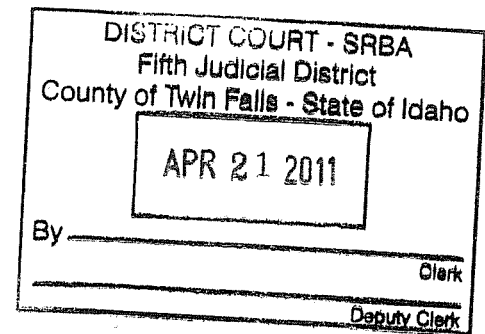


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DEPARTMENT OF
WATER RESOURCES



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	)	Subcases
	)	75-10603 (Felton)
	)	75-14531 (Heltsley)
Case No. 39576	)	
	)	ORDER DENYING MOTION
	)	TO ALTER OR AMEND

Background

Report and Recommendation

The Special Master entered a *Report and Recommendation* on July 9, 2010, finding that the source of both claims is a natural stream and the point of diversion is located on Forest Service land, all in accord with IDWR's recommendations.¹ Claimants Stuart L. Felton and Ann M. Heltsley Living Trust alleged both the source and point of diversion were the same – a spring located on Objector Daryl Hull's property – and the channel below the spring is a man-made ditch, not a natural stream. They called the channel below the spring the "Spring Ditch."

Following trial with lengthy testimony by experts and lay-people on whether the channel is a man-made ditch or a natural stream, plus a wide range of photos and historical documents, the Special Master was left with irreconcilable evidence. The conclusions were:

In any event, an attempt to determine the source and point of diversion for 1887 water rights is like drawing a map in the dark. The best we can do is rely on sometimes incomplete and conflicting evidence. But under these circumstances,

¹ In the 2007 *Director's Report*, IDWR recommended Mr. Felton's claim (75-10603) with the source a "spring." The 2009 *Director's Report for Late Claims* recommended the Heltsley claim (75-14531) with the source an "unnamed stream." As noted in the *Special Master Report*, Ms. Van Bussum "began her testimony by amending IDWR's recommended source and point of diversion for 75-10603 (Felton) from a 'spring' to an 'unnamed stream' – the same source and point of diversion recommended for 75-14531 (Heltsley)." *Special Master Report*, at 3.

the greater weight of evidence is that the channel below the spring is a natural stream.

Report and Recommendation, at 14.

Motion to Alter or Amend

On August 18, 2010, the Claimants filed their *Motion to Alter or Amend the Special Master's Recommendation*. With permission of the Court,² the Claimants lodged their *Memorandum in Support of Motion to Alter or Amend* on January 14, 2011. The Claimants argued that if the channel from the spring through the Objectors' property is determined to be a natural stream, the Claimants may lose their water right because they will not be able to maintain the ditch.

The Claimants wrote that while IDWR senior water resource agent Monica P. Van Bussum testified she did not see a spring box during her field inspection, she never visited the actual location of the box. Plus, the channel "is in fact a ditch throughout the course of its run from the North Fork Salmon River, including the portion of it that runs through the Hull and Murphy properties." Claimants' *Memorandum in Support*, at 5.

The Claimants suggested an alternative to reversing the **Recommendation**. The Special Master could order a new trial because: 1) IDWR improperly acted as a party at trial and 2) there is new evidence of an improper motive for the Objectors' opposition to the claims.

The Claimants argued IDWR was not a "disinterested, nonparty fact witness" as required by **SRBA Administrative Order 1, Rules of Procedure**, 10, i. They recalled that after Ms. Van Bussum presented the basis of IDWR's recommendations and cross examination, counsel for IDWR re-directed her examination in response to points raised by the Claimants. Next, IDWR's counsel cross examined the Claimants' witnesses and then re-called Ms. Van Bussum to refute documents and points raised by the Claimants. Finally, IDWR's counsel argued about the nature of certain evidence and objected to questions raised by the Claimants.

