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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
FEB 27 2008	
By _____	Clerk
_____	Deputy Clerk

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: 45-00167A
	)
Case No. 39576	) MEMORANDUM DECISION AND
	) ORDER ON CHALLENGE (POULTON v.
	) ROSE)
	)
	) ORDER OF PARTIAL DECREE
	)

Ruling: Recommendation of the Special Master that water right 45-00167A was not forfeited or abandoned is **affirmed**.

I.
APPEARANCES

LEAH G. ROSE, Claimant/Respondent, *pro se*,

MR. MICHAEL P. TRIBE, Robinson & Associates, Rupert, Idaho on behalf of the
Objector/Challenger, William A. Poulton

JOHN M. MELANSON, Presiding Judge of the SRBA, presiding.

II.
PROCEDURAL BACKGROUND AND FACTS

1. On August 23, 1988, John and Margaret Koyle, predecessors-in-interest to claimant Leah G. Rose ("Rose"), filed a claim in the Snake River Basin Adjudication (SRBA) to water right 45-00167A claiming .04 cfs from Willow Creek for year-round irrigation of 1.9 acres in Cassia County with a priority date of November 23, 1881.
2. The claim is a split of water right 45-00167 which is surface irrigation right originally decreed in *Thompson v. Poulton*, Decree of the Idaho Fourth Judicial District,

Cassia County (Mar. 17, 1908). The place of use for the claim was originally part of the Poulton Ranch owned by Thomas A. Poulton. In the 1930's, Thomas A. Poulton conveyed the parcel to the LDS Church for the purpose of constructing a church. The church structure was on the property from 1930 until about 1945. Eventually, the building was removed from the property leaving only the concrete foundation. In 1972, John and Margaret Koyle purchased the property from the LDS Church. The Koyle's filed the subject claim on August 23, 1988.

3. On May 8, 1989, the Koyle's sold the property to Clark and Tina Harman. The change of ownership was documented with IDWR. The Harman's buried the concrete foundation and moved a mobile home on the property. The home was placed on additional fill dirt to avoid run off flooding caused by Willow Creek during high water.

4. On August 14, 1998, the Harman's sold the property to Leah Rose. In 2002, the Idaho State Highway Department moved the portion of the Willow Creek stream bed west of where it was located previously. The stream bed no longer runs adjacent to the east side of the Rose property. The stream bed was rerouted in part so that it no longer ran through a culvert under Rose's driveway. Apparently, the culvert would become obstructed and run over its banks. Change of ownership from Harman to Rose was not documented with IDWR until August 3, 2004. There is no headgate or other means of diversion at the claimed point of diversion. Because of the rerouting of the streambed the claimed point of diversion is no longer available.

5. On September 7, 2004, the Director of the Idaho Department of Water Resources ("IDWR") filed the *Director's Report for Irrigation and Other, Reporting Area 10, IDWR Basin 45* recommending the claim to Leah G. Rose as claimed except the irrigated acreage was reduced to 1.6 acres and the period of use was limited to March 15 to November 15.

6. On January 3, 2005, William A. Poulton ("Poulton") filed the only *Objection* alleging the water right should not exist as a result of forfeiture.

7. On April 14, 2006, IDWR filed a *Supplemental Director's Report Regarding Subcase No. 45-167A* stating that the recommendation was based on the prior decree and subsequent aerial photographs evidencing irrigation.

8. Following a trial on the *Objection*, the Special Master issued a *Special Master's Report and Recommendation* recommending the claim as reported by IDWR. Based on uncontroverted evidence the Special Master found that Poulton established a five year consecutive period of non-use between 1908 and 1962. However, based on conflicting evidence the Special Master determined that there was a resumption of use prior to the initiation of forfeiture proceedings or the filing of a claim to the unused water right.

9. On September 6, 2007, the Special Master issued an *Order Denying Motion to Alter or Amend*. On September 20, 2007, Poulton timely filed the instant Challenge.

