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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

)
) SUBCASE NOS.: 37-118
)
)

Case No. 39576

) TRIAL BRIEF FOR
) DEAN R. ROGERS, III
)

This matter is before the Court on Mr. Rogers' objection to Mr. Stevenson's claimed right to 400 inches of water from the swamp ground on Mr. Rogers' land¹. The evidence to be presented at trial will show that Mr. Stevenson is the current holder of a water right appurtenant to his real property which was decreed to his predecessors in interest (the Bullers) in the decree entered in

¹It is noted that the *Frost Decree* speaks to 400 inches of water, while the Amended Director's Report dated December 30, 2010 and other pleadings in the instant matter reference eight cubic feet per second ("cfs") of water. The Idaho Department of Water Resources states that 50 miners inches is one cubic foot per second, hence the conversion to eight cfs. For consistency, this brief will use 400 inches as in the original decree.

S.C. Frost, et al. v. Alturas Water Company, et al. in the District Court of Lincoln County on December 13, 1909 (hereafter "*Frost Decree*"). The *Frost Decree* granted to Buller (and his successors) "400 inches of water in their "swamp ditch," as of a prior and exclusive right, so long as they maintain their said "swamp ditch," and continue to develop that amount of water therein."

There was no ditch put in by Stevenson's predecessors, "Buller" or "Hutchinsons." Rogers developed the current ditch which drains the Buller "swamp ditch" and conveys the water across the Rogers' property. This is the Buller Drain System. (Additionally the Court needs to keep in mind that the water coming out of a swamp is directly proportional to the water coming in to the swamp. Stevenson has not maintained the water course for this Water Right on the land north of the Rogers' property, which has reduced the water coming out of the swamp.)

The "swamp ditch" referred to in the *Frost Decree* is on land which now belongs to Mr. Rogers, and the beneficiary of that decreed flow is Mr. Stevenson's land. The testimony at trial will show that at no time, including the present, has 400 inches of water flowed through this "swamp ditch" to Mr. Stevenson's property, and moreover, until the improvements made by Mr. Rogers (ie creating the Rogers' ditch) even less water flowed to Mr. Stevenson's property than does at the present time. Testimony will also show that until very recently, no one has maintained the "swamp ditch" except Mr. Rogers and his predecessors since before Mr. Rogers' immediate predecessor acquired the property in the

early 1950s and created the Rogers' ditch (ie the Buller Drain System).

The evidence produced at trial will also show the *Amended Director's Report* also incorrectly states the source of the water as the Buhler Drain², which is the point of diversion or collection for the water, not the source. The source is porous swamp land which percolates and is developed by drainage measures and then is diverted to the Buller Drain and related ditch works. Mr. Rogers' filed an objection to the report, for the reasons above, and hereby asserts that the source of the water is not the Buller Drain, but is instead reclaimed swamp water and that Mr. Stevenson is not entitled to 400 inches of water under his senior water right, but is only entitled to the historic flows for the drain when the decree was entered by the Court and which is all the water that he and his predecessors had available to apply to beneficial use until the recent improvements by Mr. Rogers. All decreed amounts in excess of the historic flows have been forfeited or abandoned by Mr. Stevenson and have subsequently been acquired by Mr. Rogers by development and application to beneficial use.

Additionally, the evidence will show that the recorded flows of the Buller Drain since approximately 1978 bear a distorted relationship to the actual historic flows of this drain and its related ditch works. The evidence will show the recorded flows are

²Many of the documents refer to the Buhler Drain, however the *Frost Decree* references the Buller swamp ditch. Buller was the last name of the original claimants of the right at issue.

measured at the headgate at the end of the drain, and measure all the water in the system at that point. However, in approximately July of 1955, an artesian well belonging to Mr. Stevenson was diverted into the Buller Drain system, artificially increasing the measured flows. This well dumps into the drain prior to the headgate where the flows are measured, and therefore its water is included into the flows recorded after its diversion. As such, the evidence produced at trial will show the water introduced by the artesian well must be excluded from the proper measurement of this historic flows to determine the appropriate water rights of each party.

Analysis

Mr. Rogers asserts that based upon the facts to be produced at trial and applying the relevant Idaho law, Mr. Stevenson's claimed right to 400 inches has been lost through non-compliance with the terms of the *Frost Decree* or alternatively through abandonment or forfeiture of all amounts in excess of the historic flows. Mr. Rogers further asserts that all amounts of water in the Buller Drain in excess of the historic flows are now his by virtue of having developed the drainage to produce more water and subsequently applying the same to beneficial use and that this claim is superior to any claim by Mr. Stevenson to amounts greater than the historic flows.

Mr. Rogers concedes that as the party who seeks to alter a decreed water right, he bears the burden of proof by clear and convincing evidence to show that the alteration is appropriate. *Gilbert v. Smith*, 97 Idaho 735, 738 (1976). He also concedes that forfeiture is not favored, and that all intendments are indulged against such a claim. *Id* at 740. Nonetheless, Mr. Rogers contends that Mr. Stevenson has lost his right to all water in the Buller Drain in excess of the historic flows and that the evidence will bear out the same.