On the Claimants' second reason for a new trial, the Objectors failed to disclose a 2008 "Wildlife Extension Agreement" between Mr. Murphy and the U.S. Fish and Wildlife Service. Ms. Heltsley discovered the document left at the Objectors' table after trial. Under the Agreement, Mr. Murphy was to receive \$4,368 to pay for fencing the "large spring complex"

² On November 10, 2010, the Claimants' *Motion for Continuance of Deadline Within Which to File a Memorandum in Support of Motion to Alter or Amend* was granted because "the trial transcript was only recently completed and the claimants' new counsel has not yet received nor analyzed the pleadings and evidence." **Order Granting Motion for Continuance and Re-Setting Hearing Date**, at 1.

being the channel from the spring across the Murphy and Hull properties to the Forest Service land. To the Claimants, the document proves the Objectors' motive:

Because the document provides an obvious motive for Hull and Murphy to contest the designation of the waterway through which the Heltsley and Felton water rights are diverted as a "ditch", Heltsley and Felton must be given an opportunity to conduct discovery and present evidence and testimony regarding this issue.

Claimants' *Memorandum in Support*, at 23.

Objectors' Challenges

On January 12 and 13, 2011, Objectors Hull and Murphy filed their *Challenges to the Motion to Alter or Amend the Special Master Report*. The Hulls agreed with Ms. Van Bussum, "the only unbiased expert presented at trial", that there is no spring box on either of the Objectors' properties. They said the historical evidence supports IDWR's recommendations, except the priority date for both claims which may actually be 1962, not 1887. Finally, they suggested the Claimants get all the water to which they are entitled because they, along with the Kozaceks, divert the entire stream 150' inside Forest Service property.

Mr. Murphy wrote that a 1908 Hughes Creek Ranger Station survey and Elizabeth Eldridge's 1909 Homestead Entry Final Proof described the lands now owned by the Claimants being irrigated by three main ditches from the North Fork Salmon River, not a spring. In 1962, when Lew Gohmes submitted a Special-Use Application and map to clean and rebuild the "old ditch" on Forest Service land, the map showed no hint of a man-made ditch above that point, but rather a point of diversion from a natural spring channel on Forest Service land. That is the point where water is first diverted into the Spring Ditch. The Claimants and their witnesses described maintaining a ditch over the years, but "this was obviously the Murphy and Hull Ditch from the North Fork Salmon River that flows towards the North Fork Salmon River." *Murphy Challenge*, at 4.

Claimants' Response

The Claimants filed their *Response to Challenges to the Motion to Alter or Amend the Special Master Report* on January 27, 2011. They restated their main concerns with the source and point of diversion being recommended on Forest Service land:

If the point of diversion is not described upstream of the location recommended by the Special Master, Heltsley and Felton will not have the right to continue their

historic maintenance activities on the ditch to prevent similar blowouts. Blowouts resulting in cessation of water flows to the Heltsley and Felton properties will diminish the usability of those properties, and will certainly diminish their value. Claimants' *Response*, at 2.

The Claimants argued Ms. Van Bussum visited the site accompanied only by the Objectors and did not even contact the Claimants, so she received only a one-sided view of the dispute. They also wrote that when Susan Kozacek agreed with IDWR that her water right (75-4126) should be decreed with its source and point of diversion on Forest Service land – despite her earlier claim of the spring – her settlement is meaningless and should be disregarded.

The 1908 Hughes Ranger Station survey shows a different ditch system from the Spring Ditch and is very confusing at best. The 1962 Lew Gohmes map only showed reconstruction of the ditch located on Forest Service property and no point of diversion. Finally, the Claimants argued Adele Crawford's testimony confirmed the testimony of Ann Heltsley, Lawrence Heltsley and Mitzi Felton regarding maintenance work on the ditch as it crossed the Objectors' properties:

Accordingly, the Special Master must simply ignore the arguments raised by Hull and Murphy, and confirm that the point of diversion is located in the quarter-quarter section where it was originally claimed by Heltsley and Felton and recommended by IDWR. At a bare minimum, as detailed in Heltsley's and Felton's prior briefing, the Special Master should order a new trial for the taking of evidence regarding this issue because of problems with the original trial, and should view the property for himself during that proceeding.

Claimants' *Response*, at 7.

Hearing

The hearing on the Claimants' *Motion to Alter or Amend* was held on February 3, 2011, at the SRBA Courthouse in Twin Falls, Idaho. Charles L. Honsinger appeared for Claimants Felton and Heltsley, along with Ms. Heltsley; Objectors Hull and Murphy appeared *pro se*; Steve Spencer monitored the hearing for the United States of America, Department of Agriculture, Forest Service; and Garrick L. Baxter appeared for IDWR, along with Suzy Cooley-Denney.

