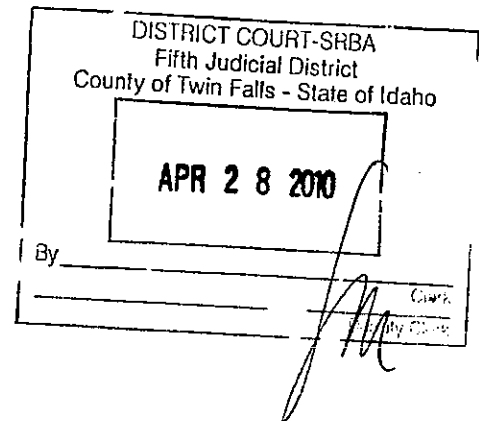


**Findings of Fact
And
Conclusions of Law**



Water Right 75-10603 Stuart Felton

Water Right 75-14531 Anne Heltsley Living Trust

Submitted By:

Daryl and Patricia Hull

Case Summary

Idaho Department of Water Resources has identified the water course from the spring head on the Hull property to the ditched portion on Forest Service land as a natural stream. They have identified a point of diversion on Forest Service property where the stream has been diverted and ditched. The Felton's and Heltsley have objected to the proposed point of diversion claiming that it should be at the spring head.

Do water users have a right to a point of diversion at the spring head on private land when neither the historical record nor the ground assessment support that point of diversion and there is no loss of water to the users if the point of diversion remains where it is identified by IDWR?

Findings of Fact:

- 1) **The point of diversion for the four water users that take their water from the unnamed stream that starts at a spring head on the Hull property has always been where IDWR identified it on Forest Service property and not at the spring head.**

The water course from the spring head on the Hull property onto Forest Service land has been identified as a stream by IDWR. The expert witness for IDWR, Monica Van Bussum as well as the expert witness for the Hulls and Murphys, Jim Gregory, submitted written reports¹ based on field observations of the spring head, stream, point of diversion, ditch and surrounding land on the Hull, Murphy and Forest Service properties. Van Bussum and Gregory concluded that the point of diversion as recommended by IDWR is correct because that is where the water is first diverted from the natural stream channel. Roger Warner, the expert witness hired by Felton and Heltsley, stated in his written report

¹ See IDWR exhibits 3 and 7.

that, without benefit of any outside knowledge, one might believe that the ditch is a natural stream. He then states that he used information from Felton and Heltsley to conclude otherwise.² In his report, Warner puts the spring head on the far north end of the Hull property instead of placing it approximately 1500 feet south of there to a location just south of the Murphy driveway where the spring actually originates. On cross, Warner stated that he was told by Anne Heltsley that the spring started at a head-gate on the far north end of the Hull property.³ The head-gate Heltsley mentioned is a head-gate on the North Fork of the Salmon that serves the Hull/Murphy water right. This raises serious doubt as to the reliability of Warner's report and also doubt as to Heltsley's knowledge of the spring, stream and ditch that supply her own water right. Adele Crawford stated during testimony that she and Harold Hansen built a spring box at the spring head which she remembers as being on the north side of the Murphy driveway on her former property. She stated that the spring box had a pump in it and served to pump water to her home.⁴ If we assume that Ms. Crawford's memory is correct after 22 odd years, the spring box would not have served as a point of diversion for the Felton/Heltsley water right, but instead, would have been a new water right and would have required a permit⁵. In fact, the spring box that Crawford mentioned is a well that is on the Hull property and serves to provide water to the Murphy (formerly Crawford) residence. The Hull property has a deeded easement for the Murphy well which dates back to Crawford's sale of her land to Kenneth Martin. The easement lists a well 12 feet deep at the location north of the Murphy driveway that Crawford states is the location of the spring box. There also exists to this day, in close proximity to where Crawford states the spring water overflowed through a culvert under the driveway, a culvert which serves to allow irrigation water for the Hull/ Murphy properties to flow under the Murphy driveway. This culvert is visible when looking at the map provided by IDWR.⁶ The property was under flood irrigation at the time the aerial photo was taken and the water is visible flowing under the driveway.

