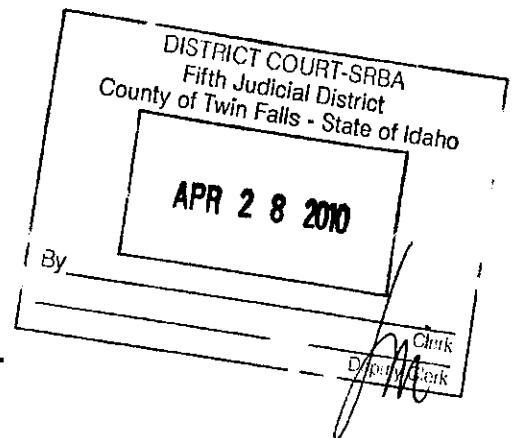




**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

Case No. 39576

Subcases:

Water Right 75-10603 Stuart Felton

Water Right 75-14531 Anne Heltsley Living Trust

Submitted By:

Patrick Murphy

Case Summary

The Idaho Department of Water Resources (IDWR) has identified and recommended that the point of diversion for water rights 75-10603 and 75-14531 is located on Forest Service property. The source for these water rights is an unnamed spring stream that rises on the property of Daryl Hull and gains and flows across the property of Patrick Murphy before entering property administered by the Forest Service. The objector's, Stuart Felton and Anne Heltsley, claim that the point of diversion is the spring head where the source of water rises to the surface on Daryl Hull's property.

The IDWR has identified and recommended that the water course between the recommended point of diversion and claimed point of diversion is a natural, unaltered stream channel. The historical record, physical features and ground assessments support this recommendation. The water user's objection is that they have a ditch right-of-way to the source of the water. Do the objectors have the right to a point of diversion which would result in alteration and channelizing a natural stream when the IDWR recommended point of diversion has always provided the convenient facility for the watering of their lands and the requisite fall needed for their ditch with no proof of injury to themselves?

Findings of Fact:

- 1) The historical documents support the Idaho Department of Water Resource's recommendation that the point of diversion for all four water user's is located on Forest Service property.**

The historical record is clear that the original point of diversion for the irrigation ditch that supplied water to the Eldridge Ranch, and current four water user's; Stuart Felton, Anne Heltsley, Russ Kozacek, and Susan Kozacek was diverted out of the North Fork Salmon River. The Homestead Entry Final Proof for Elizabeth Eldridge, dated and signed July 20th 1909 which

states; "said tracts of lands are covered with three main ditches leading from the North Fork of the Salmon River to and upon said lands."¹

This is further supported with a survey map of the Hughes Creek Ranger Station, dated November 24, 1908, by George Thompson, a Land Examiner for the Salmon National Forest. This survey and associated map shows the location of the current boundaries of Patrick Murphy's property (former Levi Jone's Claim) and the Salmon National Forest property and clearly shows the ditch conducting water from a point of diversion on the North Fork Salmon to the west boundary of the Eldridge property.² This point of diversion is no longer in use and would have ultimately intercepted and co-mingled the un-named spring creek water either on Forest Service property or on the historic Bonanza Placer downstream of the Forest Service Property before it began to highline on the hillside.

The historical record does not provide any information for these water rights from 1908 to 1962, however a Special-Use Application submitted by Lew Gohmes dated September 10th, 1962 has a detailed map that shows the point of diversion in 1962, which is the exact location of current recommended point of diversion by IDWR for the unnamed stream on Forest Service Property. Lew Gohmes purchased the old Eldridge Ranch from the Ravndal's, and owned the property that the current four water user's now own. It is clear that the point of diversion from the North Fork Salmon River was abandoned and the special use application was for "clearing and rebuilding the old ditch." The associated map for the special-use permit clearly shows that the point of diversion is from a "live spring" running through the Hughes Creek Ranger Station horse pasture on Forest Service property, and shows the existing corner markers #7 and #8 on the Harold Hanson property (HES #95), currently Patrick Murphy's property.³ This map is the only historical evidence for a POD from the natural spring channel. Both the Hughes Creek Ranger Station Survey in 1908 and the Special-Use Permit maps were unbiased, not produced or hired by the landowner/irrigator, and accurately describe the property boundaries, ditches, and point of diversions.