Claimants

At the hearing, the Claimants argued they hold a prescriptive easement to maintain the Spring Ditch because of 50 years of such work. They said the evidence shows their water is diverted from the North Fork Salmon River into the ditch where it flows to a spring box *above* the road to Mr. Murphy's residence, then through a culvert under the road, down the ditch, across

Forest Service property and finally to their lands. The reason the ditch looks like it has not been recently maintained from the spring box to the Forest Service land is because it has always been maintained with a light hand.

The Claimants said a new trial in this matter is warranted under I.R.C.P. 59(a) because of irregularities in the proceedings of the court: IDWR participated as a party, not a disinterested witness, and was allowed to re-direct Ms. Van Bussum, cross-exam the Claimants and even object to the Claimants' testimony. Plus, there is the newly discovered evidence (Wildlife Extension Agreement) not disclosed before trial.

Objectors

Mr. Murphy recalled the evidence showed the ditch above the spring belongs to the Objectors and is not connected with his domestic well. There is no spring box and no culvert under the road. The spring claimed by the Claimants is *below* the road.

Mr. Murphy said the Wildlife Extension Agreement to fence the area around the channel across their properties was disclosed to the Claimants' trial counsel two weeks before trial. He also repeated that the Objectors would allow the Claimants access to the natural stream to remove beaver dams which can cause blowouts, the Claimants' only concern.

Discussion

After reviewing the Claimants' *Motion to Alter or Amend* and the alleged errors, the Special Master remains convinced the main conclusion of the ***Report and Recommendation*** is valid – "the greater weight of evidence is that the channel below the spring is a natural stream." That means IDWR correctly recommended the source and point of diversion is a natural stream located on Forest Service land, not a spring located on Objector Hull's property.

Ms. Van Bussum's extensive investigation and documentation of the channel below the spring, plus her expertise in assessing stream channel geometry and characteristics, is more convincing than evidence to the contrary presented by the Claimants. The channel is a natural system, not a man-made ditch, despite occasional maintenance to remove obstructions. As suggested by IDWR, occasional maintenance of a natural waterway does not mean it is a man-made ditch.

The Claimants' suggestion that the channel is actually a ditch that begins at the North Fork Salmon River, flows to a spring box and then across the Objectors' properties lacks credibility. First, Ms. Van Bussum testified she saw no spring box, only a number of springs

feeding the natural channel downstream. The first change from the natural gradient of the channel – where water leaves the natural channel – is an earthen berm on Forest Service land. That is where Ms. Van Bussum placed the point of diversion.

Second, if the ditch begins at the river, why would the Claimants suggest the source and point of diversion is the spring and not the river? After all, by their reasoning, the spring would be nothing more than a contributing source along the ditch. The evidence is more convincing that water flows from the unnamed spring down a natural stream gaining volume along the way from other springs, across the Objectors' land and onto Forest Service land where it is diverted into the Spring Ditch.

The Claimants' suggestion that a new trial is warranted because IDWR was not a "disinterested, nonparty fact witness" at trial has no basis. IDWR's witness and counsel merely presented the basis of the Director's recommendations and that included responding to statements and arguments in opposition. For instance, when the Claimants misstated Ms. Van Bussum' testimony, IDWR's counsel corrected the record or recalled her to the stand. At no time did IDWR act as an interested party witness. It merely "defended" its recommendations of the claims to assist the Special Master's determination of the facts under his direction. Besides, there is no evidence the Claimants objected to IDWR's conduct during the trial.

The Claimants' other reason to suggest a new trial – newly discovered evidence – also lacks credibility. In light of the preponderance of evidence on the nature of the stream channel, it is not credible to suggest the Wildlife Extension Agreement would affect the Objectors' motives to object to the claims. In any event, the Objectors said they disclosed the Agreement to the Claimants' trial counsel two weeks in advance and the issue was never raised at trial. More discovery and a new trial would be a waste of resources for the parties and the Court.

Order

THEREFORE, IT IS ORDERED that the Claimants' *Motion to Alter or Amend* is **denied**.

DATED April 21, 2011.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO ALTER OR AMEND was mailed on April 21, 2011, with sufficient first-class postage to the following:

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