

RECEIVED

SEP 03 2009

DEPARTMENT OF
WATER RESOURCES

Jerry R. Rigby (Bar No. 2470)
of RIGBY, ANDRUS
& RIGBY, Chartered
25 North Second East
P.O. Box 250
Rexburg, Idaho 83440
Phone: 208 356-3633
FAX: 208 356-0768

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

	)	Subcase No. 35-02019
In Re: SRBA	)	
	)	Trial Memo Re: Forfeiture
Case No. 39576	)	
_____	)	

INTRODUCTION

Although Idaho law allows forfeiture of a water right, Idaho Code § 42-222(2) states that a water right may only be forfeited after 5 consecutive years of non-use of the beneficial purpose of the right. Furthermore, courts abhor forfeiture and they have a long history of the such abhorrence to forfeiture of water rights.

Argument

THE RECOMMENDATION OF FORFEITURE WAS FACTUALLY ERRONEOUS

Idaho Code § 42-222(2) states that a water right may be forfeited after 5 years of non-use of the beneficial purpose of the right. Thus, for a finding of forfeiture to be valid, it must be shown that a right has actually been un-used for the **full** five years. Further, filing a claim in the

Snake River Basin Adjudication has been ruled by the SRBA courts as a strict tolling of the statute of forfeiture.

In the present sub-case, 35-2019, the determination of forfeiture as recommended by the Director's Report clearly fails. First and foremost, water right 35-2019 has not been "unused" for a period of five full years as required by Idaho Law (I.C. 42-222(2)). The director's report, issued by the Idaho Department of Water Resources, recommended this right be disallowed for non-use from 2002 to 2006. However, the allegation of non-use is false for at least two reasons:

First, a motion to file a late claim was filed on this license on September 2, 2006 and date stamped as received by IDWR on September 6, 2006. This was well within the irrigation season and normal period of use for the area and certainly could have been diverted after September 6 to a beneficial use especially when the crop was pasture.

Therefore, even by the factual assumptions made in the Director's Report, because the claim was actually filed during the period of use for right 35-2019, and therefore before a **full five years** of non-use had passed, it tolled the statute before the five year statutory period had actually run. Memorandum Decision and Order on Challenge and Order of Partial Decree (*Wood v. Troutt*). Subcase No 65-05663B, In Re SRBA, Case No. 39576, May 2, 2002, clearly stands for the legal authority that once a claim is filed in the SRBA, it fully tolls the statute of limitations. As this court is well aware, the tolling can and has occurred for well over 25 years in some cases in the SRBA where the claim was filed in 1988 when most filed their SRBA claims and yet are now receiving their partial decrees. Clearly, a recommendation of forfeiture should not have occurred, and should not be found by this court.

Secondly, in addition to and independent from the above, the Director's Report states that

the water had not been beneficially used from 2002 to 2006. However, contrary to the assertions of IDWR, the water was beneficially applied to the lands in 2002 by Merland and Donetta Nelson, who owned the property and the water right at that time. Testimony and exhibits to be produced at the trial shall more than satisfy the "weight of the evidence" requirement in order for this Court to so find. This would also make the effective period of time in which the water was not used to be less than the required five years. Therefore, as this period of time also does not fulfill the statutory requirement, a finding of forfeiture should not be allowed.

THE COURTS OF IDAHO ABHOR FORFEITURE OF WATER RIGHTS

The courts abhor forfeiture of water rights, and have a long history of such position. In *Hurst v. Idaho-Iowa Lateral & Reservoir Co.*, the court raised this abhorrence position. 42 Idaho 436, 246 P.23. In this Supreme Court case, the plaintiff, John Hurst, brought an action against the Idaho-Iowa Lateral Reservoir Co. to have the company's reservoir right declared forfeit on the ground that the company had forfeited its rights by nonuser. The plaintiff alleged that the company had not used the reservoir to provide water for irrigation purposes for five continuous years. The Supreme Court of Idaho found that forfeiture had not taken place and used the following language to describe the attitude of the court towards forfeiture, "the courts abhor a forfeiture, and, where no public interest is favored thereby, equity leans against declaring a forfeiture." Thus, equity does not favor finding forfeiture unless there is a public interest in finding such.

In the current case before the court, no public interest would be served by a finding of forfeiture. This is purely a matter of private water rights. The only public interest to be served in this case is the furtherance of the law, which in this case would require a ruling of no forfeiture.