¹ Heltsley/Felton Exhibit 2

² Murphy/Hull Exhibit 3

³ Murphy/Hull Exhibit 2

This opinion was also supported in a letter from Rogers M. Thomas, a District Ranger for the Salmon-Challis National Forest, dated September 4th, 1986. This letter was a correspondence to Robert Felton, an attorney and brother of Stuart Felton, who represented the Diamond H Ditch Association, that all four water user's were member's of. This letter talks about applying for special use permits and easements for their ditch on Forest Service property. He specifically states that a later priority date "may be more supportive since a 1908 Forest Service survey shows a ditch in that vicinity coming from the North Fork and not from the spring area." Additionally, he talks about Lew Gohme's special use permit; "This was a 1962 application and the point in time when, as an example, a ditch was dug directly from the spring across the back of the small horse pasture by the Hughes Creek Barn."⁴ This again is the location of the recommended IDWR point of diversion and has not changed in 48 years (1962) and was reaffirmed in this letter in 1986 (24 years ago).

The historical evidence shows that in the initial statutory water rights claim's for both Ann Heltsley and Stuart Felton was that the point of diversion was located in the same quarter – quarter section as the IDWR recommended point of diversion. The IDWR recommended point of diversion is the SE1/4, SW1/4, SW1/4 of Section 15, Township 25 North, Range 21 East, B.M.⁵ The objector's claim the point of diversion is at the spring head in the same township, range, and section 15, but different quarter-quarter-quarter section, being the NW1/4, SE1/4, SW1/4.

On February 18th, 1983, Ann Heltsley applied for an IDWR Form 243 – Claim To A Water Right⁶ from the unnamed stream and claimed a point of diversion for the water right in the SW1/4, SW1/4 of Section 15, Township 25 North, Range 21 East. This is the same quarter, quarter section as the IDWR recommended point of diversion and not the same quarter, quarter section of the point of diversion they are currenting claiming at the head of the spring in SE, SW. Additionally, Mrs. Heltsley states in her Standard Form 1 Objection to her recommended water right, Subcase 75-14531, signed August 5, 2009 that the reasons supporting objections: "The recommended water right does not specify that the gathering point of the un-named spring is the primary point of diversion. Water is diverted from this gathering point and carried by a man

⁴ Hull/Murphy Exhibit 6.

⁵ IDWR Exhibit 1 and 2.

⁶ Heltsley/Felton Exhibit 7.

made ditch to the point of use.” States the” Point of Diversion should be as claimed, and should specify the primary point of diversion as the gathering point of the un-named spring located at the SESWSW of T25N R21E”. Mrs. Heltsley has claimed both in her initial statutory claim to a water right in 1983 and currently that the point of diversion is located at the same location as the IDWR recommended point of diversion.

Stuart Felton submitted as evidence of priority for his water right, 75-10603, the IDWR Form 243 – Claim To A Water Right submitted by Russell J. Kozacek for Claim No. 75-4126 which was dated June 13th, 1979.⁷ The four water user’s use the same ditch, and have the same priority date and would presumably have the same point-of-diversion. By using Russell Kozacek’s statutory claim to a water right as evidence of his own water right, he must have been agreeable to fact that Russell Kozacek’s claimed point of diversion was in the SW, SW of Section 15. This is again in the quarter, quarter section of the recommended point of diversion of IDWR. It is not in the SE, SW as they are now claiming. Russell and Susan Kozacek are also in agreement with IDWR, and the Hull’s and the Murphy’s that the historical and current point of diversion is SE1/4, SW1/4, SW1/4 of Section 15, Township 25 North, Range 21 East, B.M.⁸

Adele Crawford, a witness for Heltsley and Felton, stated in testimony that Harold Hanson and herself built a spring box at the spring head which she remembers as being on the north side of the driveway, currently the driveway for Mr. Murphy. She stated that the spring box had a pump in it and served to pump water up to her house⁹. Although it has been 22 years since Mrs. Crawford lived on the property, there is a deeded well with an easement in her name signed July 5, 1990 on the Hull property approximately 350 feet upstream of where the natural spring channel crosses the property boundary between the Murphy and Hull property. This location of the well is on the north side of the property however this well intercepts water 12 feet beneath the surface and north of where the spring water comes to the surface on the other side of the road. This well has a domestic ground water right (75-10547) with a priority date for 9/14/1982 for the Murphy house. This is not a point of diversion for irrigation water and does not divert the natural spring channel into a ditch.