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

- 1) Land Registration patent for Elizabeth Eldridge. This document does not identify a point of diversion and makes no mention of irrigation from the spring.⁷

² See IDWR exhibit 5.

³ See testimony SRBA_ 02-26-10 4-11_01_cab6ff192a2ab0

⁴ See Testimony SRBA_ 02-26-10 01-11_01cab6e529a51090

⁵ See Testimony SRBA_ 02-26-10 8-46_01cab724c61e4a60

⁶ See IDWR exhibit 2

⁷ See Felton/Heltsley exhibit 1

- 2) Homestead entry Final Proof for Elizabeth Eldridge. This document states that the land was fed from 3 ditches originating from the North Fork of the Salmon. No mention is made of a ditch from the spring.⁸
- 3) Statement of Velma Ravndal. This document does not identify a point of diversion. Also, it is a notarized statement and there is no indication that Velma Ravndal ever lived on the property. Ravndal states that irrigation water was obtained by tapping the overflow from a spring on private property.⁹ This indicates that there was no ditch on private property.
- 4) Statement from Harold Hansen. This document states that the water rises on the lower end of Hansen's property and is caught in a ditch.¹⁰ It does not identify a point of diversion nor state where the ditch is located. In fact, it appears to indicate that the water was caught in a ditch below the Hansen property.
- 5) 1909 letter from Levi Jones. Jones owned the property where the Hulls and Murphys now live. He was complaining about the Forest Service taking what he thought was his land on the south side of his ranch. He tells the Forest Service that they will have to dig a ditch or pipe 2000 feet from a spring in order to get water. This indicates that the spring was not ditched in 1909.¹¹
- 6) Eldridge Homestead Application June 1906. Elizabeth Eldridge, who homesteaded the property where the Feltons and Heltsley now live, stated that her water was under ditch from the North Fork and Hughes Creek. She makes no mention of a ditch from a spring. She also states that there are no possibilities for developing water, but that there is an abundance of water from both the North Fork and Hughes Creek easily obtainable for irrigation.¹²
- 7) 1962 Lew Gohmes Special Use application. This document is an application to rebuild the ditch from the spring stream. The map that accompanies the application clearly shows a point of diversion on Forest Service land and is representative of the

⁸ See Felton/Heltsley exhibit 2

⁹ See Felton/Heltsley exhibit 3

¹⁰ See Felton/Heltsley exhibit 10

¹¹ See Felton/Heltsley exhibit 11

¹² See Hull/Murphy exhibit 5

property as it is today.¹³ It also shows a live stream on private property upstream from the point of diversion. Lew Gohmes owned the Eldridge property prior to it being subdivided.

8) 09/04/1986 Letter from Rogers Thomas to Stuart Felton. This is a letter from a Forest Service District Ranger to the Feltons disputing their historical claim to a water right.¹⁴

It is clear from the historical record that there is no evidence to suggest that a ditch ever existed from the spring head through the Hull and Murphy properties. It would not make sense for the original homesteader of the Felton/Heltsley land, Elizabeth Eldridge, to have dug a ditch from the spring head on another rancher's property as was testified to by Felton¹⁵ when Eldridge states in her homestead application that there is copious water available from the North Fork and Hughes Creek and no other possibilities for developing water. The Lew Gohmes application of 1962 indicates that the ditch captured the water from the spring stream on Forest Service property at the exact location where IDWR has identified the point of diversion as being.

Russell and Susan Kozacek, who are two of the water users on the same ditch as Felton/ Heltsley, identify the point of diversion in their 1979 substantive claim to a water right¹⁶ as the SW1/4SW1/4 of Sec.15 Township 25N Range 21E which correlates to the point of diversion on Forest Service property identified by IDWR as being T25N R21E Sec.15 SESWSW. The coordinates for the spring head on the Hull property has been identified as the NW 1/4SE1/4SW1/4 of Sec.15, Township 25N, Range 21E.

