

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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In Re SRBA
Case No. 39576

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DEPARTMENT OF
WATER RESOURCES

Subcase No. 45-00167A)
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CLAIMANT BRIEF

Leah Rose,
 Claimant

COMES NOW, the Claimant, Leah Rose, appearing *pro se*, and asserts the following facts regarding Subcase No. 45-167A:

THAT THE CLAIMANT asks the Court to consider all previous matters submitted by the Claimant in all briefings, affidavits and hearings.

The Claimant asks the court to regard rebuttal from Claimant to the *Challenger's Opening Brief* submitted by Michael P. Tribe, attorney for Objector, William A. Poulton on November 30, 2007.

On March 20, 2007 Special Master Terrence A. Dolan "entered a ***Report and Recommendation*** following summary judgment proceedings and trial concluding as a matter of law that claimant Leah G. Rose's water right had not been abandoned and she was entitled to a water right as recommended by IDWR.

The Special Master found that despite compelling evidence of nonuse for at least 54 years, 1) use of the water was resumed before objector William A. Poulton

instituted proceedings to declare a forfeiture and 2) nonuse resulted from circumstances beyond Ms. Rose's control and that of her predecessors in ownership."

" Those conclusions were based on the following premises: 'Given that Idaho's courts do not favor forfeiture of water rights and that no public interest is served by forfeiture of Ms. Rose's water rights, equity leans against declaring a forfeiture in these unique circumstances.' **Report**, at 10. For those reasons, the Special Master recommended that Ms. Rose is entitled to .04 cfs from Willow Creek to irrigate 1.6 acres from March 15 to November 15 with a priority date of November 23, 1881, based on a 1908 decree."

On April 10, 2007, a ***Motion to Alter or Amend Special Master's Report***... was filed by Mr. Poulton. In the ***Order Denying Motion to Alter or Amend*** of September 6, 2007, it states: "Mr. Poulton correctly argued 1) that there can be a partial forfeiture of water rights by nonuse for five years and 2) that 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 a water right. *Sagewillow v. Idaho Dept. of Water Res.*, 70 P.3d 669, 138 Idaho 831 (2003). However, *Sagewillow* defined the term 'claim of right' as when a third party has 1) instituted proceedings to declare a forfeiture, 2) obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use or 3) has used the water pursuant to an existing right."

“Mr. Poulton does not qualify as a third party asserting a claim of right under any of the above three definitions. “ The Claimant asks that this be considered, especially after the amount of time and careful deliberation Special Master Terrence A. Dolan took to reach this conclusion.

The Claimant also asks the Court to regard in particular the hearing held January 11, 2007 before Special Master Dolan, particularly regarding the testimony of Jeanie Robertson, Senior Water Resource Agent with the Idaho Department of Water Resources, with 13 years experience in water rights recommendations, who made the recommendation for Claimant water right, and in particular the testimony on page 43, lines 6 through 25 and page 44, lines 1 through 8:

Q. : And, again, you weren't concerned with imagery from 1987 and forward—

A. : Because they were protected from the dates the claims were filed.

Q. : And even though that ditch has been moved, that still didn't factor into recommending, because of the protection?

A. : No. In fact, I made my recommendation before this was done – at least before I knew that it was done. Yeah, I made that recommendation before that ditch was moved.

Q. : So in your desktop review of photos ranging from 1962 to 1987, what were you basically able to glean?

A. : I was able to glean that there was some activity going on and some probable irrigation. I certainly couldn't recommend that, nope, there was no irrigation on that parcel and disallow it. I wasn't able to feel comfortable with that.

Q. : So you were not able to find, at least based on those photos, non-use

A. : That's correct.

Q. : And based on your experience, do you feel that there was a correct recommendation?

A. : Yes, I do.

Q. : Finally, Jeanie, is the Department's recommendation based on historical evidence of beneficial use and a reasonable conclusion?

A. : I believe it is.

Claimant also asks the Court to consider in particular the testimony of Jeanie Robertson on page 98, lines 24 and 25 and page 99, lines 1 through 25, and Page 100, lines 1 through 4:

Q. : Jeanie, I just wanted to clarify a couple of things again and maybe just reiterate, again: How many years of experience do you have recommending water rights in the SRBA?

A. : 13.

Q. : And, again, during those 13 years, you've reviewed aerial photographs many numbers of times?

A. : Yes, and I've made probably between 1500 and 1800 recommendations.

Q. : And do you rely on aerial photography for almost all of those recommendations?

A. : Yes, I do.

Q. : The aerial photography that we've been discussing today, based on what Mr. Mundt had to offer and the questions you've been presented I guess on cross-examination by the parties, do you have any different opinions as to the nature of your recommendation?

A. : No, I don't. I still would stick by my recommendation.

Q. : And that recommendation is that you found evidence of irrigation in the place of use?

A.: Yes.

Q. : And while that may not be center pivot irrigation, there was some irrigation?

A. : There was some – I couldn't determine that there wasn't irrigation, so I found that there was, you know, evidence of some casual irrigation that I could recommend.

Q. : And then just to close: Is your recommendation based on historical evidence of beneficial use and reasonable conclusions?

A. : Yes, it is.

In conclusion, Claimant would like to correct errors that I have knowledge of

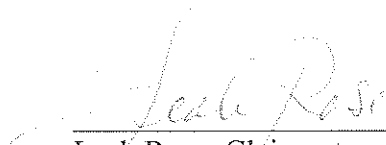
in Mr. Poulton's *Challenger's Opening Brief*. In the trial, Mr. Tribe objected to anything dealing with the Burley Highway District (p. 173 of transcript) calling it "irrelevant to the case" and "immaterial." Yet discussion of the Highway District is used at length on page 4 of the *Challenger's Opening Brief*. Also, on page 4, with regard to the discussion of the driveway, it is based upon Mr. Poulton's recollections. The culvert under the driveway was not "continually" clogged, and when it did have occasion to, it would have happened after 1998, because Mr. Harman, who owned the property prior to this, installed the culvert under the driveway, and had the means to unclog the debris. Also, when asked by Ms. Rose if any help could be given, Mr. Poulton refused it. Also, any flooding in that area would not have been caused by the driveway prior to the culvert being installed (c1988) and could not explain the presence of flood water in aerial photos because the culvert was not there.

Mr. Poulton's headgate (p. 5) is located 6 feet from the Rose property, not "10 to 12 feet from the Northeast corner of Rose's property." This error was earlier corrected by Ms. Rose after having measured the distance. On page 6, it states that "there is no one who ever irrigated the property. Clark Harman, from whom claimant purchased the property, told claimant he irrigated the property, but that Mr. Poulton prevented him from doing so after a time. He had plans to irrigate the pasture from a ditch on the southwest corner of the subject property and he said it would have been the best way to irrigate the property.

Finally, claimant states that she bucketed the water from Willow Creek to water her

property, whether Mr. Poulton approved or not, because when claimant purchased said property from Mr. Harman, she was told that she was getting a valid water claim, and wished to be able to use the water from Willow Creek.

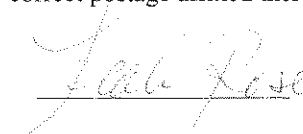
Submitted this 20st day of December, 2007.



Leah Rose, Claimant
Pro Se

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I served a true and correct copy of the following document on the persons listed below by United States Mail with the correct postage affixed thereto on this 20th day of December, 2007.



Leah Rose

Document Served: Claimant Brief

Persons Served:

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