I. Mr. Stevenson's claimed right was lost by non-compliance with the terms of the decree

Mr. Rogers asserts that any rights Mr. Stevenson may have had to water in excess of the historic flows under the terms of the *Frost Decree* have been lost by Mr. Stevenson's (and/or his successor's) non-compliance with the express terms of the decree which granted those rights. On page 22 of the *Frost Decree*, it is expressly ordered by the Court that the Bullers were

"entitled to 400 inches of water in their swamp ditch, as of a prior and exclusive right, so long as they maintain their said swamp ditch, and continue to develop that amount of water therein."

The evidence at trial will show that at no time did the Buller Drain ever carry 400 inches of water before the interference of Mr. Stevensen's artesian well diverted into the drain. Instead, the historic flows will show that the drain carried far less at the time of the decree, and for most of the drain's history. In

Albrethsen v. Wood River Land Company, 40 Idaho 49 (1924) (which, coincidentally, concerned a different portion of the *Frost Decree*), the Idaho Supreme Court held that a party claiming a right to use of the full amount of water decreed to them could not be claimed when the evidence showed that the carrying capacity of their canal system never held the amount of water claimed, nor where they could not show that the excess beyond their carrying capacity was diverted and applied to beneficial use in some other manner before the intervention of an adverse right. The court expressly recognized and applied a doctrine of partial forfeiture of a claimed right to water in excess of what was actually historically used. The court further stated:

"When, however, the capacity of a canal has been calculated...and...it is clear that it has never had the capacity to carry the maximum amount of water claimed by respondent and decreed to it in 1909, and from the whole of the record it is clear that this excess has not been diverted and applied to a beneficial use by respondent, it is subject to the rights of subsequent appropriators under the *Frost decree*, upon their showing that they have so applied this excess." 40 Idaho at 56-57.

Mr. Rogers asserts the evidence at trial will show that at no time did the Buller Drain carry 400 inches of water, and as such, this case is indistinguishable from *Albrethsen*. Moreover, the *Frost Decree*, by its own terms imparts that the right to 400 inches was a contingent right and would be lost by the failure of Buller (or their successor) to develop 400 inches of water and to apply the same to beneficial use. As that amount of water was not developed from the swamp, all rights Mr. Stevenson had in excess of the historic flows are nullified.

The *Frost Decree* also required Buller (and his successors) to maintain the "swamp ditch" to be able to claim their right to the water. The evidence at trial will show that until very recently, the only persons who maintained the drain on Mr. Rogers' land were Mr. Rogers' and his predecessors. Only recently has Mr. Stevenson performed any maintenance on the drain, which was a one time event and limited in scope. Similar to the amount of water being contingent on the development of the same, the *Frost Decree* made the continuation of the right to the water contingent on the continued maintenance of the ditch by the claimant of the water. The evidence at trial will show this contingency was not complied with, and thus, the right to the water in excess of the historic flows was lost due to failure to comply with the contingency terms of the decree, as well as the historic lack of capacity.

It is true that there can be no abandonment or forfeiture of a water right when a party who is not using the water they have a right to because of circumstances which are beyond that party's control. *Hodges v. Trail Creek Irrigation Comp.*, 78 Idaho 10, 16 (1956). However, in the instant matter, Mr. Stevenson and his predecessors had time and opportunity to develop 400 inches from the swamp, as well as to maintain the "swamp ditch." They have failed to do so and have, by their own action (or rather inaction) permitted the loss of the right to accrue. It is also conceded that a claimant does not lose their rights when they are prevented from using their water by the wrongful acts of another. *Id.*

However, nothing in the record shows that at any time did Mr. Rogers or his predecessors perform any act which prevented anyone from developing 400 inches of water or maintaining the "swamp ditch."

For these reasons, Mr. Rogers contends that Mr. Stevenson cannot claim any water in excess of the historic flows under the *Frost Decree* because neither Mr. Stevenson nor his successors have complied with the express terms of the decree because he has failed to comply with the contingencies required by the decree to enforce the right. As the subsequent appropriator and developer of the water in the swamp in excess of the historic flows, Mr. Rogers is entitled to a superior right to all water in excess of those historic flows.

II. Mr. Stevenson has abandoned all claimed water in excess of the historic flows

Mr. Rogers contends that, even absent a finding that the contingencies of the *Frost Decree* were met and no diminution in the claimed water right is caused by failure to comply with the decree, Mr. Stevenson (and/or his predecessors) abandoned their claim to water in excess of the historic flows by operation of law.

