

Patrick Murphy
14 Blaze Tree Trail
North Fork, ID 83466
Telephone: (208) 865-2099

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DEPARTMENT OF
WATER RESOURCES

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

Sub-cases: 75-10603 & 75-14531

Case 39576

**CHALLENGE TO THE MOTION
TO ALTER OR AMEND THE
SPECIAL MASTER REPORT**

I, Patrick Murphy, challenge the motion to alter or amend the Special Master's Recommendation on the above case filed by the previous attorney for the Felton's/ Heltsley, Jerry R. Rigby, and supported by their current attorney, Charles L. Honsinger, for the following reasons.

On July 9th, 2010, Special Master Terrance Dolan issued a report and his recommendation for the partial decree of water rights 75-10603 and 75-14531 from his findings based on a review of the facts during the trial for Case 39576 which was held on February 26, 2010 in Twin Falls, Idaho. At issue in this case was the location of the point of diversion for the Felton and Heltsley water rights. The Idaho Department of Water Resources recommended that the point of diversion for these water rights is located downstream on an unnamed spring on Forest Service property. This recommendation has been supported by the affected landowners; Daryl Hull and Patrick Murphy, and two of the four irrigators, Susan and Russell Kozacek. The objectors, the other two irrigators, Felton and Heltsley, claimed the point of diversion is at the spring head on the Hull property. Special Master Dolan concluded that the greater weight of evidence is that the channel below the spring is a natural stream and recommended that the point of diversion is located on

Forest Service property.

Special Master Dolan was correct in his recommendations that the point of diversion for the partial decree of water right claims; 75-10603 and 75-14531, is on Forest Service land - T 25N, R 21E, § 15, SESWSW, and that the channel above this point of diversion is a natural stream.

In this case, the preponderance of evidence from the unbiased historical documents from the Forest Service strongly support the Idaho Department of Water Resource's recommendation that the point of diversion for all four water user's is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.

There is clear evidence in the early historical record from both the Hughes Creek Ranger Station Survey in 1908 and the Lew Gohmes Special-Use Permit maps in 1962, two separate land surveys that were unbiased, not produced or hired by the landowner/irrigator, and accurately describe the property boundaries, ditches, and point of diversions.

The historical record is clear from the Hughes Creek Ranger Station Survey on November 24, 1908, by George Thompson 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, not the spring. 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." This is further supported with an accurate, detailed survey map of the Hughes Creek Ranger Station, dated November 24, 1908, by George Thompson, a Land Examiner for the Salmon National Forest showing the ditch diverting out of the North Fork Salmon River, again, not from the spring.

The historical record supports that Lew Gohmes cleaned and rebuilt the "old ditch" on Forest Service land in 1962, with no hint of a man-made ditch above that. A Special-Use Application submitted by Lew Gohmes dated September 10th, 1962 has a detailed map that accurately describes the property boundaries, ditches, and the point of diversion in 1962, which is the exact location of the current recommended point of diversion by IDWR for the unnamed stream on Forest Service Property. 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. This map is the only historical evidence for a POD from the natural spring channel. 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 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." This again is the location of the recommended IDWR point of diversion and has not changed in 49 years (1962) and was reaffirmed in this letter in 1986 (25 years ago).

The Idaho Department of Water Resources, expert witness, Monica Van Bussum concluded in her report, and in testimony of 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. Ms. Van Bussum provided an unbiased description of the natural stream itself, providing graphic evidence of dense vegetation, substrate composition, deadfall, aquatic plants, channel geometry, flow rate and meandering channels, all indicating a natural stream, not a man-made ditch.

Special Master Dolan was correct in his Conclusions of Law that the testimony from IDWR and both sides stated that the channel below the spring is a gaining reach, meaning other springs along the channel add to the flow. "That being the case, it would make more sense for an appropriator to divert the flow below that reach to access the maximum amount of water. Then there were observations that near the point of maximum gain, the water turns sharply away from its natural channel. That point is the berm or earth dam, "the first indication of human intervention on the stream", IDWR's recommended source and point of diversion."

There was no historical evidence provided at trial for the Felton/Heltsley claim to identify the point of diversion for their water rights at the spring head. In fact, testimony from their expert witness, Roger Warner, raised 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. 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 property. 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 his submitted report, 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. In a full paragraph of his report, Mr. Warner clearly and accurately describes the wrong ditch, and was referring to the Hull and Murphy point of diversion and ditch from the North Fork Salmon River. 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 raises questions as to the knowledge and experience of the objector's about the irrigation practices.

During the trial, Adele Crawford, a key witness for Heltsley and Crawford, who owned the property that Murphy currently owns, could not accurately describe the spring or her domestic water. She continually talked about maintaining and trenching a ditch that had an 18" culvert with "lot of overflow out of it.", that Harold Hanson always maintained in the lower end of the blue property. But it was clear that Mrs. Crawford was having some difficulty deciphering property lines, and when asked to show where she was explaining on the map, she said "I'm not sure I recall, where I am" and "I don't remember exact lines (property lines) being drawn for it." Mrs. Crawford is correct there is a ditch and she probably maintained it with Harold Hanson, however, this was obviously the Murphy and Hull Ditch from the North Fork Salmon River that flows towards the North Fork Salmon River.

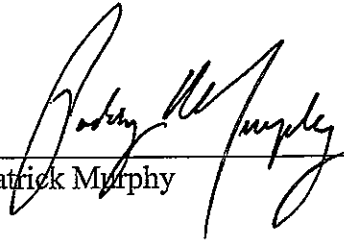
Adele Crawford also testified that she recalled helping Harold Hanson install a box and pump in a 4' x 4' hole at the spring. Although it has been 22 years since Mrs. Crawford lived on the property, she forgot to mention that at the time she sold the property there was a deeded well with an easement 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.

The Special Master's 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 water, in fact, they divert all the flow of the natural spring stream year-round with excess water returned to the river.

In conclusion, I entirely support, without any argument, both Special Master Dolan's and 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 support this recommendation.

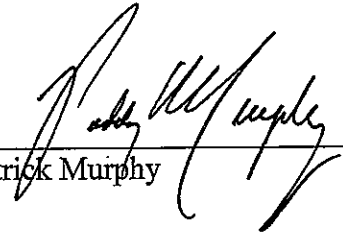
Dated this 12th day of January, 2011


Patrick Murphy

CERTIFICATE OF SERVICE BY MAIL, DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, by mail a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid.

Dated this 12th day of January, 2011.



Patrick Murphy

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

United States of America
US Department of Justice
Environment and Nat'l Resources
550 West Fort Street, MSC 033
Boise, ID 83724

Director of IDWR
P.O. Box 83720
Boise, ID 83720

Charles L. Honsinger
Ringert Clark Chartered
455 S. Third Street, P.O. Box 455
Boise, Idaho 83701 -2773