III. ISSUES RAISED ON CHALLENGE

Poulton raises several issues in the Challenge. The Court summarizes the issues as follows:

1. Whether the Special Master erred in finding that there was a resumption of use after the finding that the "Objector clearly established non-use of Willow Creek water between 1908 and 1962?"
2. Whether the Special Master erred by not finding specific facts demonstrating resumption of use after the findings of the Director's Report were rebutted by testimony?
3. Whether the Special Master erred by not considering the doctrine of partial forfeiture with respect to the quantity of water resumed?
4. Whether the Special Master erred by not determining the proper point of diversion for a resumption of use when there was testimony that the claimed point of diversion was incapable of diverting water?
5. Whether the Special Master erred in finding that there existed circumstances beyond Rose's control which prevented Rose from beneficially using the water?
6. Whether the Special Master erred by not considering that the water right was abandoned based on the extended period of non-use?

IV.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on January 15, 2008. The parties did not request the opportunity to submit additional briefing, and the Court does not require any additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision the next business day, or January 16, 2008.

V.

STANDARD OF REVIEW OF SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Seccombe*, 115 Idaho

at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial,¹ although perhaps conflicting, evidence. *Seccombe*, 115 Idaho at 435, 767 P.2d at 278; *Higley*, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a special master's findings of fact under I.R.C.P. 53(e)(2) just as an appellate court reviews a district court's findings of fact in a non-jury action, i.e. using the "clearly erroneous" standard. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence *de novo*. Wright and Miller, Federal Practice and Procedure § 2614 (1995); *Zenith Radio Corp. v. Hazletine Research, Inc.*, 395 U.S. 100, 123 (1969). The mere fact that on the same evidence an appellate court might have reached a different result does not justify it in setting a district court's findings aside. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, § 2585.

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971).

In the application of the above principles, due regard must be given to the opportunity a special master had to evaluate the credibility of the witnesses. I.R.C.P. 52(a); *U.S. v. S. Volpe & Co.*, 359 F.2d 132, 134 (1st Cir. 1966).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much a prerogative of the finder of fact as inferences as to the credibility of witnesses. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). The rule in Idaho is

¹ Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

less clear. Professor D. Craig Lewis states that “[u]nlike Fed. R. Civ. P. 52(a), IRCP 52(a) does not explicitly state that the ‘clearly erroneous’ standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of Appeals has held that it does, relying on the Idaho Appellate Handbook.” Lewis, Idaho Trial Handbook, § 35.14 (1995), (citing *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook § 3.3.4.2.).

The party challenging the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. *Ernst v. Hemenway and Moser Co., Inc.*, 126 Idaho 980, 987, 895 P.2d 581, 588 (Ct. App. 1995); *Zanotti v. Cook*, 129 Idaho 151, 153, 922 P.2d 1077, 1079 (Ct. App. 1996).

B. Conclusions of law of a special master.

In contrast to the standard of review relative to findings of fact, a special master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Oakley Valley Stone, Inc.*, 120 Idaho at 378, 816 P.2d at 334; *Higley*, 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court's standard of review of a trial court's (special master's) conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d at 104. Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, *supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

VI. DISCUSSION

A. The Special Master did not err in finding resumption of use after the finding that Poulton established non-use of Willow Creek water between 1908 and 1962.

1. Rose's claim is based on a prior decree.

Poulton argues that the Special Master's findings of resumption of use erroneously rely on the *prima facie* weight of the director's report. This Court disagrees. In the SRBA the claimant carries the ultimate burden of persuasion for each of the elements of the water right claim. I.C. § 42-1411(5); *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). The director's report carries with it *prima facie* weight. *Id.* The *prima facie* weight creates a rebuttable evidentiary presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *State v. Hagerman Water Right Owners* at 745-46, 947 P.2d at 418-19. Where the presumption operates in favor of the claimant, the claimant is relieved from having to produce evidence in support of the claim until the opponent introduces substantial evidence in opposition to the director's recommendation. *Prima facie* weight does not shift the burden of persuasion on the issue. Therefore, once rebutted the presumption disappears and the claimant retains the burden of persuasion on the issue. *Id.*