⁷ Heltsley/Felton Exhibit 6.

⁸ Murphy/Hull Exhibit 1.

⁹ See Testimony SRBA_02-26-10 01-11_01cab6e529a51090

There were a number of other historical documents submitted by both sides in this case:

- 1) A Form 110 Report on Agricultural Homestead Applications was submitted by Elizabeth M. Eldridge, on October 9, 1908.¹⁰ This is the original homestead ranch for all four water user's. It stated: "All the bench and bottom land is under ditch from North Fork and Hughes Creek". There are no possibilities for developing water but, there is an abundance of water in both the North Fork and Hughes Creek easily obtainable for irrigation. It makes no mention of a ditch from a spring, and further illustrates that the first point of diversion for this ditch was out of the North Fork Salmon River.
- 2) Affidavit from Harold H. Hanson. Mr. Hanson states: "I have lived on H.E.S. 95 since 1948 and do hereby certify the water that raises on the lower end of my ranch is caught in a ditch that goes to irrigate part of the ranch known to me as the old Ravndal Ranch on Hughes Creek, North Fork, Idaho, part of which Russ Kozacek has purchased."¹¹ This statement does not state where the point of diversion is located or where the ditch is located. This affidavit was signed on March 5, 1979 before either of the objector's, Heltsley and Felton had purchased their properties. This affidavit was signed and used for Russell Kozacek's IDWR Form 243 – Claim To A Water Right for Claim No. 75-4126 dated June 13th, 1979.¹² Since Mr. Kozacek claims the point of diversion in this claim as being in the SW of SW of Section 15 and has agreed that the point of diversion is at the IDWR recommended point of diversion, it can be presumed that Mr. Hanson and Mr. Kozacek understood the water was captured in a ditch on the Forest Service property downstream of his property line.
- 3) Notarized statement by Velma Ravndal concerning the ditch used by the Diamond H Ditch Association 7/13/1984.¹³ This is a notarized statement, and there is no ability to confirm or deny Mrs. Ravndal's statements. However she makes no mention of a

¹⁰ Murphy/Hull Exhibit 4.

¹¹ Felton/Heltsley Exhibit 10.

¹² Felton/Heltsley Exhibit 6.

¹³ Felton/Heltsley Exhibit 3.

point of diversion only that; “irrigation water was attained by tapping the overflow from a spring.”

2) The physical evidence, field observations, and professional assessment support the Idaho Department of Water Resource's recommendation that the point of diversion for all four water user's is located on Forest Service property.

The IDWR has identified that the water course between the recommended point of diversion on Forest Service property and claimed point of diversion at the spring head on the Hull's property is a natural, unaltered stream channel. Both the expert witness for IDWR, Monica Van Bussum, and the expert witness hired by the Hull's and Murphy's, Jim Gregory, conducted on-site field observations to document and provide professional assessment of the irrigation structures associated with the spring head, natural stream channel, physical point of diversion, ditch, and surrounding riparian and property features. Monica Van Bussum and Jim Gregory independently concluded that the physical point of diversion is clearly located on Forest Service property and this is the location where water is first diverted from the natural stream channel by a non-natural earthen dam.¹⁴

The expert witness hired by Felton and Heltsley, Roger Warner, also conducted a field observation and aerial photography assessment.¹⁵ In the fourth paragraph of his written review, Mr. Warner states; “Of interest is the relationship of the location of the spring-fed ditch to the North Fork River. At the top of the meadow the North Fork meander is near the base of the slope and furthest west from the highway. It is at that location that was represented the beginning of the spring. The spring-fed ditch then travels along the base of the slope southward while the North Fork meander curves its way eastward towards the highway. Along where the Murphy driveway crosses the ditch, it is represented that additional springs discharge into the ditch thereby increasing flows in the ditch.” In this paragraph, Mr. Warner is clearly and accurately referring to the Hull and Murphy point of diversion and ditch from the North Fork Salmon River. On cross-examination, Warner stated that he was told by Anne Heltsley that the

¹⁴ IDWR Exhibits 3 and 7.