Abandonment is a common law doctrine and requires a showing of intent to abandon a water right. *Gilbert, supra*. Mr. Rogers asserts such intent can be inferred from the actions of Mr. Stevenson and his predecessors. The *Frost Decree* required Buller and his successors (including Mr. Stevenson) to develop the drain and maintain the "swamp ditch" to produce 400 inches to be able to

claim the same under the decree. By not taking any steps, until lately, to develop the drain or maintain the "swamp ditch", Mr. Stevenson and his predecessors have manifested an intent to not use any water beyond the historic flows in the "swamp ditch" before Mr. Rogers' improvements thereupon. Quite simply, Mr. Stevenson and his predecessors did not take the necessary steps to develop the whole 400 inches, and therefore this evidence shows they had no interest in using the water in excess of the historic flows and thereby abandoned the same.

In a situation where water has been over-appropriated, a junior appropriator can gain a senior right over a senior appropriator when the senior appropriator has abandoned the over-appropriated water by non-use. *See, e.g., Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831 (2003). It is required that the junior appropriator make a showing that they put the over-appropriated water to beneficial use and that there was no resumption of use by the senior appropriator prior to the claim of right by a junior appropriator. *Id* at 837. A claimant under such a theory must show over-appropriation of the stream, application to beneficial use by the claimant of the over-appropriated portion such that the junior appropriator received water that but-for the senior appropriator's non-use the junior appropriator would not have received. *Id*. Mr. Rogers has developed the drain to produce more water than it ever did under the historic flows. He has maintained the ditch works and drain such that more water has flowed than historically was possible. He also has an absolute

right to practice erosion control on his land. And Mr. Rogers has appropriated this water for his own uses. As the historic flows show, this "stream" was over-appropriated because it did not produce the decreed 400 inches of water. Because of his development, Mr. Rogers has been able to utilize water that he otherwise would not have had if Mr. Stevenson and his predecessors had taken steps to develop 400 inches of water from this source. There is no evidence that Mr. Stevenson resumed use of the water beyond the historic flows before Mr. Rogers made his claim to the excess water. Moreover, Mr. Rogers' improvements to the land have prevented the waste of water that otherwise would not have been able to be used at all. Waste of water is contrary to the policy of the State of Idaho. See, e.g., *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677 (1980).

For these reasons, Mr. Rogers asserts that he has accrued a senior right to all water in excess of the historic flows of the Buller Drain because Mr. Stevenson has abandoned the same, his intent inferred from his non-development of water beyond the historic flows and non-maintenance of the ditch works, and because Mr. Rogers has developed the water beyond those historic flows and has put the water to beneficial use.

III. Mr. Stevenson has forfeited all claimed water in excess of the historic flows

Alternatively, Mr. Rogers asserts Mr. Stevenson has forfeited his right to all waters in excess of the historic flows.

Forfeiture of water rights is distinct from abandonment. *Sagewillow, supra*. While abandonment is a creature of the common law requiring a showing of intent, forfeiture is created by statute and does not require a showing of intent to be found and, in fact, is unconcerned with the intent of the party forfeiting the water right. *Gilbert, supra*. Idaho Code § 42-222 sets out the criteria for forfeiting a water right: a finding that water has not been put to beneficial use for five years or more. Forfeiture under section 42-222 can be for a whole water right or for part of a water right. *State v. Hagerman Water Rights Owners, Inc.*, 130 Idaho 727 (1997). There are some exceptions to the five year period in Idaho Code §42-223, however none of them are present in the instant case.

As before, the historic flows of the Buller Drain are instructive. As the evidence will show, at no time has 400 inches of water flowed through the drain. Because of this, at no time was Mr. Stevenson or his predecessors receiving water in excess of the historic flows. Because they did not receive any water beyond those historic flows until the recent improvements by Mr. Rogers or the interference of Mr. Stevenson's artesian well, there was no way for Mr. Stevenson to put to beneficial use any water beyond the historic flows before Mr. Rogers' improvements were made. And since the improvements were made, Mr. Rogers has put the water beyond the historic flows to his own beneficial uses.

Nor was Mr. Stevenson's non-use based on circumstances beyond his control. As noted above, he had the right (and the obligation) to develop 400 inches of water from the swamp, as well

as to maintain a drain that would carry the same. No effort was made to do so. Nor did Mr. Rogers prevent him from developing that water. Mr. Stevenson (and his predecessors) simply did not take advantage of the opportunity to develop their allotted water, and as such, have forfeited the right to water beyond historic flows under Idaho Code §42-222 for non-use for more than five years.

Conclusion

For the forgoing reasons, Mr. Rogers asserts that the evidence to be produced at trial will show that Mr. Stevenson either abandoned or forfeited his rights to any water beyond the historic flow of the Buller Drain, either by operation of the specific terms of the *Frost Decree*, or by operation of the applicable law. Mr. Rogers further asserts that pursuant to his improvements to the drain, and the application of the developed water to beneficial use, he has thereby developed a superior water right in all waters in the Buller Drain in excess of the historic flows and should be decreed the same by order of this court.

Dated this 10th day of June, 2011.

STEPHAN, KVANVIG, STONE & TRAINOR

By 
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CERTIFICATE OF MAILING

I hereby certify that on the 10th day of June, 2011,
I caused a true and correct copy of the foregoing instrument, to be
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