In the instant case Rose did not rely on the *prima facie* weight of the director's report in support of her claim. Rose's claim was based on the prior decree entered in *Thompson v. Poulton*. A prior decree evidences a legal right to the use of water and is binding on parties to the decree and their privies. *Hagerman Water Right Owners* at 742, 947 P.2d at 415. A prior decree is not conclusive proof of the nature and extent of a water right because the right may be subsequently lost or reduced based on evidence of forfeiture or abandonment. *Hagerman Water Right Owners* at 741, 947 P.2d at 414. The IDWR claims file containing the prior decree and some of the chain-of-title conveying the appurtenant water right was admitted into evidence. Both Poulton's and Rose's

predecessors-in-interest were parties to the decree and therefore Poulton and Rose are bound by the decree.

2. Poulton must prove abandonment or forfeiture as well as disprove any resumption of use by clear and convincing evidence.

The burden is then on Poulton to prove forfeiture or abandonment by Rose or her predecessors-in-interest. Statutory forfeiture is based on Idaho Code § 42-222 (2) which provides that a water right may be lost if not applied to a beneficial use for five consecutive years. I.C. § 42-222 (2); *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). Forfeitures are disfavored under Idaho law and the Idaho Supreme Court has consistently held that forfeiture must be proven by clear and convincing evidence. *Id.* at 389, 647 P.2d 1261. Abandonment of a water right is a common law concept. In *Crow v. Carlson*, 107 Idaho 461, 467, 690 P.2d 916, 922 (1984), the Idaho Supreme Court distinguished between abandonment and forfeiture.

Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right. Forfeiture, on the other hand, is predicated upon the statutory declaration that all rights to use water are lost where the appropriator fails to make beneficial use of the water for a continuous five- year period. I.C. § 42-222(2).

...

While under the doctrine of forfeiture mere non-use of water for a sufficient period of time may be sufficient to bring about a loss of water rights, abandonment is more difficult to prove than forfeiture, in that mere non-use does not result in abandonment. Rather, the party alleging abandonment must prove by clear and convincing evidence that the owner of the water right *intended* to abandon that right.

Id. at 467, 690 P.2d at 922 (internal citations omitted).

Finally, even if a consecutive five-year period of non-use can be established statutory forfeiture is not effective if after the five-year period of non-use the use of the water is resumed prior to a third party: 1) Claiming right to the water; 2) instituting proceedings to have the right declared forfeited; 3) obtaining a valid water right authorizing the use of such water with a priority date prior to the resumption of use; or 4) using the water pursuant to an existing right. *Sagewillow v. Idaho Dept. of Water*

Resources, 138 Idaho 831, 842, 70 P.3d 669, 680 (2003). Although the claimant of the water right has the burden of raising defenses to statutory forfeiture, **the burden of persuasion remains on the party claiming that the water right was forfeited and must disprove the defense.** *Id.* This defense also applies to abandonment. *See discussion infra* section VI.E.

3. **The Special Master determined Poulton had proven non-use between 1908 and 1962 based on uncontroverted evidence but found the evidence to be conflicting between 1962 and when the claim was filed in 1988.**

The Special Master concluded that: “IDWR’s finding of irrigation on the property as early as 1962 is credible and consistent with the parcel having a decreed water right, a matter of public record, and common use of the property as part of a “cattle corridor” or stock driveway.” Pursuant to I.R.C.P. 53(e)(2), the district court shall accept the factual findings of the special master unless clearly erroneous. *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001) (citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997)). This Court has reviewed the record and finds the Special Master’s findings to be supported by substantial evidence, albeit conflicting. Whether or not this Court may have reached a different conclusion is not the standard this Court applies to the findings of a special master.

At trial, Poulton offered testimony of non-use beginning as early as 1908. The earliest evidence relied on by Rose controverting the assertion of non-use or supporting resumption of use was through the aerial photographs and interpretive testimony offered and admitted by IDWR, which dated back to 1962. This is not Rose’s reliance on the director’s report but rather the evidence that was admitted at trial, albeit through IDWR. The Special Master determined that Poulton had established a consecutive five-year period of non-use prior to 1962 based on Poulton’s uncontroverted evidence. However, after 1962, the Special Master found the evidence to be conflicting as to resumption of use.