¹⁵ IDWR Exhibit 5.

spring started at the head-gate on the far north end of the Hull property¹⁶. This location is approximately 1800 feet upstream from the spring head which is the source for the four water user's water rights. Nowhere in the paragraph, does Mr. Warner describe the spring head or the natural spring channel between the spring head and the recommended point of diversion on the Forest Service. He spends most of his assessment on our ditch. This raises serious doubts that Heltsley and Felton even knew the true location of the spring head and that they clearly lack first-hand knowledge of their own ditch and source of water. Why would they represent the location of the beginning of the spring as the exact location of our North Fork Salmon River point of diversion? Why would they hire someone to do an assessment of someone else's ditch? Felton and Heltsley claim to have routinely conducted maintenance up the ditch to the spring head over the decades, but obviously don't even know the location of the source of their spring water rights. The difference in locations is substantial, a distance of over 1/3 of a mile, approximately twice as long as the distance between the recommended and claimed point of diversion. This further raise questions as to the knowledge and experience of the objector's about the irrigation practices. Mr. Gregory states in his review that " The upstream ditch that diverts water from the North Fork of the Salmon River does not physically connect (inject) water into the spring channel which feeds the downstream ditch, as evidenced by the lack of a ditch routing water into that spring channel."¹⁷

Additionally, in Paragraph 8, Mr. Warner does talk about a lower ditch and states in his review; "The opportunity to observe the ditch and the North Fork without benefit of any outside knowledge might easily lead one to believe that the ditch is not a ditch but a natural stream of itself conveying spring water to its origins to the lower ditch with excess wasted back to the creek and North Fork near Hughes Creek Road. However, information obtained by Heltsley and Felton lead one to conclude otherwise." It is clear from this statement that Mr. Warner was influenced by information from Heltsley and Felton, even though they are describing the wrong point of diversion and our ditch as being the higher ditch. Mr. Warner does say that it "might easily lead one to believe that the ditch is not a ditch but a natural stream of itself conveying spring water to its origins to the lower ditch." Mr. Warner makes no distinction between the higher ditch, which is clearly our ditch, and the natural spring channel which is physically

¹⁶ See Testimony SRBA_02-26-10 4-11_01cab6ff192a2ab0

¹⁷ IDWR Exhibit 7.

diverted by the lower ditch. It can only be assumed that the lower ditch starts at the IDWR recommended point of diversion due to its description by Mr. Warner. Mr. Warner states; "For instance, the lower ditch turns sharply towards the west and is excavated onto the hillside preserving its optimum elevation for maximum capability of irrigation of the lower meadow lands near Hughes Creek Road and south of the same road." This lower ditch is the only ditch that physically diverts water from the un-named spring stream and where it obviously has been excavated and channelized onto the hillside to provide the requisite fall for the ditch. This is the reconstructed ditch that Lew Gohmes built in 1962 and this location is on Forest Service property and is recommended location where IDWR, Patrick Murphy, Daryl Hull, and Russell and Susan Kozacek agree the point of diversion is located for all four water user's.

The four irrigator's do not have a lockable, controllable headgate structure or a measuring device on their ditch, only a man-made earthen berm at the IDWR recommended point of diversion which diverts all of the spring creek water year-round to their properties. Additionally, as Mr. Warner stated above, "with excess wasted back to the creek and North Fork near Hughes Creek Road ". Jim Gregory documented in his report that: "The diversion point (place where the water is physically diverted from the natural channel) is directly northwest of the Forest Service Guard Station buildings on Forest Service Land. I observed no headgate or measuring device but an earth dam across the natural channel though overgrown with vegetation was clearly visible as a non-natural feature."¹⁸ The irrigator's do not effectively control the water they are diverting without a headgate structure and the earthen diversion dam captures all the water year-round even outside the irrigation season and during periods they are not utilizing the water for beneficial use. This situation characterizes a long period of time with a serious lack of structure maintenance and adherence to Idaho Code for the right to divert water. Instead, Heltsley and Felton want to claim a point of diversion at the spring head which is not a diversion, but a source, and a location where there is no physical manmade diversion works or an adequate location to even measure their water.

