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DEPARTMENT OF
WATER RESOURCES

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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	)	Subcases: 75-10603 & 75-14531
	)	
	)	
Case 39576	)	CLAIMANT/OBJECTORS
	)	HELTSLEY & FELTON
	)	PROPOSED FINDINGS OF FACT
	)	AND CONCLUSIONS OF LAW
_____	)	

Comes now, Claimant/Objectors Ann M. Heltsley Living Trust and Stuart & Mitzi Felton, by and through counsel of record, Jerry R. Rigby, of Rigby, Andrus & Rigby, Chartered, and pursuant to the request of Special Master Dolan at the end of the Court Trial held on the 26th day of February, 2010, hereby proposes the following Findings of Fact and Conclusions of Law in the above entitled matter:

FINDINGS OF FACT

1. Claimant/Objectors Ann M. Heltsley Living Trust and Stuart & Mitzi Felton, are the owners of water right numbers: **75-14531 & 75-10603**, respectively. Each water right has as its source, a common spring (hereinafter called "Spring").
2. The Spring originates on lands presently owned by the Respondent Hulls and the waters from which cross the lands presently owned by the Respondent Murphys before entering Forest Service lands. From the Forest Service lands, the Spring waters travel to the Heltsley/Felton lands where their water rights are beneficially applied to their lands.
3. Respondents Patrick Murphy & Daryl & Patricia Hull (hereinafter sometimes referred to as Murphy/Hull) own no water rights in the Spring except for a claim which may (or may not) be held by Mr. Hull to a domestic well and right located in the Spring itself.
4. David & Elizabeth Eldridge were the first settlers on the Hughes Creek drainage, five (5) miles north of North Fork, Idaho in 1887. The family turned a wilderness area into a working ranch, with agricultural crops and a large orchard. With the help of their children, the family hand dug ditches and constructed buildings.
5. Following the death of her husband, Elizabeth Eldridge proceeded with the requirements to obtain a homestead and on May 10, 1913, the Homestead was granted to her and signed by President Woodrow Wilson. Because the lands were required to have been developed in order to qualify for a homestead, the conveyance documentation also vested Ms. Eldridge with any accrued water rights and ditches used in connection with such water rights.

6. The Government's official survey map used in conveyance was signed and dated September 4, 1911. The survey depicts the totality of the Eldridge property and identified the ditch, which has as its source the Spring, as in place and developed.
7. The ditch was used for the purpose of supplying the Spring water to the homestead for domestic water, six hundred (600) bearing fruit trees and other beneficial uses.
8. It was the common practice of settlers in upper valleys such as this area to divert water as high as possible, given their limited abilities, and keep the water as high and as close to the bottom of the mountains as possible in order to allow gravity fed irrigation of the valley floor lands.
9. Ms. Eldridge and her children hand dug the ditch which carried the water from the Spring to the lands now owned by Heltsley/Felton.
10. All historical documentation introduced at trial refers to the Spring fed channel as "ditch" or "Spring Ditch". No historical documentation was introduced that referred to the ditch as anything which would denote a natural channel, stream or creek anywhere along its reach up to and including the Spring area itself.
11. The evidence is uncontradicted that there is only ONE channel from the Spring itself through the Forest Service property where all parties and the Department agree that the channel is considered a ditch.
12. The lands upon which the Spring originates, now owned by Respondents Patrick Murphy and Daryl & Patricia Hull, were settled by a Mr. Levi Jones in the early 1900s (1906). Mr. Jones was granted a homestead to the Jones lands on or about June 24, 1914.

13. The Jones lands were eventually passed down to a Mr. Harold Hanson who was first on the Spring lands in approximately 1948. He resided in the area for over 45 years and was most familiar with the Spring Ditch and other ditches on his lands as well as below his lands. For several years, he was responsible for the irrigation of both the old homesteads, Jones and Eldridge properties.
14. Mr. Hanson's historical notarized statement, dated March 5, 1979, contained in the Department's records and introduced at trial clearly states that the water arises on his lower piece of property and is carried by the Spring Ditch down to the Eldridge homestead.
15. A subsequent owner of the Eldridge lands was Velma Revndal. Her historical notarized affidavit dated July 13, 1984 in on file with the department and was introduced by Heltsley/Felton. It states that the Ravndal family purchased the Eldridge homestead in 1918 and were long time residents of thirty nine (39) years. Ms. Revndal describing the water used for the ranch as coming from tapping the overflow from a spring on the private property of Harold Hanson and building the "Spring Ditch", coming across Forest Service property to the said Eldridge property. The affidavit included an attached; signed & dated, hand drawn map evidencing the Spring Ditch originating at the head of the spring rising and not connected to the North Fork of the Salmon River at its origin.
16. Mrs. Adele Crawford is the oldest surviving previous owner to the Jones lands. Her testimony was directly related to the Spring Ditch. She was involved with the care and irrigation of the Jones lands as early as 1968. She worked with and was instructed with

the care of the lands by Mr. Hanson and verified as to the content of Mr. Hanson's March 5, 1979 statement. She recalled how she was instructed by Mr. Hanson in the care of the Spring Ditch.