Aerial photographs were admitted into evidence that were taken in 1962, 1968, 1976, 1987, 1992 and 2004. Senior Water Resource Agent Jeannie Robertson testified

that the photos supported the conclusion that irrigation was taking place. Jeannie Robertson testified that she has made approximately 1500-1800 recommendations and that approximately two-thirds of the recommendations are made based on “desk top” reviews as opposed to actual field inspections. These reviews include the use of aerial photographs. She also testified that the aerial photographs were taken in late July or early August so as to distinguish between spring runoff and seasonal flooding. She also testified that in her experience aerial photographs can be more reliable than eye witness accounts. She testified that there was evidence of some pooling of water taking place on the property. She testified that based on the aerial imagery the evidence of use in 1992 and 2004 was less apparent than in the 1962 and 1976 images, particularly as to the southern portion of the property.

Jacob Mundt, a GIS mapping coordinator for Ada County, testified that aerial photography does have some “very severe limitations” as opposed to eye witness accounts. Mr. Mundt also testified that he did not have professional experience in examining matters dealing with the irrigation of agricultural land.

John Anderson, who purchased a farm in the area in 1971, testified that he drove by the place of use about three times a week. Mr. Anderson testified that he witnessed cattle grazing on the subject property and assumed that they were Poulton’s cattle. The last time he noticed cattle on the property was in 1989 when Clark Harman purchased the property. He testified that he never witnessed whether or not water was actually diverted onto the property because the row of trees bordering the property obstructed his view. Also a ninety-degree turn in the road made it difficult to concentrate on something other than the road.

Grant Matthews testified that he lived on a ranch in the area until 1978. He testified that he never witnessed irrigation from Willow Creek taking place on the property. He testified that cattle were frequently watered out of Willow Creek on the property.

Margaret Koyle, who purchased the Rose property with her husband in 1972, testified that after the property was purchased they moved to Gooding and she never observed the property. She testified that she didn’t believe her husband or children

irrigated the property but that they did bring cattle through the property. She testified that she and her husband filed a claim for the subject appurtenant water right in 1988 and sold the property including the water right to the Harman's shortly thereafter.

Cory King, who has lived and worked in the area since 1985, testified that he drives by the Rose property about a dozen times a week. He testified that he has never witnessed irrigating taking place on the property. He testified that he was physically on the property in 1989 for about two hours when Clark Harman hired him to bulldoze the foundation of the old church. He testified that he did not see a headgate or any other means of diversion. He testified that the only vegetation growing was the row of trees along the creek, sagebrush and dried grass. He also testified that he had never seen cattle grazing on the property.

Poulton testified that he grew up and lived most of his life in the area. He testified that between 1972 and 1988 he never witnessed any irrigating taking place on the property. He testified that spring runoff historically creates a pool on the property. He testified that as a result of heavy rains and debris the ditch banks on the north side of the Rose property would overflow. He testified that he never intentionally ran cattle on the property and on occasion a cow or two may have wandered onto the property. He testified that he has a rotation worked out with other water users on the creek and at times has only received a portion of his water. He testified that Harmon irrigated his lawn on the property but did so from his domestic well. He testified that he never prevented either Harman or Rose from taking water from the ditch.

Rose testified that she purchased the property in 1998 she purchased it with the water right, which she believed to be valid. She testified that thereafter Poulton told her that she had no right to use Willow Creek water. She recalls Poulton describing her water right as a worthless piece of paper. She testified that Harman installed the domestic well on the property in 1987 when he purchased the property. Rose testified that she hasn't irrigated the pasture since she purchased the property. She testified that since the highway department moved the ditch in 2002 a lot of her trees bordering her property have died. She testified that she has tried to water the 80 foot poplar trees with the domestic well but that it didn't work very well. Rose testified that she bucketed water

out of the ditch to water her garden and plants. Rose also testified that she has in the past allowed Poulton to graze a couple of his cows on the property. No testimony was presented from Rose's predecessor-in-interest Harman.