- 2) **The water course from the spring head to the point of diversion on Forest Service property is a natural stream and not a ditch.**

¹³ See Hull/ Murphy exhibit 2

¹⁴ See Hull/ Murphy exhibit 6

¹⁵ See Testimony SRBA_02-26-10 1-4101_cab6e95c1585b0

¹⁶ See Felton/Heltsley exhibit 6

Felton¹⁷, Heltsley¹⁸ and witness Crawford¹⁹ state during testimony that they only maintained the "ditch" gently and did not alter the channel. They also state that they removed debris from the "ditch" and occasionally cut down trees and never used machinery on the Murphy or Hull property. These activities do not change a stream to a ditch. If they did, then the North Fork of the Salmon and many other streams would be "ditches" since landowners routinely remove debris and cut down vegetation along stream banks.

Also, as noted in the historical documents used to support the recommended point of diversion earlier in this paper, there is no evidence to support the theory that the stream channel from the spring head on the Hull property to the recommended point of diversion on Forest Service land has ever been channelized or ditched. As noted earlier, both IDWR's expert, Monica Van Bussum and Hull/ Murphy expert witness, Jim Gregory, identified the water course as a natural stream after completing both an on-site assessment and consulting aerial photos and historical documents.

Van Bussum in her report²⁰, and Gregory²¹ in testimony, stated that the stream channel is shallow and braided, consistent in flow and that it flows toward the southwest. Van Bussum's report clearly shows cobbles and vegetation consistent with a natural stream. Both Van Bussum and Gregory agree that there is no change in the water course that would lead them to believe that the flow has been altered by humans until the water reaches the recommended point of diversion on Forest Service property where it is clearly bermed and channeled.

Roger Warner, the expert witness for Felton and Heltsley, states in his report that "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 from its origins to the lower ditch." ²² He then goes on to say that the 'outside knowledge' was provided by Felton and Heltsley who also told him that the spring head was on the far north end of the Hull property instead of at the plum dot as identified on the IDWR map (exhibit 2). This would lead a person to seriously question the credibility of Warner's report and the testimony of Warner, Felton and Heltsley as it relates to whether the water channel is a stream or a ditch.

¹⁷ See Testimony SRBA_02-26-10 1-51 01_cab6eac2408050

¹⁸ See Testimony SRBA_02-26-10 5-41 01_cab70afdbdf0c0

¹⁹ See Testimony SRBA_02-26-10 1-21 01_cab6e68faec790

²⁰ See IDWR exhibit 3

²¹ See testimony SRBA_02-26-10 6-51 01_cab714aeeecbda0

²² See IDWR exhibit 5

- 3) There is no loss of water or damage to Felton or Heltsley if the point of diversion remains where identified by IDWR and the water from the spring head to the identified point of diversion is designated as a stream.

Felton stated in testimony²³ that the current property owners won't allow her to enter the property to maintain the 'ditch'. However, on cross,²⁴ admits that she never asked permission and that she currently gets all of her water. She further admits²⁵ that she was offered a good neighbor policy by Mrs. Hull at the first settlement conference and that the Hulls would assist her with cleaning the stream channel. In fact, both the Feltons and Heltsley were offered a settlement agreement that would have guaranteed them access to the Hull and Murphy properties in order to clean and maintain the stream channel. The agreement was to be written into their water right on a *Standard Form 5-Stipulated Elements of a Water Right*, so that it would be binding on all future owners of the Hull and Murphy properties. The same agreement was offered to both Russell and Susan Kozacek who are the other 2 water users on the unnamed stream formed from the water that has its source at the spring-head on the Hull property. The Kozaceks agreed to the settlement and the agreement was added to their water right in December, 2008²⁶. However, the Feltons and Heltsley insisted that the point of diversion be moved to the spring-head or that the stream be named a ditch or they would not agree. This is not consistent with their stated wish to only have guaranteed access to the spring-head and stream so that they can clean and repair the channel.

