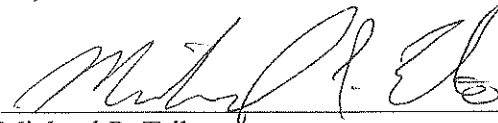
g. Finally, The Court did not hold the claimant to the same standard as a party represented by a lawyer. The case law in Idaho is clear, a pro se litigant must be held to the same standards and rules as those represented by attorneys. *Golay v. Loomis*, 118 Idaho 387, 393, 797 P.2d 95, 101 (1990). That did not happen. At trial, the Court allowed the claimant to give direct testimony without asking questions over the objections of the objector. When the claimant was directed to do so and it became difficult for her to question herself, the Court asked questions for the claimant over the objection of the objector's counsel. Based on this improper aid, several issues regarding her defenses were raised by the Court for the claimant. Understandably, it was hard for the pro se claimant to present her case but she should have been held to the same standard as a party represented by an attorney and she was not.

III. Conclusion

Based on the above, the Court should alter and amend the *Special Master's Report* based upon the clear and convincing evidence provided by the objector in this case and find that the claimed water right was forfeited and no proper defenses are available to the claimant. The claimant did not offer at trial any evidence of who allegedly irrigated her property. The evidence before the Court was that the claimant could have controlled the circumstances, once she obtained the property, if she would have acted as a reasonable prudent person. Also, based on the above there must be a new hearing so the claimant can present evidence as to the amount of water she diverted based on a partial resumption of use.

DATED this 10th of April, 2007.

LING, ROBINSON & WALKER

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

CERTIFICATE OF MAILING

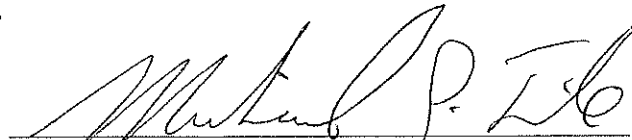
I hereby certify that on the 11th day of April, 2007, I served true and correct copies of the foregoing *Motion to Alter or Amend Special Master's Report* as follows:

Leah Rose, Claimant
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Michael P. Tribe