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DEPARTMENT OF
WATER RESOURCES

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. 74-54
	)	
	)	LEADORE LAND PARTNERS LIMITED
Case No. 39576	)	PARTNERSHIP'S RESPONSE TO WHITTAKER'S
_____	)	MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." I.R.C.P. 56(c). F. James Whittaker and Paula J. Whittaker's (Whittaker) March 14, 2008 *Motion For Summary Judgment* must be dismissed because the Whittakers, along with the other objectors, have not established non-use of water rights 74-54 sufficient to demonstrate a forfeiture. The objectors' information is consistent with the continued beneficial use of water right 74-54 as determined in the original Lemhi Adjudication and as recommended to the SRBA Court by the Idaho Department of Water Resources (IDWR).

I. Summary judgment of forfeiture is not appropriate when facts brought forward by the objectors are consistent with IDWR's investigation, examination, and recommendation of the nature and extent of water right 74-54.

In the Whittakers' Motion for Summary Judgment, they present facts that they claim support a finding of non-use. However, what these facts primarily demonstrate is that the

situation on the ground at the place of use for 74-54 is materially the same as it has always been. The Department used these same facts to reach a determination that the water was being beneficially used sufficient to support water right 74-54.

A. The Director's Recommendation for SRBA claim 74-54 is prima facie evidence of the nature and extent of water right 74-54.

Idaho Code section 42-1411(5) explains that, "(s)ince the director's report is **prima facie evidence of the nature and extent of the water rights** acquired under state law...(a)ny party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." (emphasis added)

In the Supreme Court of Idaho's decision in *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614 (1995), the Court defined the status of the Director's report as follows:

The Legislature's direction that the contents of the Director's report shall constitute prima facie evidence of some water rights claims was a permissible exercise of the authority, recognized in I.R.E. 301, to create an evidentiary presumption. Unless that evidentiary presumption is overcome by the evidence or the application of that presumption is clearly erroneous on its face, the facts set forth in the Director's report are established.

The determinations of the "nature and extent" of a water right made by IDWR and evidenced by the Director's report are entitled to a high level of respect and the presumption of their correctness is not easily overcome. The Director serves as the SRBA Court's "independent expert and technical assistant" with a responsibility to "assure that claims to water rights acquired under state law are accurately reported".¹ The facts presented in Whittaker's Motion for Summary Judgment do not demonstrate a change in circumstances from those that the

¹ Idaho Code 42-1401B

Department examined in reaching its determination that water right 74-54 was being applied to a beneficial use and merited recommendation.

B. The objectors have not overcome the prima facie evidence of the nature and extent of water right 74-54 presented by the Director's Report because their evidence is consistent with the facts of the original investigation of 74-54 in the Lemhi Adjudication and consistent with the continued use of 74-54 subsequent to the original Lemhi investigation.

Consistent with Leadore Land Partners' Motion for Partial Summary Judgment the Whittakers acknowledge that the relevant time period for purposes of a forfeiture analysis is December 30, 1982 (the entry of the partial decree in the Lemhi Adjudication) to April 9, 1990 (the date of filing of the SRBA Claim for 74-54).² However, they proceed to present numerous affidavits, aerial images, and watermaster reports that paint a picture of the factual situation surrounding the diversion and application to a beneficial use of water right 74-54 dating back to the 1930's. What the evidence that they present does demonstrate is that there has been no significant change in circumstances surrounding the diversion and application to a beneficial use of water right 74-54 from its establishment up through the present. The Department examined essentially the same factual situation when it conducted its examination in preparation for the Lemhi adjudication and it reached the conclusion that water was in fact being applied to a beneficial use and recommended water right 74-54 accordingly.