Expert witness for IDWR, Monica Van Bussum²⁷ and expert witness, Jim Gregory,²⁸ state that the stream flows to the southwest and that a 'breakout' of the stream bank would be highly unlikely upstream of the point of diversion identified by IDWR. They also state that the land slopes to the southwest and that in the unlikely event of a 'breakout', water would rejoin the stream channel and not run into the North Fork of the Salmon until it was at or near the point of diversion identified on Forest Service property. Also, Russell and Susan Kozacek are dependent upon the water for irrigation, stock and domestic use and would certainly exercise their rights under the signed agreement with the Hulls and Murphys if their water was threatened. Additionally, the Hull's and Murphys graze stock on their property and in the highly unlikely event that a 'breakout' did occur on their land, would obviously repair it in order to protect their pastures.

²³ See Testimony SRBA_02-26-10 1-51 01_cab6eac2408050

²⁴ See Testimony SRBA_02-26-10 2-01 01_cab6ec287c43d0

²⁵ See Testimony SRBA_02-26-10 2-06 01_cab6ecdb882430

²⁶ See IDWR water rights 75-10400 and 75-4126 (final adjudication)

²⁷ See Testimony SRBA_02-26-10 10-06 01_cab6cb51877a90

²⁸ See Testimony SRBA_02-26-10 06-56 01_cab71562026200

Finally, Felton and Heltsley have not done any maintenance on the stream channel for at least 7 years. Yet, the water continues to flow in spite of 2 recent very high water years and their water right has not been adversely affected nor has the stream broken out of its channel. This is due to the fact that the spring stream is extremely stable across the Hull and Murphy properties and it requires little or no maintenance to keep the water flowing. Streams, unlike ditches, naturally flow with the slope of the land and do not need maintenance to fix their banks or to flow from the highest to the lowest point unless they are unnaturally altered.

Conclusions of Law

Point of Diversion is defined as the place where water is physically diverted by manmade works from the source of water. It is clear from both the testimony of expert witnesses and the lack of historical evidence to the contrary, that the point of diversion for the Felton and Heltsley water right is and has always been, at the point on Forest Service property identified by IDWR and not at the spring head. Lew Gohmes who owned the old Eldridge ranch, in his 1962 special use application to reconstruct the ditch from the spring stream, identified the ditch as beginning on Forest Service property and his map shows a live stream on private land above that point. Also, Russell and Susan Kozacek used the coordinates for the point of diversion identified by IDWR on Forest Service property in their substantive claim to a water right. In fact, Russell and Susan Kozacek have agreed to that point of diversion and it has been included in the final adjudication for their water right.²⁹

The water at the spring head flows at a rate of only about ¼ cfs.³⁰ If the water was diverted at that point, the Feltons and Heltsley would not be able to fill their water right.

Idaho Code 42-3801 Alteration of Channels of Streams

The water course from the spring-head to the point of diversion on Forest Service property has been identified as a natural stream by IDWR. In order to move the point of diversion to the spring-head as requested by Felton and Heltsley, the court would have to rule that the stream is a ditch and not a natural waterway. This would not change the quality or the amount of water that the Feltons and Heltsley receive. However, it would grant them an easement through the Hull and Murphy properties and allow them to ditch and channel the waterway, thereby damaging the Hull's and Murphy's property both aesthetically and monetarily while providing no gain to the water users.

²⁹ See IDWR water right 75-10400 and 75-1426 (Final Adjudication)

³⁰ See Testimony SRBA_02-26-10 7-01 01_cab71615215530

Closing Arguments

This case started in 2007, when an IDWR contractor, Jack Ellis, accompanied by one of the water users, Susan Kozacek, came onto the Hull property in order to identify a point of diversion for the water rights that use the water that originates from the spring. Ellis identified the point of diversion at the spring source based on Susan Kozacek's word. Patrick Murphy saw Ellis and Kozacek on the property. He told Ellis that the proper point of diversion was below his property line on the Forest Service property. Murphy offered to show Ellis that location. However, for whatever reason, Ellis declined to assess the situation on the ground and marked a point of diversion at the spring head. In December, 2007 Susan Kozacek sent letters of apology to IDWR's Nate Arave, the Hulls and the Murphys stating that she had misidentified the point of diversion to Ellis and that it was actually on Forest Service property.³¹ However, by this time, the Feltons had filed their water right claiming a point of diversion at the spring head. The Hulls and Murphys filed a late objection to Feltons point of diversion. Then, Heltsley filed a late claim to a water right claiming the spring head as the point of diversion and the Hull's and Murphy's filed an objection to her POD.

