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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JAN 24 2013	
By _____	Clerk
Deputy Clerk	

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

Case No. 39576

) Subcase No. 65-23481
)
) ORDER GRANTING IN PART AND
) DENYING IN PART MOTION TO
) ALTER OR AMEND FILED BY ALLEN
) RANCH LLP
)
) ORDER GRANTING IN PART AND
) DENYING IN PART MOTIONS TO
) ALTER OR AMEND FILED BY MR.
) BUNCE AND MS. CHESS
)
) AMENDED SPECIAL MASTER'S
) REPORT AND RECOMMENDATION

I. APPEARANCES

Bruce M. Smith for Allen Ranch, LLP.

Sandra M. Chess, *pro se*

James T. Bunce, *pro se*.

II. ISSUES PRESENTED

A. Issues Raised by Allen Ranch, LLP. Allen Ranch LLP raises the following
issues in its *Motion to Alter or Amend*:

1) Whether the language in the Payette Decree¹, which states: “Beneficial use rights from surface water sources are those rights which were commenced by diversion and application of the water to a beneficial use prior to May 20, 1971,” and as that language was considered in the ***Order Conditionally Granting Motion to File Late Notice of Claim; Order Requiring Filing of Amended Claim; Order Requesting Amended Director’s Report if Amended Claim is Filed***, Subcases 74-15015 and 74-15861 (January 12, 2009) (“Riggan Decision”), allows a beneficial use late claim with a priority date equal to or later than May 20, 1971, but earlier than July 1, 1971?

2) Whether a water right which was decreed as forfeited pursuant to the Payette Decree is subject to being revived under the resumption-of-use doctrine, and hence can be claimed in the SRBA?

B. Issues Raised by Mr. Bunce and Ms. Chess. Mr. Bunce and Ms. Chess raise the following issues in their respective *Motions to Alter or Amend*:

1) Whether Allen Ranch, LLP has demonstrated a meritorious position for its claim to non-irrigation season stockwater in light of the lack of specific evidence in the record demonstrating historical use of water for livestock watering purposes during such non-irrigation season.

2) Whether Allen Ranch, LLP has demonstrated a meritorious position with respect to its claim for a point of diversion located in the NWSW of T13N R3E S3 (i.e. the “upper” point of diversion).

III. ANALYSIS

A. Allen Ranch LLP’s Motion to Alter or Amend.

1) Beneficial Use Claim for Early and Late-Season Irrigation. Allen Ranch argues that it has met the “meritorious position” standard under I.R.C.P. 55(c) with respect to its late claim (based upon beneficial use) for early and late season irrigation. Specifically, Allen Ranch argues that the Riggan Decision allows a beneficial use water

¹References herein to the “Payette Decree” refer to the ***Partial Decree Pursuant to Rule 54(b) I.R.C.P.*** entered on January 21, 1986 in the case *In the Matter of the General Determination of the Right to the Use*

right to be acquired on or subsequent to the May 20, 1971, date specified in the Payette Decree, but before the July 1, 1971, effective date of the mandatory permit statute found in Idaho Code § 42-201. This Special Master agrees with Allen Ranch that the situation presented in this case is indistinguishable from the situation at issue in the Riggan Decision, and therefore Allen Ranch should be allowed to proceed with its claim. That being said, this Special Master recommends that the District Court re-evaluate the law concerning the effective date of the mandatory permit statute found in Idaho Code § 42-201.

In the Riggan Decision, the SRBA District Court stated that the mandatory permit requirement for appropriating surface water did not become effective until July 1, 1971. As explained below, further research shows the effective date of the 1971 amendment to Idaho Code § 42-201 (eliminating the “beneficial use” method of appropriating a water right) to be May 19, 1971, not July 1, 1971. The starting point in determining when an act of the legislature becomes effective is Article III, Section 22 of the Idaho Constitution, which states:

§ 22. When acts take effect. – No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law.

Idaho Const., Art. III, Sec. 22. The statutory codification of this Constitutional provision is found in Idaho Code § 67-510. In 1971 the language of the statutory provision was identical to the Constitutional provision. In 1972, the Idaho Legislature amended Idaho Code § 67-510 to state:

67-510. Statutes and Resolutions – When Effective. – No act shall take effect until **July 1 of the year of the regular session or** sixty days from the end of the session at which the same shall have been passed, **whichever date occurs last**, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law.