The only historical and physical evidence for a man-made diversion structure on the unnamed spring stream is at the IDWR recommended point of diversion, which is the exact same location

¹⁸ IDWR Exhibit 7.

as shown on Lew Gohmes Special Use Permit map¹⁹. It can only be assumed that this location was chosen intentionally by Mr. Gohmes to maximize the diversion efficiency. At the location of the earthen diversion there is adequate elevation to afford the requisite fall for the ditch and to capture most of the volume of the spring channel. The section of natural spring channel on the Murphy property is a braided and a gaining reach and putting the diversion any higher up would have compromised its effectiveness. Jim Gregory states in his review that; “The water in the spring channel discussed is clearly in its natural channel from the spring source downstream approximately 1000 feet to the point where an earth dam removes it from the natural channel. Not only is this the observed point where water is removed from the natural spring channel, it is the expected point where water would be removed from the natural channel. It is the expected point because diverting water from the actual spring would result in non-diversion of additional water that enters the spring channel as groundwater between the spring and the earth dam.”²⁰

3) The physical evidence, field observations, and professional assessment support the Idaho Department of Water Resource’s recommendation that the water course between the objector’s claimed point of diversion at the spring head and the recommended point of diversion is a natural, unaltered stream and not a maintained ditch.

The Idaho Department of Water Resources, expert witness, Monica Van Bussum concluded in her report after her field observations that the channel on the Murphy and Hull property upstream of the IDWR recommended point of diversion is indicative of a natural stream channel that has no indications of any type of manipulation²¹. Both Van Bussum in her report, and Jim Gregory²² in testimony say that the stream channel is sinuous, shallow, and braided and consistent in flow. They both agree that there are no human-altered characteristics to the channel until the water reaches the recommended point of diversion on Forest Service property where the channel is clearly bermed, and channelized in a maintained ditch.

¹⁹ Hull/Murphy 2.

²⁰ IDWR Exhibit 7.

²¹ IDWR Exhibit 3.

²² See Testimony SRBA_02-26-10 1-21_01cab6e68faec790

In the last paragraph of his professional assessment, Jim Gregory states; “Additionally during my field visit I observed no evidence that the spring channel upstream from the earth dam had been modified in any way that could be construed as making it into a ditch. Therefore, the physical point of diversion is clearly located on Forest Service land northwest of the Forest Service guard station.”²³ He also states that; “The water in the spring is clearly in the natural channel from the spring source downstream approximately 1000 feet to the point where an earth dam removes it from the natural channel”.

The expert witness for Felton and Heltsley, Roger Warner states in his report; “The opportunity to observe the ditch and the North Fork without benefit of any outside knowledge might easily lead one to believe that the ditch is not a ditch but a natural stream of itself conveying spring water to its origins to the lower ditch.”²⁴ He continues to say; “However, information obtained by Heltsley and Felton lead one to conclude otherwise.” As stated earlier, on cross-examination, Warner stated that he was told by Anne Heltsley that the spring started at the head-gate on the far north end of the Hull property²⁵. These circumstances cast serious doubt to the credibility of Mr. Warner’s report especially when influenced by “information obtained by Heltsley and Felton lead one to conclude otherwise”. This again, caused by the fact that Heltsley and Felton instructed their expert witness to give an assessment on the wrong ditch, the Murphy and Hull Ditch, 1/3 of a mile away from their claimed point of diversion. It seems that due to the circumstances of not being able to direct their expert witness to the correct point of diversion, their claimed point of diversion, and assess the channel between the claimed and recommended points of diversion, it seriously questions the credibility of the testimony of Warner, Felton, and Heltsley as it relates to whether this channel is a stream or a ditch.

However, Felton²⁶, Heltsley²⁷, and their witness Adele Crawford²⁸ do state during testimony that all of them only maintained the “ditch” gently and never altered the channel or used machinery. They state that they removed debris from the “ditch” and occasionally cut down trees. These activities do not in themselves change the classification of a natural stream channel to a ditch. A

²³ IDWR Exhibit 7.

²⁴ IDWR Exhibit 5.