17. Mrs. Adele Crawford's testimony verified that she owned and worked on the entire Jones property now owned by Murphy/Hull and lived & worked the same from approximately 1968 to 1988. She was emphatic that the entire reach from the spring down through her property was a ditch. She confirmed that the ditch was called "Spring Ditch" by all who were associated with it. Furthermore, she testified that she worked on the springs itself and modified the direction of its flow into a culvert under a road next to the Spring. She testified that while she was on the lands, the disputed reach looked much more like a ditch than it does today due to Mr. Hanson and her vigorous "work" on the banks of the ditch.
18. Mrs. Crawford further testified that she could specifically recall several occasions (and one most specifically) where the water from the Spring Ditch DID breach the banks on her lands and the flow of the water was toward the North Fork and NOT parallel to the banks of the present ditch. She also testified, which was attested to by other witnesses besides the claimants, including Mr. Warner and Ms. Nancy Liebrecht of Rocky Mountain Environmental, that to have any water breach the banks and head toward the North Fork would be water lost to the Heltsley/Felton lands and only swamp Mrs. Crawford's lands. Finally, the same witnesses testified that a change in the elevation of the water, even to a small degree, would not supply the water to the ditch further down

the reach and thus unusable to the Heltsley/Felton lands. The water was required to be kept as high as possible in order to maintain its elevation as the full volume available from the Spring was critical to the proper irrigation of the Heltsley/Felton lands.

19. Other witnesses, Ms. Felton, Ms. Heltsley, and her brother Mr. Larry Heltsley each testified and confirmed that the ditch was always considered a ditch from the Spring itself and on several occasions helped the owners of the Jones property repair breaches in the ditch located on the Jones property itself.
20. The care of the Spring Ditch on the Jones lands continued in a similar manner and only changed dramatically when the ownership changed to the Murphys and Hulls. Ms. Heltsley testified that she sometimes crossed over into the Jones lands even after the change in ownership to attempt to maintain the Spring Ditch.
21. Although before man's intervention, the Spring certainly ran in a channel, from the historical documentation and testimony of those who resided on the lands many years ago, there is compelling evidence that some intervention by man must have occurred at the Spring itself which would cause the flow of the Spring to be more in a parallel path to the North Fork instead of its natural tenancy to flow in a direction below the present location and in an angle toward the North Fork, thus making it unusable to the lands of Heltsley/Felton.
22. Even if a small reach of the original natural channel was originally used, as was testified by Heltsley/Felton' experts, Mr. Warner & Ms. Liebrecht, it is common to take over natural water courses and "convert" or "adopt" them into private canals or ditches.

23. Furthermore, testimony by Mr. Warner and Ms. Liebricht each testified that it is consistent to have these type of man made ditches take on the appearance of a natural channel, especially when there has not been any maintenance work done on them for several years.
24. Testimony from Mrs. Crawford, Ms. Heltsley, Ms. Felton, Mr. Warner, Ms. Liebrecht each testified that “but for mans intervention” the spring would have found its way to the North Fork from its origin and NOT remained as high as it presently runs in order to be up gradient from the newly proposed point of diversion and eventually to the Helstley/Felton lands which are watered from its waters.
25. Mr. Warner produced a topographical map which evidenced that even though the gradient was not steep, it nevertheless ran from Spring Ditch toward the North Fork and not parallel to it.
26. A special use permit issued to Lew Gohmes by the Forest Service, dated September 17, 1962 was presented at trial by Murphy/Hull for the reach of Spring Ditch as it crossed the Forest Service lands. The permit reflects the public lands managed by the Forest Service and it required a permit for any work being proposed. The permit addresses a proposed ditch reconstruction of the Spring Ditch over Forest Service lands. It does not address any work that may or may not have been performed on private land as no permit was necessary from the Forest Service for work performed on private lands. On the northern end of the Forest lands, the drawing of proposed reconstruction stops. However, the line continuing upstream depicts the Spring Ditch continuing to the ‘live spring’ on private

property. The Forest Service permit is an indication of reconstruction that is inherent with the Spring Ditch. There is no indication shown on the said permit, that a point of diversion is located on Forest lands.