The uncontroverted testimony supports that pooling routinely occurred on portions of the property. Poulton testified as to pooling by spring runoff. Jeanne Robertson testified as to evidence of pooling from the aerial photography. Poulton testified that heavy rains and debris would cause the ditch banks to overflow and flood the property. Harman erected his house on fill dirt because of concerns over flooding. The highway department moved the stream bed because of flooding which occurred as a result of obstructions in the culvert under Roses driveway. The Rose property is bordered by rows of 80 foot poplar trees which relied on the location of the streambed and which began to die when the streambed was moved. Whether water was physically diverted out of the ditch or the prior owners relied on the frequent overflow and flooding or both is not clear from the record. The aerial photography depicted less water on the property in 1992 and in 2004, which is consistent with Roses testimony that she did not irrigate the pasture after she purchased the property in 1998. There is also evidence to support that the trees bordering the property relied on the water and the location of the stream bed.

In *Memorandum Decision and Order on Challenge; and, Order of Partial Decree (Wood v. Troutt)*, SRBA subcase no. 65-05663B (May 9, 2002) ("*Wood v. Troutt*") a case involving similar facts, the Honorable Roger S. Burdick, then Presiding Judge of the SRBA held:

Lastly, evidence of non-use alone is not sufficient to prove forfeiture. In order for a water right to be forfeited water must be available to satisfy the water right during the alleged period of non-use. Thus low water years and/or the relative priorities on a given source must be taken into account. The testimony indicated that Camp Creek experienced good and bad water throughout the entire summer. If for example during a dry year there was not water available to use the water right then that year is not considered a period of non-use for purposes of forfeiture. Additionally, the water must be needed during the period of non-use. In the case of irrigating a pasture, unusually high precipitation within a growing season may alleviate the need to irrigate during the part of the summer the creek is capable of supplying water. The Court raises this issue because Wood cautioned the Special Master to not be misled by the condition of the vegetation depicted in the photograph exhibits and explained that the property sits on a

lowland that receives runoff as well as a lot of precipitation in the spring. Given the fluctuations in the precipitation and the fluctuating supply of water from year to year, the availability and necessity of water during any of the periods in question are relevant to establishing forfeiture by clear and convincing evidence. No such evidence was presented.

Id. at 33.

There is conflicting testimony over the number and frequency of cattle that were grazed on the property. John Anderson testified that he witnessed cattle being grazed on the property between 1971 and 1989 and assumed them to be Poulton's cattle. Grant Matthews testified that cattle were frequently watered out of Willow Creek on the property. Margaret Koyle testified that her husband brought cattle through the property. Corey King testified that since 1985 he drove by the property about a dozen times a week and has never seen cattle grazing on the property. Poulton testified that other than a few stray cattle wandering on the property he has never intentionally grazed cattle on the property. Rose testified that she allowed Poulton to graze a couple of his cows in the pasture. Accordingly, there is conflicting evidence to support that historically water ended up on the property and that cattle were historically grazed and watered on the property until 1988. In addition, what is at issue is the irrigation of a pasture which requires a less sophisticated infrastructure or delivery system than would be required for crop row irrigation. There was also evidence of some history of conflict over the water right and the Rose property. In that context the Special Master also had the opportunity to observe and weigh the credibility and biases of the witnesses. In *Wood v. Troutt*, the Court discussed witness credibility:

The conflicting evidence of non-use presented by Wood really distills down to the testimony of Edward and Jean Wood regarding their personal observations of non-use between 1986 and 2000. The statements regarding forfeiture contained in Kay Walker's report were predicated on Edward Wood's representations, not Walker's observations. The photos presented of the irrigation ditch depict its condition in 1999. It is undisputed that Troutt had not used that portion of the ditch since 1988. The Special Master found that the Woods were "mistaken" in their observations regarding non-use. However, after reviewing the record this Court would also discount any weight given to the Wood testimony. Significant to this