²⁵ See Testimony SRBA_02-26-10 4-11 01_cab6ff192a2ab0

²⁶ See Testimony SRBA_02-26-10 1-51 01_cab6eac2408050

²⁷ See Testimony SRBA_02-26-10 5-41 01_cab70afdbdf0c0

²⁸ See Testimony SRBA_02-26-10 1-21 01_cab6e68faec790

ditch removes water and heads water away from its natural course. If the routine activities of removing beaver dams, debris, and riparian vegetation from a natural stream would reclassify the stream as a man-made ditch than every river and stream in the country would have the distinction of being categorized as a ditch. Although Felton and Heltsley describe all the maintenance they have routinely conducted in the channel they also contradict these assertions. In testimony, Felton says she wants to hire an expert to ascertain how to best handle the problems with the "ditch"²⁹ Heltsley states that; "the Murphy's and Hull's aren't taking care of the ditch" and "it is going to take major work to put it back the way it was"³⁰. I have never seen either, Felton or Heltsley cleaning the ditch on the Forest Service property, and since July 2004, I have never observed either of them on my property or the Hull's property. In addition, they have never asked for permission³¹ or for help in any way. I believe Mrs. Heltsley is confused on the fact that the natural spring channel looks much different than her ditch on Forest Service property, and much different than the Murphy and Hull ditch. This is because this reach of natural stream channel, is just that, a natural stream channel that hasn't been maintained. Mr. Hull and myself take care of and maintain our own ditch. Mrs. Heltsley seems to be confusing all the water courses together; our ditch from the North Fork Salmon River on the upstream end of the Hull property, the natural spring channel which starts at the spring head which is between the two ditches, and their ditch which begins at the recommended point of diversion on Forest Service property.

Adele Crawford, a witness for Heltsley and Crawford, who owned the property that Murphy currently owns, talked about cleaning and maintaining a ditch but was very confused about which was her property and Harold Hanson's property on the IDWR Exhibit #2 map. She stated in testimony; "The section that is marked off on the map in blue was my property, from 1983 I believe, until I left there and sold it". Jerry Rigby then stated; "So therefore you say the property that is outlined in blue, IDWR Exhibit #2, is the land you were either on to begin with, or ended up owning". Adele replies; "I ended up owning, yes".³² She reaffirmed this later in testimony when she said; "It would have flooded the lower part of my property" and Jerry Rigby said;

²⁹ See Testimony SRBA_02-26-10 1-56 _01cab6eb755f9a90

³⁰ See Testimony SRBA_02-26-10 8-11 _01cab71fe06d7760

³¹ See Testimony SRBA_02-26-10 2-01_01cab6ec287c43d0

³² See Testimony SRBA_02-26-10 1-06 _01cab6e4768f9340

“And that would be the lower part of the blue area.” Adele confirmed; “Yes”.³³ This property was obviously Harold Hanson’s property (Hull’s Property) in the blue and Adele Crawford’s (Murphy Property) was in the green, and when this was pointed out to her later in testimony, she said; “I’m not sure I recall, where I am” and “I don’t remember exact lines (property lines) being drawn for it.”³⁴ It is clear that Mrs. Crawford is having some difficulty deciphering property lines but she is talking about a ditch in the lower blue area. Mrs. Crawford continually talks about maintaining and trenching a ditch that Harold Hanson always maintained in the lower end of the blue property, and if it’s not maintained water will head toward the North Fork Salmon River.³⁵ Mrs. Crawford is correct this is a ditch and she probably maintained it with Harold Hanson, however, this is obviously the Murphy and Hull Ditch from the North Fork Salmon River that flows towards the North Fork Salmon River, southern corner of blue property, before heading in a southwestern direction to the Murphy property. Additionally, Adele mentions an 18” culvert and the channel with a “lot of overflow out of it”³⁶. This sounds exactly like the lower end of our ditch on the Hull property. This ditch most assuredly did, and still does, look remarkably different than the natural spring channel in the photographs. This ditch is easily seen on the IDWR Exhibit #2 map and has a culvert which crosses the road about 150 m. to the NE of the claimed point of diversion.

4) There is no injury to the objectors, Felton and Heltsley, if the channel upstream of the Idaho Department of Water Resource’s recommended point of diversion is classified as a natural stream.