I.C. § 67-510; Idaho Session Laws, 1972, Ch. 176, p. 444. The statutory amendments making the permit system mandatory for the appropriation of surface water were

of the Surface and Ground Waters of the Payette River Drainage Basin, Gem County Case No. 3667.

approved by the Idaho Legislature on March 24, 1971². Idaho Session Laws, 1971, Ch. 177, pp. 843-844. No emergency was declared in the preamble or body of the act. *Id.* The regular session of the Forty-First Idaho Legislature adjourned on March 20, 1971. The sixtieth day after March 20, 1971, was Wednesday, May 19, 1971. Because the amendment to Idaho Code 67-510 was not passed until the following year (1972), the applicable law at the time the legislature approved the statutory amendments making the permit system mandatory provided that the amendments became effective sixty days from the end of the session, or May 19, 1971. In accordance with the foregoing analysis, it is recommended that the SRBA District Court revisit the issue of when Idaho's permit system became mandatory for the appropriation of surface water.

As to the claim by Allen Ranch that it has a valid claim to a water right based upon diversion and application to beneficial use, with a priority date equal to or later than May 20, 1971, but before July 1, 1971, the current law of the case in the SRBA, as set forth in the Riggan Decision, would allow such claim to proceed, absent a re-evaluation by the SRBA District Court of the effective date of the mandatory permit statutes. It should be noted that because the basis of such a claim is diversion and beneficial use, whereas the basis of Allen Ranch's stockwater claim is derived from the Payette Decree, there are two different claims at issue here that cannot be combined into a single claim.

In accordance with the foregoing, Allen Ranch's *Motion to Alter or Amend* is **granted** in this regard.

2) Resumption of Use. Allen Ranch argues that it has presented a meritorious position concerning the possibility that its claimed water right for early and late season irrigation, despite having been adjudicated as "forfeited" in the Payette Adjudication, has been revived under the resumption-of-use doctrine. This Special Master disagrees. As explained below, the resumption-of-use doctrine does not apply to water rights that have been decreed as forfeited.

² The Session Laws for 1971 indicate that the subject act (H.B. 83) was approved March 24, 1971, which is four days after the end of the Regular Session. This date is apparently the date the bill was signed by the Governor. In any event, H.B. 83 was introduced during the Regular Session of the 41st Idaho Legislature,

First, it should be noted that the concept of “forfeiture” in the body of Idaho water law arises in different contexts. For example, there is forfeiture that occurs pursuant to Idaho Code § 42-222(2), which states: “All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated . . .” The “five-years-non-use” type of forfeiture is different from the forfeiture at issue in this case, which arose out of the language in the Payette Decree (which language referenced former Idaho Code § 42-1411). In other words, forfeiture applicable to any water rights owned by Allen Ranch or its predecessors-in-interest, which it now seeks to claim in the SRBA, did not arise out of five years non-use, but rather such forfeiture arose from the failure to file a claim for such right in the Payette Adjudication.

The resumption-of-use doctrine does not apply to previously existing water rights which have been decreed as forfeited by a court. In *Sagewillow v. IDWR*, 138 Idaho 831, 70 P.3d 669 (Idaho 2003), the Idaho Supreme Court held:

Under the resumption of use doctrine, statutory forfeiture is not *effective* if, after the five-year period of nonuse, use of the water is resumed prior to the claim of right by a third party. A third party has made a claim of right to the water if the third party has either instituted proceedings to declare a forfeiture, or has obtained a valid water right authorizing the use of such water with a priority date prior to the resumption of use, or has used the water pursuant to an existing water right.

Sagewillow, 138 Idaho at 842, 70 P.3d at 680 (emphasis added)(internal citations omitted). In a subcase which raised the issue of when a forfeiture upon five-years non-use became irretrievably effective, this Special Master analyzed the issue as follows:

This language in *Sagewillow* makes it clear that the doctrine of resumption of use does not involve the resurrection of a forfeited right [], but rather establishes that a forfeiture is not effective, even after the passage of the five-year period of nonuse, unless there has been a claim of right by a third party (i.e. unless one of the listed events has occurred). Indeed, the whole concept of resumption of use is antithetical to automatic forfeiture. If a water right became fully and completely forfeited upon five-years of nonuse, the right could not be resurrected through a resumption of use. The better analytical framework is that a forfeiture is not effective or

and not during the Extraordinary Session of the 41st Idaho Legislature (which convened on March 22, 1971 and Adjourned on April 8, 1971).

complete -- and hence the use of such right may be resumed – unless and until the one of the events listed in *Sagewillow* actually occurs (i.e. a third party either: (1) institutes legal proceedings to declare a forfeiture; (2) obtains a new water right prior to the resumption; or (3) uses the water pursuant to an existing right).