27. Prior to the onset of the Snake River Basin Adjudication, certain claims to water rights were filed with the Department. One of said claims was introduced into evidence at trial and was a claim filed by John Westman as a claim of to a water right, claim #75 4055, signed and dated October 13, 1976. Another similar claim introduced at trial was filed and signed by Russ Kozacek in 1979. These claims were made well before the adjudication claims and describe the water source as the Spring and the means of diversion of water, as the ditch capturing the spring water. No where in the Department files does it state a diversion from a stream, creek or other natural channel nor is there any dispute filed by any third party to the Spring being the claimed point of diversion.
28. There was also evidence introduced as to a Forest Service permit for which was applied and received by the Kozaceks and which granted the right to cross the **entire** width of Forest Service lands along the ditch.
29. Testimony of Ms. Helsley and Ms. Felton made clear their intentions that they never intended or would intend to disrupt the reach from the Spring to the Forest Service line except to insure that their water rights remained in the ditch. This has taken only hand tools in the past and unless Murphy/Hull cause something to change upon their lands in the future, this should only take hand tools to maintain in the future.
30. Testimony by Mr. Warner and Mrs. Crawford in addition to the claimants, indicate that

without **some** maintenance, the water rights of Heltsley/Felton stand in jeopardy of being lost with no legal right to enter the lands of Murphy/Hull and correct the flows to allow their water rights to be restored.

31. The Testimony of the Heltsley/Felton experts besides that which is stated above are as follows:

- a. A written report was introduced by Nancy Liebrecht (Exhibit 11 of Heltsley/Felton). Ms. Liebrecht is an environmental planner and wetland scientist. She has extensive experience and certificates of education, including environmental studies in the field of wetlands. Ms. Liebrecht was charged with the environmental impact study for the whole reach of the North Fork Salmon River, in compliance with the Clean Water Act and Endangered Species Act. This study took more than a year of ground investigation. Her expert opinion was that mature vegetation may give the impression that the existing channel is natural, but native black cottonwoods and willows are very fast growing and will easily reach maturity in 40 to 50 years. The woody riparian plant community colonized the ditch corridor after the channel was dug by early settlers.
- b. A written report was also introduced by Roger Warner (Exhibit 12 of Heltsley/Felton). Mr. Warner is a hydrologist and partner owner of the Rocky Mountain Environmental Association. He testified as to his vast experience with the Department as a former employee. Mr. Warner has also worked on several water rights issues along the Salmon Valley and Bitterroot Mountain range. A

significant on site visit analysis was completed and testimony given based on his knowledge of the area. Yet, in contradiction to Ms. Van Bussum opinion, his bottom line testimony was that without proper maintenance, the disputed reach will fail some day and Heltsley/Felton will not receive their full water rights.

32. The relevant findings as to the Snake River Basin Adjudication process are as follows:

- a. All relevant claims were filed on the official forms provide by the Idaho Department of Water Resources (IDWR). The claims specifically claimed the head of the Spring as their points of diversion and Spring Ditch being at the head of the spring rising from the ground. Signed and notarized affidavits accompanied the claims when filed at the beginning of the adjudication. The statements and hand drawn maps are sufficient to describe the Spring Ditch and point of diversion as now claimed by Heltsley/Felton.
- b. The IDWR under the Snake River Basin Adjudication, filed the directors report with the Fifth Judicial District on January 11, 2007, for 75-10603 water right.
- c. On or about May 19, 2006, IDWR western region adjudication section claim verification field exam sheet was complete by Jack Ellis. The IDWR employed Mr. Ellis as a qualified investigator. An SRBA aerial photograph was generated by this field survey and signed by Roxanne Brown, an employee of IDWR. The generated map was entered into the Directors Report by the IDWR, and evidenced the point of diversion to be at the head of the Spring rising.
- d. The IDWR's recommendation report determined the point of diversion to be the

point of origin, which is the head of the Spring rising.