The current location of the ditch and the recommended point of diversion on the ground today is exactly what was re-constructed by Lew Gohmes in 1962 on the Forest Service property³⁷. The un-named spring stream is very stable in flow, ~ 2 cfs, thermally consistent, and does not exhibit the higher, scouring flows that move significant amounts of bedload material. This is an irrigator’s dream because it is so unusually stable and will not blow-out diversions, overtop headgates, or overflow ditches. The natural stream channel has successfully delivered water to the point of diversion on Forest Service property for 48 years without any man-made alterations,

³³ See Testimony SRBA_02-26-10 1-16_01cab6e5dcb843f0

³⁴ See Testimony SRBA_02-26-10 1-21_01cab6e68faec790

³⁵ See Testimony SRBA_02-26-10 1-16_01cab6e5dcb843f0

³⁶ See Testimony SRBA_02-26-20 1-26_01cab6e742cdbac0

³⁷ Murphy/Hull Exhibit 2.

or channelizing. The stable nature of the system is evident in the amount of vegetation that has grown up on the earthen berm diversion structure³⁸ and probably the only reason the four irrigator's have not needed to install a control structure/headgate to avoid blowing out there perched ditch.

There is no injury to the objector's from water loss as they divert the entire flow with no control structure, always fill their rights, and spill excess back to the river. Mrs. Felton stated that the spring, "It has maintained its' water volume even though it has not been maintained as well as it should have".³⁹ Additionally on cross-examination, Mrs. Felton was asked; "Are you currently getting all your water?" She replied, "Yes".⁴⁰

There is concern by the objector's that the water will "break-out" of the channel and flow to the southeast towards the North Fork Salmon River. The chance of this is very remote between the claimed point of diversion and the recommended point of diversion due to the stable volume of flow and the elevation between the spring channel and North Fork Salmon River. The expert witness of the IDWR, Monica Van Bussum⁴¹ and expert witness, Jim Gregory⁴², both state that this would be highly unlikely the a "break-out" would occur upstream of the IDWR recommended point of diversion. Additionally, the topography of the immediate area has a very low slope in a southwesterly direction paralleling the North Fork Salmon River and would most likely rejoin the natural spring channel and not "break-out" and run east to the North Fork Salmon until it was well below the recommended point of diversion on Forest Service property. However, the "break-outs" always have and will continue to occur in the 2500' of perched ditch on the Forest Service below the recommended point of diversion.

The Honorable Special Master Dolan asked Mrs. Felton when she was on the stand; "Can you think of a reason why they would allow a "blow-out" like you talked about. They would want it maintained just as you want it maintained?" Mrs. Felton replied, "One could assume that yes." Honorable Special Master Dolan concluded; "What would they have too gain if it blew out?"⁴³ I can assure you that I would not let the spring channel "blow-out" or "break-out" across my

³⁸ IDWR Exhibit 3 and Exhibit 4.

³⁹ See Testimony SRBA_02-26-10 01-56 01_cab6eb755f9a90

⁴⁰ See Testimony SRBA_02-26-10 02-01 01_cab6ec287c43d0

⁴¹ See Testimony SRBA_02-26-10 08-41 01_cab72412fce630

⁴² See Testimony SRBA_02-26-10 06-56 01_cab71562026200

⁴³ See Testimony SRBA_02-26-10 01-51 01_cab6eac2408050

property in the highly unlikely event that this would happen, and would gladly help return the spring channel back to its' current channel on its way to the recommended point of diversion. This perceived problem would self-limiting in nature and not at all likely to occur.

Conclusions of Law

"Point of Diversion is the location at which water is physically diverted by manmade works from the source of water. Points of diversion are identified by legal descriptions in Idaho water rights." (Definition – "Idaho Statutes – Pertaining to Canals and Laterals, Idaho Department of Water Resources, April 2006).

The historical documents, physical evidence, and testimony from expert witnesses support the Idaho Department of Water Resource's recommendation that the point of diversion for all four water user's in Case #39576 is located on Forest Service property. The only historical and physical evidence for a man-made diversion structure on the unnamed spring stream is at the IDWR recommended point of diversion, which is the exact same location in 1962 where Lew Gohmes obtained a Special Use Permit from the Forest Service to reconstruct a ditch and divert water from a live spring.