Court is the testimony of Edward and Jean Wood, both firm in their conviction, to the effect that they carefully monitored any activity on their property as well as the adjacent Troutt property and never observed irrigating taking place. However, from the testimony of the disinterested witnesses it is clear that periodic irrigating did in fact take place between 1986 and 1992. This is inconsistent with the Woods' testimony. Wood then argues that even if irrigating did take place on the Troutt property it was from an unauthorized point of diversion. While this argument raises another independent issue (*see infra*), it does nothing to lend credibility to the Woods' statements regarding their observations. Consequently, even though the evidence is conflicting, there is nonetheless substantial evidence to support the Special Master's finding that irrigation took place periodically between 1986 up through the 1992 irrigation season. Although not a necessary prerequisite to upholding the special master's findings this Court would have also reached the same result.

Id. at 31.

In summary, the evidence of non-use was based on the uncontroverted testimony of Poulton. The evidence of resumption of use between 1962 and 1988 was conflicting. The burden is on Poulton to prove by clear and convincing evidence that no resumption of use took place. Based on the foregoing this Court cannot find that the Special Master was clearly erroneous in finding a resumption of use between 1962 and the date the claim was filed in 1988.

B. The Special Master did not err by failing to consider the doctrine of partial forfeiture with respect to the quantity of water resumed.

In finding a resumption of use the Special Master found resumption of use between 1962 and 1988, which supported irrigation for the entire property. After Rose purchased the property the only evidence of irrigation was her watering the trees and removing water from the creek by bucket. However, because the forfeiture statute tolled upon the filing of the claim the Special Master's finding of resumption prior to 1988 supports a finding that the right was not partially forfeited.² Had the Special Master relied solely on Rose's resumption of use the result may have been different as the

² Long established law-of-the-case in the SRBA holds that the running of the forfeiture statute tolls upon the filing of the claim. *For comprehensive discussion see Wood v. Troutt* at 12-15. This law-of-the-case has not been appealed nor is it being challenged in the instant case.

resumption defense only applies to the portion of the right where use was resumed. See *Sagewillow v. Idaho Dept. of Water Resources*, 138 Idaho at 842, 70 P.3d at 680.

C. The Special Master did not err by not determining the proper point of diversion for a resumption of use when there was testimony that the claimed point of diversion was incapable of diverting water.

One of the issues raised in *Wood v. Troutt*, was that the claimed point of diversion was incapable of delivering water. The Court held that because the claimant was nonetheless diverting water from the same source, albeit at a different location and using the same appurtenant water right that forfeiture was not the proper sanction.

While this Court does not condone the unauthorized change in the point of diversion, in this particular case the change in the point of diversion for the consecutive five-year period does not constitute non-use of the water right for purposes of establishing forfeiture. Idaho Code § 42-108 and 42-222 do not provide for forfeiture of the water right as the sanction for changing the point of diversion without authorization. Idaho Code sections 42-351 and 42-1701B set forth the appropriate sanctions. In this case, Troutts were clearly using the same water right (i.e 65-05663B) on the same land for the same beneficial use and therefore the Court finds that the use from the unauthorized points of diversion in excess of the five-year statutory period did not result in forfeiture of the water right.

Wood v. Troutt at 35. Consequently, whether water was being diverted at the claimed point of diversion or at some other point on the creek the result is not forfeiture.

In 2002, the highway department moved the creek channel apparently making the claimed point of diversion no longer usable or practical. The point of diversion is described as being located within two ten acre tracts. Whether or not water can be accessed via pump from within these ten acre tracts is not entirely clear from the record. However, to the extent it cannot be readily accessed, Rose will have from the date of entry of the partial decree to within the statutory period to arrive at a solution. To the extent that Rose seeks to establish a new point of diversion outside of these 10 acre tracts, she will need to comply with applicable law and procedure for transferring a point of diversion.

D. Whether the Special Master erred in finding that there existed circumstances beyond Rose's control which prevented Rose from beneficially using the water?