- e. The IDWR deemed the report appropriate and proper and did not file anything to change its position and original recommendation until preparation for trial on this matter.
- f. The IDWR by legal description placed the point of diversion at the head of the Spring rising. A Global Positioning System (GPS) was engaged by the IDWR, in the North Fork Salmon River drainage. Although the GPS readings were misinterpreted and the corrected readings have been made following evidence of the actual point of diversion submitted at the trial of this matter.
- g. IDWR employee and investigator, Monica Van Bussum, was dispatched on May 1, 2009, to do a field examination. Van Bussum did a non-extensive several hour site visit and did not interview any witnesses for Heltsley/Felton. An Amended Recommendation followed which changed the original recommended point of diversion from the Spring itself down to a point into the lands of the Forest Service. The change in recommendation was primarily due to Ms. Van Bussum's belief that the reach had the characteristics of a natural stream and not a ditch down to where substantial work had obviously been performed in the channel.
- h. No evidence of a diversionary box or any structure to divert water was introduced at the location where the new point of diversion is recommended.
- i. There was testimony that the new point of diversion's characteristics are mainly due to employing heavy equipment for repair of beavers causing the breach in a

levied bank and where the channel widened.

- j. The Respondents, Murphy/Hull have no water rights in the Spring. Therefore, pursuant to *Idaho Code, Title 42, Chapter 14*, they cannot prove any injury as required by the statute. Their desire to change the name of the Spring Ditch to a 'natural stream' in and of itself, is not an injury. Furthermore, their support of IDWR in attempting to move the point of diversion off from their lands does not constitute an injury to their water rights as contemplated by the SRBA adjudication.

CONCLUSIONS OF LAW

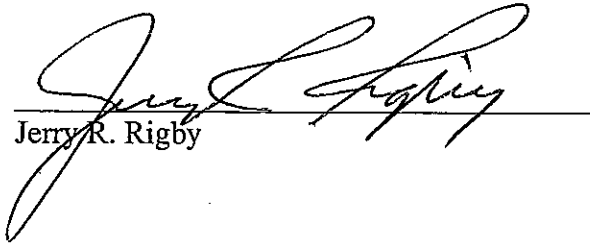
1. Pursuant to *Title 42, Chapter 14, 42-1411 (4)*, the Director's Report "constitutes prima facie evidence of the nature and extent of the water rights acquired under state law."
2. However, pursuant to *§42-1411 (5)*, the "claimant" has the "ultimate burden of persuasion for each element of a water right." Those objecting to the 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." (*42-1411 (5)*).
3. Therefore, the prima facie evidence presented by the Department is clearly rebuttable by the claimants evidence presented at trial on the particular matter.
4. Finally, those who disagree with the objector's position "may submit evidence in opposition to the objector's position and in support of the director's report." (*42-1411 (5)*).
5. Heltsley/Felton have produced clear and convincing evidence through historical

documentation and witnesses and have therefore met their required burden of persuasion and proof to require the Department's originally recommended point of diversion be reinstated with the modification being made to the actually intended location as determined by the Department from the evidence at trial and as submitted by the Department following the trial on this matter.

6. Murphy/Hull have failed to discredit the clear and convincing evidence by Heltsley/Felton through either historical documentation or witnesses. To the contrary, the historical documentation and historical witnesses (none of which was refuted), fully support the original Director's Recommendation.
7. Heltsley/Felton land owners have continuously diverted the water from the Spring through the Spring Ditch for beneficial use upon their lands and have never forfeited these rights.
8. Even if a particular reach or segment of Spring Ditch was originally a natural channel, the reasoning and holding in *Park v. Boulware*, 7 Idaho 490, 63 P. 1045 (Idaho 1901) stands for the authority and supports the evidence that the original ditch may have adopted certain segments of the channel beginning from the location of the Spring as part of the Spring Ditch and treated it as a ditch for all purposes, granting ownership rights to the water users equal to an artificial channel which does not destroy all normal rights associated with a ditch.
9. *Chapters 11 & 12 to Title 42 Idaho Code* entitle Heltsley/Felton a statutory right of way and a right of maintenance over the lands owned by Murphy/Hull from the Spring to

where the Spring Ditch enters the Forest lands. Consistent with §42-1204, the type of maintenance shall be consistent with historical practices of hand tools only unless the owners of the Murphy/Hull lands cause the need for more significant maintenance.

Respectfully Submitted this 29th day of April, 2010.



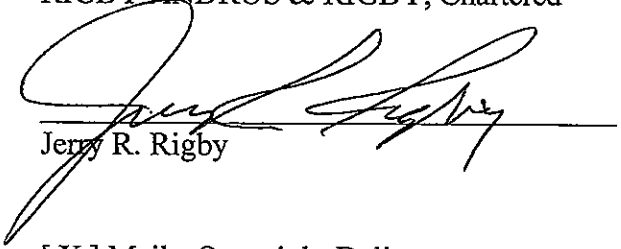
Jerry R. Rigby

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DATED this 29th day of April, 2010.

RIGBY ANDRUS & RIGBY, Chartered


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