Currently, all four water user's that divert water from the un-named natural spring channel at the IDWR recommended point of diversion located at the SE1/4, SW1/4, SW1/4 of Section 15, Township 25 North, Range 21 East, B.M.⁴⁴; Stuart Felton (75-10603), Anne Heltsley (75-14531), Russ Kozacek (75-4126), and Susan Kozacek (75-10400) have water rights that share the same basis. This basis is a common water right established by diversion and beneficial use on May 1, 1887. There is only one point of diversion for irrigation from this un-named natural spring channel. Therefore, in the absence of a transfer of a point of diversion of any of these four water rights, presumably the point of diversion would be the same for all four of the rights.

⁴⁴ IDWR Exhibit 1 and 2.

Closing Arguments

In 2007, the landowners and irrigators were discussing the difference between a point of diversion and a source. We are still having this debate in 2010. The Hulls and Murphys have always believed that the point of diversion is on the Forest Service property where there is evidence that water is physically being diverted by a man-made structure from the source, a natural fish-bearing stream channel. On the other side, Felton and Heltsley believe the location where the spring water comes to the surface naturally is evidence enough for their claim to a point of diversion. At one site water is physically diverted, at the other site it flows naturally down its' own channel. At one site water withdrawal can be measured, at the other site water is not withdrawn and so cannot be measured.

We tried for over 2 years and through dozens of meetings to diligently come to a settlement that would work for all parties, and even waited, without objection, while one of the landowner's filed a late application for a water right. We finally after many attempts to get everyone's concerns addressed, drafted an agreement with two of the four water user's; Russell Kozacek and Susan Kozacek. This agreement, with concessions by both sides, was to provide access the irrigator's claimed they needed, which was to occasionally remove beaver dams and debris jams to prevent icing for their stock water. In turn, they would agree the point of diversion was located on the recommended location on Forest Service property. This agreement was written into their water right on the *Standard Form 5 – Stipulated Elements of a Water Right* and is binding to all heirs and assignees. The Kozacek's were the first of the irrigator's to buy property with water right's out of this ditch and are intimately knowledgeable about their irrigation system. Why would the Kozacek's make an agreement that was injurious to them? Since day one, the Feltons and Heltsleys have demanded that the point of diversion be at the spring head, although through this whole process it is evident it that they were confused about its' true location. Additionally, they would not concede anything in the settlement conferences unless they established that their claimed point of diversion would be the recognized and recommended point of diversion rendering the water course a ditch, and providing them a new and granted right-of-way. However, there is no historical or physical evidence to suggest this is the point of diversion, and additionally, there are State of Idaho and Federal regulations which regulate working in natural stream channels. In testimony, Feltons and Heltsleys repeatedly claim they

only want to do “light” maintenance with hand tools in the “ditch” and would never channelize it. This is exactly what they were offered in the same settlement agreement the Kozaceks signed and the same “good neighbor policy.”

The other question in this debate is which party is injured? The IDWR recommended point of diversion has always provided the irrigator’s with a convenient facility for the watering of their lands and the requisite fall needed for their ditch. The irrigators admitted in testimony that they always receive their water⁴⁵, in fact, they divert all the flow of the natural spring stream year-round with excess water returned to the river⁴⁶. There is no injury to the irrigators and this is evident from the fact that two of the four irrigators, Russell Kozacek and Susan Kozacek, worked effectively together in the settlement conferences with IDWR, the Hulls, and the Murphys and have agreed that the historic and current point of diversion is the recommended point of diversion on Forest Service property.

Although the irrigators’ cannot prove injury, and will continue to irrigate as they always have with the same irrigation system in place since 1962⁴⁷. The landowner’s Murphy and Hull will be injured if the irrigators were granted their claimed point of diversion by damage to their property both aesthetically and monetarily by the associated right-of-way that could effectively destroy the natural, unaltered spring stream and associated riparian habitat. Neither the Hull’s or the Murphy’s have, or need water right’s from the natural spring stream.

In conclusion, I entirely support, without any argument, the Idaho Department of Water Resources recommendation that the point of diversion for all four water user’s is located on Forest Service property. The historical record, physical features and ground assessments by expert witnesses support this recommendation.

⁴⁵ See Testimony SRBA_02-26-10 01-56 01_cab6eb755f9a90

⁴⁶ IDWR Exhibit 5.

⁴⁷ Murphy/Hull Exhibit 2