The Hulls and Murphys have never claimed the water that starts at the spring head and feeds the water rights for Russell Kozacek, Susan Kozacek, Stuart and Mitzi Felton and the Heltsley Living Trust. However, they understood the need for the water users to have access to their property in order to clean out blockages in the stream or to remove debris. So, in 2008, they drafted an agreement that would provide the water users with the access that they claimed they needed. The agreement was to be made part of their water right so that it would continue on to all heirs and assignees. Russell and Susan Kozacek agreed to the settlement which identified the point of diversion on the Forest Service property and identified the water from the spring head to the point of diversion as an unnamed stream.³² However, the Feltons and Heltsley said they would not agree unless the POD was at the spring head.

Then in 2009, IDWR sent Monica Van Bussum to do a ground assessment of the spring stream, ditch and surrounding land affecting the Felton and Heltsley water claim. Ms. Van Bussum concluded that the stream from the spring head to the point of diversion in the Forest was a natural stream and that the point of diversion was that point on Forest Service property identified as a yellow dot on IDWR exhibit 2 at the hearing. IDWR then placed the point of diversion for Heltsley's late claim at that location in the Forest. Heltsley objected. There have been several settlement conferences since that time. However, the Feltons and Heltsley insist that the point of diversion be located at the spring head or that the stream be named a ditch. Counsel for Felton/ Heltsley stated that this is because they need protection from endangered

³¹ See Testimony SRBA_02-26-10 11-49_01cab6d9cc423550 and Hull exhibit 1

³² See IDWR water right 75-10400 and 75-1426 (final adjudication)

species regulations and should not be required to obtain 404 permits.³³ There is no provision in Idaho code that allows a water user to obtain a point of diversion on private property simply because they do not want to deal with endangered species laws or 404 permits. The Hulls and Murphys will not accept the POD at the spring head because under Idaho code, the users would have an easement through their land and the stream would lose its protected status and allow the users to ditch or use machinery on the Hull and Murphy property, thereby devaluing the aesthetic and monetary value of their land while failing to provide any additional water to the users. Throughout the testimony, Felton and Heltsley stated that they only want to maintain the "ditch" lightly, using only hand tools and occasionally a chain saw. This is exactly what they were offered in settlement and as a "good neighbor policy"³⁴ prior to that. Yet, they declined. However, in testimony, Felton wants to hire an expert to ascertain how best to handle the problems with the "ditch"³⁵ and Heltsley states that due to a lack of maintenance, the "ditch" will require major work.³⁶

It is clear from the testimony and evidence submitted in this case, that the water users on the unnamed stream that originates on the Hull property have never had a point of diversion on private land and that they accessed that land only with the permission of the owners. They now want an unlimited easement by moving the point of diversion and to declare the natural stream a ditch. There can be only one reason for this and that is so that they can ditch the stream and thereby remove any argument about the protected status of the stream. This will greatly devalue the Hull and Murphy property and the water users will not gain one additional drop of water for their land. The point of diversion has been identified by IDWR as being on Forest Service property where it always was and 2 of the 4 water users have agreed to that POD. The other 2 water users should not be granted a second point of diversion when they gain no additional water from it and only want to bypass regulations.

³³ See Testimony SRBA_02-26-10 2-21_01cab6eef4cfc810

³⁴ See Testimony SRBA_02-26-10 2-06_01cab6ecdb882430

³⁵ See Testimony SRBA_02-26-10 1-56_01cab6eb755f9a90

³⁶ See Testimony SRBA_02-26-10 8-11_cab71fe06d7760