Having affirmed the Special Master on other grounds the Court need not decide whether the circumstances found to have prevented Rose from beneficially using the water are of the type recognized as a legally cognizable as a defense to forfeiture.

E. The Special Master did not err by not considering that the water right was abandoned based on the extended period of non-use.

This Court does not read the *Sagewillow* decision to hold that the resumption of use doctrine is limited to statutory forfeiture. The resumption of use doctrine also applies to abandonment. In Justice Kidwell's concurrence he wrote:

Previous Idaho case law suggests, in dicta, that resumption of use, a common law defense to abandonment, may apply in cases of statutory forfeiture. Although somewhat obfuscated by prior case law, careful scrutiny of Idaho Code § 42-222(2) demonstrates that the legislature did not include the antiquated doctrine of a resumption of use as a defense to forfeiture.

Sagewillow at 846, 70 P.3d at 684. (internal citations omitted).

VII. ORDER PARTIAL DECREE

Pursuant to I.R.C.P. 53(e)(2) and *SRBA Administrative Order 1*, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the *Special Master's Report* and wholly adopts them as its own.

Therefore, IT IS ORDERED that the above-captioned water right is hereby decreed as set forth in the attached *Partial Decree Pursuant to I.R.C.P. 54(b)*.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

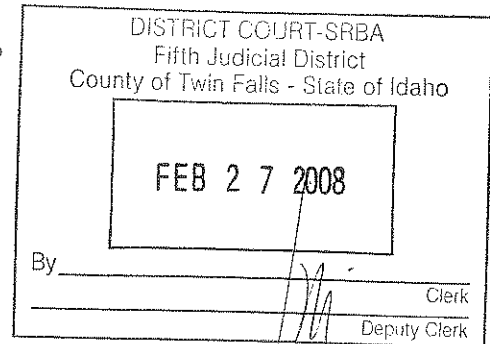
Dated Feb. 27, 2008



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 45-00167A



NAME AND ADDRESS: LEAH ROSE
994 S 150 E
BURLEY, ID 83318

SOURCE: WILLOW CREEK TRIBUTARY: SINKS

QUANTITY: 0.04 CFS

The amount of water diverted under this water right, 45-167B and 45-13666 may not exceed 25% or 1/4 of the stream flow of Willow Creek at the point of diversion described below at any given time.

The amount of water diverted under the following water rights may not exceed 50% or one half of the stream flow of Willow Creek. Combined Right Nos.: 45-166A, 45-166B, 45-167A, 45-167B, 45-11928, 45-13421, 45-13623, 45-13631, & 45-13632.

PRIORITY DATE: 11/23/1881

POINT OF DIVERSION: T12S R23E S09 SESESE Within Cassia County
S26 SWNESE

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	0.04 CFS

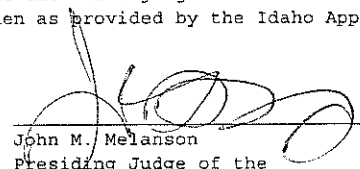
PLACE OF USE: Irrigation Within Cassia County
T12S R23E S09 SESE 1.6
1.6 Acres Total

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM
DECISION AND ORDER ON CHALLENGE (POULTON V ROSE) ORDER OF PARTIAL
DECREE was mailed on February 27, 2008, with sufficient first-class
postage to the following:

WILLIAM A POULTON

Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396
Phone: 208-436-4717

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

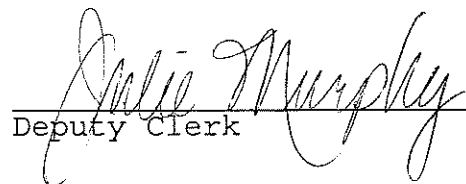
LEAH ROSE
994 S 150 E
BURLEY, ID 83318
Phone: 208-677-9985

ORDER

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FILE COPY FOR 00399

Deputy Clerk

A handwritten signature in cursive script, appearing to read "Julie Murphy", is written over a horizontal line.