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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
SEP - 3 2009	
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 35-2019 (Stieglitz)
	)	
Case No. 39576	)	ORDER REQUESTING POST-TRIAL
	)	DIRECTOR'S RECOMMENDATION
	)	AND SETTING DEADLINES

Claimants Jeffrey and Bridgette Stieglitz filed their *Motion to File Late Notice of Claim* in subcase 35-2019 on September 6, 2006, and their *Motion* was granted on November 27, 2006. They claimed 2.5 cfs from Upper Spring Creek to irrigate 125 acres in Bingham County from April 1 to October 31 with a priority date of May 23, 1910, based on a license.

IDWR filed its *Director's Report for Late Claims, Irrigation & Misc. Claims* on April 27, 2007. The Director recommended the claim be disallowed: "Forfeited / abandoned due to non-use from 2002 to 2006."

Conan Feld, Don and Ruth Adams, Steven Adams and Richard Koompin filed *Objections* to the Stieglitzes' claim between April 27 and July 2, 2007. Mr. Stieglitz was granted leave to file a late *Objection* on January 23, 2008. On December 18, 2008, the Stieglitzes filed a *Notice of Withdrawal of Objection* agreeing the claim should be disallowed, and on December 23, 2008, the Special Master entered a *Report and Recommendation* recommending the claim be disallowed.

On January 28, 2009, Donnetta M. Nelson filed her *Motion to Alter or Amend Special Master Report and Recommendation* because;

Movant was the Seller to Claimant, Jeffrey Stieglitz, and is now being sued by Claimant for damages due to his claim that the lands sold were misrepresented as having the above water rights [35-2019]. Although, there was no such representation, Movant firmly believes that the water right does exist, that it is valid and should be decreed, all of which supports the conclusion that relief should be granted and that Movant be allowed to

advance the claim on her own in order to avoid the inappropriate damage claim by Claimant against her.¹

The Special Master deemed Ms. Nelson's *Motion to Alter or Amend* as a motion to file a late objection and on April 17, 2009, entered an *Order Staying Recommendation*.

Trial on Ms. Nelson's objection was held on September 1, 2009, in Blackfoot, Idaho. Jerry R. Rigby appeared for Ms. Nelson, along with Rob Wood; Conan Feld, Don and Ruth Adams, Steven Adams and Richard Koompin appeared *pro se*; and Andrea L. Courtney appeared for IDWR, along with Michael W. Holliday and Ray Williams. At the beginning of the trial, counsel for Ms. Nelson lodged a *Trial Memo: Forfeiture*.

Mr. Holliday, an IDWR Senior Water Resource Agent, gave two hours of direct testimony in support of the Director's recommendation that claim 35-2019 was forfeited due to non-use between 2002 and 2006. Mr. Holliday, qualified by the Court as an expert hydrographer with 6½ years experience with the IDWR Adjudication Bureau, said he did a field exam of the claim on April 13, 2007, with Mr. Stieglitz and former Senior Water Resource Agent Nathaniel Arave. Based on his observations, statements by Mr. Stieglitz and multiple aerial photographs taken of the property during the irrigation season, Mr. Holliday concluded that before 2002, evidence of irrigation within the claimed place of use was either inconclusive or spotty. But from 2002 to 2006, there was no evidence of irrigation; hence, there was a forfeiture of the water right because of failure to apply the water to beneficial use for five consecutive years when water was available. I.C. §42-222(2).

During cross examination, Mr. Rigby noted that the Stieglitzes filed their *Motion to File Amended Notice of Claim* and *Notice of Claim* in subcase 35-2019 on September 6, 2006. That would be within the five year period of alleged forfeiture cited by Mr. Holliday whether the period is considered five consecutive calendar years or five consecutive irrigation seasons (April 1 to October 31). Mr. Rigby then moved for a "directed verdict" because the only evidence of forfeiture fell short of the five year statutory period. He argued that Mr. Stieglitz's filing "tolled" the running of the five years.

The law of the SRBA case is indeed as argued by Mr. Rigby:

Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. §42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree. . . . [U]nless a claimant

¹ On August 26, 2009, counsel for Mr. Stieglitz filed a *Notice Regarding Property Ownership* stating: "Mr. Stieglitz provides notice to this Court [SRBA] that he does not object in any way to Ms. Nelson pursuing disallowed claim number 35-2019, and that actual ownership of the property and the attendant water right should not be an issue of concern before the Court."

ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture.

Former SRBA Presiding Judge Barry Wood's *Order on Challenge*, subcases 36-2708, *et al.*, December 29, 1999, at 27-28. Also see former SRBA Presiding Judge Roger S. Burdick's *Memorandum Decision and Order on Challenge (Wood v. Troutt)*, subcase 65-5663B, May 9, 2002, adopting and affirming Judge Wood's reasoning:

[T]he Court affirms the prior ruling . . . holding that the running of the statutory forfeiture provision of Idaho Code section 42-222 tolls upon the filing of a claim in the SRBA until a partial decree is entered. After the partial decree is entered the statutory period begins to run anew.

Memorandum Decision, at 22.

The factual evidence presented by IDWR in support of the Director's recommendation established that Mr. Stieglitz's property was not irrigated at least from 2002 until 2006. However, the law of the SRBA case, as argued by Mr. Rigby, bars any finding of statutory forfeiture. When Mr. Stieglitz filed his late claim with the SRBA Court, the five year period of non-use was tolled as a matter of law so long as Mr. Stieglitz, and now Ms. Nelson, continues to pursue the claim to partial decree.

Because IDWR recommended the claim be disallowed, the Special Master is left without an independent expert recommendation of the elements. With that in mind, it is necessary to request an IDWR Director's recommendation of the elements.

THEREFORE, IT IS ORDERED that:

1. The IDWR Director shall file with the SRBA Court his recommendation of claim 35-2019 as a valid water right no later than **Friday, October 30, 2009**;
2. Objections to the Director's recommendation shall be filed with the SRBA Court no later than November 30, 2009; and
3. A status conference shall be held by telephone on **Thursday, December 10, 2009, 1:00 p.m.**

DATED September 3, 2009.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER REQUESTING POST-TRIAL DIRECTOR'S RECOMMENDATION AND SETTING DEADLINES was mailed on September 03, 2009, with sufficient first-class postage to the following:

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ORDER

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