Further, “forfeitures are abhorrent and all intendments are to be indulged against a forfeiture.” *Application of Boyer*, 73 Idaho 152, 159, 248 P.2d 540, 544 (1952). In *Boyer*, the claimant applied for a transfer to a new place of use for some of his water rights. Objections of forfeiture were raised by other water users because the claimant had not applied a portion of his water rights to a certain tract of land to which the water rights were appurtenant. He had however, used water on other tracts of his land. In that case, the court found that he had not forfeited his water rights. Black’s Law defines “intendment” as “the sense in which the law understands something,” or “a decision-maker’s inference about the true meaning or intention of a legal instrument.” Blacks Law Dictionary on Westlaw, available at www.westlaw.com. In *Boyer*, the court used the word “intendment” in regards to forfeiture to essentially say that when a court looks at a possible forfeiture, the court should at least indulge an understanding that a forfeiture has not taken place in making its decision.

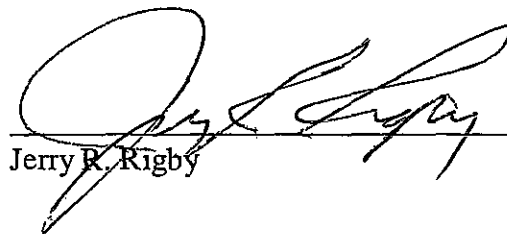
Here, the court should indulge an understanding that a forfeiture has not taken place. First, as has been noted above, the finding of forfeiture was factually inaccurate. Further, the totality of the circumstances would not favor a finding of forfeiture. Merland and Donetta Nelson have irrigated the ground they owned for decades, putting water to which they had a license to a beneficial use. Merland died in 2003, which is the only reason the lands were not irrigated beginning in 2003. During that period of time, he was handling all of the irrigation for the property. Because they had a valid license from the State of Idaho, Merland and Donetta were unaware that they needed to file a claim in the SRBA. Only upon selling the property did it come to Ms. Nelson’s attention that a claim needed to be filed, which was done promptly to secure the water right for the purchaser of her property.

Furthermore, it cannot be overemphasized that this is a case wherein a valid LICENSE exists. This is not a case where proof of a beneficial use is being advanced in order to originally obtain a right pursuant to the rights granted under the Constitution of the law of Idaho. This is a case where the rights were already established fully granted within a license authorizing the diversion and lands described. Therefore, besides the fact that the finding of forfeiture was erroneous, the circumstances surrounding this water right do not warrant a finding of forfeiture.

CONCLUSION

The finding of forfeiture of water right 35-2019 by the and the resulting disallowed recommendation by the Director was an erroneous finding, and should not be followed by this Court. First and foremost, the finding of forfeiture was factually erroneous in that water was diverted through 2002 and a filing of the claim tolled the statute for 2006. Second, Idaho has a clear history of abhorring forfeitures. In this case, the Court should first look at the facts and determine the forfeiture finding to be factually false. Further, the Court should indulge all intendments as against a forfeiture by looking at the situation and determining that a forfeiture finding should not be followed by this Court.

DATED this 1st day of September, 2009.



Jerry R. Rigby

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 1 day of September, 2009, a true and accurate copy of the foregoing was hand delivered or sent by facsimile transmission and/or U.S. Mail, postage prepaid to the following:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environmental and Natural Resource
550 West Fort Street, MSC 033
Boise, ID 83724

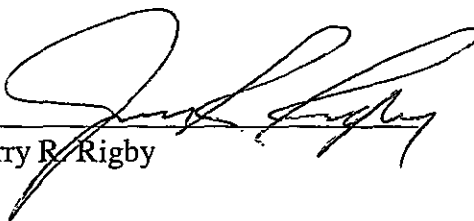
Don and Ruth Adams
2201 W. 1200 S.
Aberdeen, ID 83210

Steven Adams
2215 W. 1100 S.
Aberdeen, ID 83210

Richard Koompin
2229 W. 1000 S.
Sterling, ID 83210

Conan Feld
2781 W. 1800 S.
Aberdeen, ID 83210

Robert L. Harris
Holden, Kidwell, Hahn & Crapo, PLLC
P.O. Box 50130
Idaho Falls, ID 83405



Jerry R. Rigby