The Whittakers rely on the affidavits of numerous friends and neighbors to support the proposition that water right 74-54 has not been applied to a beneficial use since well before the Lemhi adjudication. These affiants allege variations on the same theme: (1) that over the course of their respective times spent in and around the place of use for water right 74-54 none of them

² Whittakers' *Memorandum in Support of Motion for Summary Judgment* at 1

has observed water being put to use and (2) that the ground is sagebrush covered.³ The Whittakers choose to summarize and conclude their presentation of the statements of their affiants with the “memorandum prepared by an unnamed IDWR officer” which states that “the place of use does not appear to have been cultivated for an extended period of time and consists mainly of low sagebrush and some short grasses.”⁴ This line of reasoning, however, falls prey to the very subtle trap of assuming that *irrigated* land is necessarily *cultivated* land.

The remaining evidence presented in the Whittakers’ *Memorandum* rests on the same problematic assumption. Exhibit J, the Lemhi County Assessment Records are included because they state that the place of use for 74-54 is “incapable of supporting crops on regular rotation.”⁵ Likewise, Exhibit K (Aerial maps from 1946 and 2004), is included because the Whittakers conclude that “there does not appear to be any irrigated crop on the property.”⁶ While it is easy to assume land on which a water right is being put to use will be covered in cultivated crops in neat rows this is not the law in Idaho.⁷ When the Department conducted their field examination of the very same ground on June 9th, 1972 they found that “the land was being irrigated but was sagebrush covered.”⁸

The Whittakers present no evidence that that conditions on the ground at the place of use for water right 74-54 (intermittent delivery of water, sparse husbandry, sagebrush covered ground) have materially changed since the Department conducted its field examination in

³ See generally: Affidavit of James Whittaker, Affidavit of Julia Russell, Affidavit of Dan Smith, Affidavit of Ed Peterson, Affidavit of Ted Adams, and notarized letters from Chet Adams and Opal Adams.

⁴ Whittakers’ *Memorandum in Support of Motion for Summary Judgment* at 5, quoting Exhibit I – Copy of Memorandum from IDWR file for 74-54.

⁵ *Id.* at 5.

⁶ *Id.* at 6.

⁷ See generally *McAtee v. Faulkner Land & Livestock*, 113 Idaho 393, 744 P.2d 121 (1987); *Rudge v. Simmons*, 39 Idaho 22, 226 P. 170 (1924); *Pyke v. Burnside*, 8 Idaho 487, 69 P. 477 (1902)

preparation for the Lemhi Adjudication. To the contrary, their evidence seems to support the idea that conditions have generally remained the same throughout the course of the use of water right 74-54. The conditions were much the same when the Department conducted its field examination and concluded that irrigation was taking place. The conditions were much the same when the District Court issued the Lemhi Decree and decreed 74-54 as a valid water right. The conditions were much the same when the Department prepared the SRBA claim for 74-54. And the conditions were much the same when the Director's Report was filed on January 23, 2006 recommending 74-54 be decreed by this Court as it was in the Lemhi Adjudication.

II. If water right 74-54 were subject to examination for forfeiture, disallowal of the right would be inappropriate because of defenses to forfeiture and because there is no clear and convincing evidence of forfeiture.

In 2003, the Idaho Supreme Court reviewed, addressed, and summarized the law of forfeiture that relates to allegations of non-use and defenses to non-use. *Sagewillow, Inc., v. IDWR*, 138 Idaho 831, 70 P.3d 669 (2003). The Court's summary in part follows. The party asserting that a water right has been forfeited by nonuse for a period of five years has the burden of proving the forfeiture by clear and convincing evidence. *Carrington v. Crandall*, 65 IDAHO 525, 147 P.2d 1009 (1944). Although the owner of the water right has the burden of raising defenses to statutory forfeiture, *Jenkins v. State, Department of Water Resources*, 103 IDAHO 384, 647 P.2d 1256 (1982), the burden of persuasion remains on the party claiming that the water right was forfeited, and that party must disprove the defense. *Zezi v. Lightfoot*, 57 IDAHO 707, 68 P.2d 50 (1937).

⁸ Beeman Affidavit, Exhibit 2 (Field Exam Notes from the IDWR Lemhi Adjudication file for water right 74-54).

Many defenses to statutory forfeiture have been recognized over the years, in deference to repeated court decisions that “forfeitures are not favored.” *McAttee v. Faulkner Land and Livestock, Inc.*, 113 Idaho 393, 396 (1987).

As discussed above and cited in Leadore Lands’ Motion for Summary Judgment, the filing of SRBA claim 74-54 on April 9, 1990 presents a defense to forfeiture. From April 9, 1990 until a partial decree is entered for 74-54, the five-year statutory period of non-use for establishing forfeiture law is tolled. *Memorandum Decision and Order on Challenge; and Order of Partial Decree*, subcase 65-05663B (May 9, 2002) (“*Wood v. Troutt*”) at 19. *Wood v. Troutt* is law of the case in the SRBA.

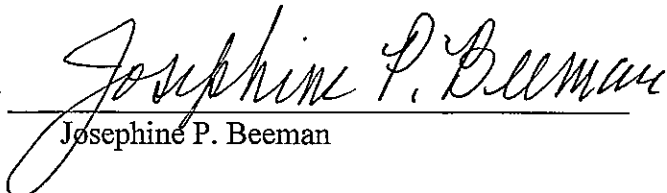
For the seven years between the entry of the partial decree for 74-54 in the Lemhi Adjudication (December 30, 1982) and the filing of SRBA claim 74-54 (April 9, 1990), the Whittaker Motion for Summary Judgment would have to establish by “clear and convincing evidence” that 74-54 was not exercised during five consecutive years that water was available under priority for this right. The evidence in support of the Whittaker Motion for Summary Judgment does not show that water was available to 74-54 during the years that non-use is alleged. Water right 74-54 has a November 12, 1909 priority. Water rights are not forfeited because of the failure to use them for a period of five years if such failure is caused by circumstances beyond the control of the water right holder. *Jenkins v. State of Idaho*, *supra*; *Alamo Water v. Darrington*, 95 Idaho 16 (1972); *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10 (1956); *Welch v. Garrett*, 5 Idaho 639 (1897). It would be necessary to establish by “clear and convincing” evidence that water was available for use under 74-54, before it can be determined that water right 74-54 was forfeited by nonuse of the water.

The law of forfeiture in Idaho also includes defenses based on resumption of use after the five-year period, but before any third party has made a claim on the water, which such resumption being held by the courts as a basis for declining to declare a forfeiture. *Sagewillow, Inc., v. IDWR* (2003), *supra.*, *Application of Boyer*, 73 Idaho 152 (1952); *Wagoner v. Jeffrey*, 66 Idaho 455 (1945); *Carrington v. Crandall*, 65 Idaho 525 (1944). It would be necessary to establish by “clear and convincing” evidence that any junior appropriator used water that was available because of continued nonuse of 74-54. The mere existence of a junior appropriator, however, is not sufficient to show that the junior appropriator has made a claim of right to the water not used by the senior appropriator. It would have to be shown that because of continued nonuse of 74-54, junior appropriators received water that they would otherwise not have received. Water right 74-54 could be filled only during periods of high water flow. It would have to be established that after the statutory period of nonuse, there was water available that could have been used to fill some or all of water right 74-54.

These facts have not been demonstrated and summary judgment is not appropriate.

Dated this 28th day of March 2008.

BEEMAN & ASSOCIATES, P.C.
Attorneys for Leadore Land Partners Ltd. Partnership

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 2008, I caused a true and correct copy of the foregoing **LEADORE LAND PARTNERS LTD. PARTNERSHIP'S RESPONSE TO WHITTAKER'S MOTION FOR SUMMARY JUDGMENT** to be deposited in an official U.S. Post Office receptacle with proper First Class postage affixed, addressed to the following:

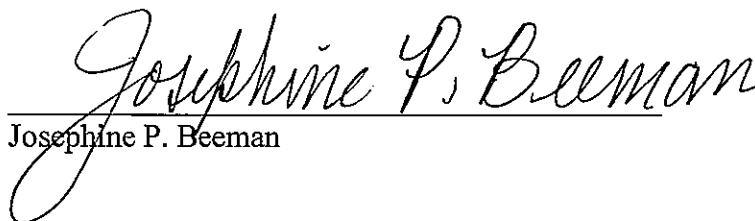
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