Memorandum Decision and Order on Motion for Summary Judgment, Subcase 63-2446 et al., December 16, 2009 (Monarch Greenback LLC).

In the present subcase, the forfeiture applied to unclaimed water rights in the Payette Decree was not based upon five-years non-use, but rather the forfeiture was based upon the failure to claim water rights in a general stream adjudication. Once a court declares a water right to be forfeited, whether upon five-years non-use or otherwise, such determination is final, and use of water under that right is henceforth foreclosed. The doctrine of resumption-of-use is not applicable in such a situation.

In accordance with the foregoing, Allen Ranch's *Motion to Alter or Amend* is **denied** in this regard.

B. Bunce and Chess' Motion to Alter or Amend.

1) Historical Non-Irrigation Season Stockwater. Mr. Bunce and Ms. Chess argue that Allen Ranch historically has not kept and watered livestock on the Allen Ranch during the non-irrigation season. Mr. Bunce and Ms. Chess assert that livestock cannot be kept on the Allen Ranch during the non-irrigation season due to snowfall and winter weather conditions. This Special Master makes no factual findings as to whether Allen Ranch has historically kept and watered livestock during the non-irrigation season. That being said, and as explained on the record at the hearing on these motions to alter or amend, it is not appropriate to have a "mini-trial" in a proceeding on a motion to file a late notice of claim, on the issue of the historical livestock practices of the Allen Ranch. If such a factual determination ultimately needs to be made, the proper time for that is after a Director's Report and objections/responses thereto have been filed with the Court. For purposes of the criteria under I.R.C.P. 55(c), the statements concerning the use of

water for livestock contained in the *Affidavit of J. R. Allen in Support of Motion to File Late Claim* are sufficient to demonstrate a meritorious position.

In accordance with the foregoing, Mr. Bunce's and Ms. Chess' *Motions to Alter or Amend* are **denied** in this regard.

2) Upper Point of Diversion. Mr. Bunce and Ms. Chess argue that there is no legal basis that would allow Allen Ranch to claim a point of diversion at a location that has been described in these proceedings as the "upper" point of diversion. This Special Master agrees, but only to the extent that the irrigation claim made by Allen Ranch is derivative of a previously existing water right that has been decreed as disallowed (forfeited) in the Payette Decree for the reason the same was not claimed. However, to the extent that Allen Ranch proceeds with a beneficial use claim with a post May 20, 1971, priority date, then the elements of such a beneficial use water right will be determined by examining the extent of historical beneficial use. In the *Affidavit of J. R. Allen in Support of Motion to File Late Claim* Mr. Allen avers that portions of the Ranch have historically been irrigated from water diverted at the upper diversion. This averment is sufficient for purposes of satisfying the I.R.C.P. 55(c) criteria. Because this Special Master is recommending that Allen Ranch be allowed to proceed with its early and late season irrigation beneficial-use late claim, with a post May 20, 1971, priority date, the factual issue as to whether Allen Ranch has established a valid water right with a point of diversion at the subject location can be determined through the SRBA objection and response procedures.

With respect to whether Allen Ranch has met the I.R.C.P. 55(c) criteria for claiming a point of diversion at the "upper" location for its non-irrigation season late claim for stock water, this Special Master agrees with Mr. Bunce and Ms. Chess that there is no legal basis for the point of diversion to vary from the point of diversion decreed for 65-3111X. The basis for Allen Ranch's late claim for non-irrigation season stockwater is water right 65-3111X coupled with Conclusion of Law No. 7 from the Payette Decree. Therefore the point of diversion for Allen Ranch's late claim for non-irrigation season stockwater is limited to the point of diversion decreed for 65-3111X.

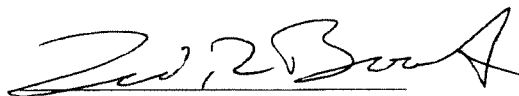
In accordance with the foregoing, Mr. Bunce's and Ms. Chess' *Motions to Alter or Amend* are **granted** with regard to Allen Ranch's late claim for stockwater which is derivative of the Payette Decree; and the *Motions* are **denied** with respect to Allen Ranch's late claim for early and late season irrigation which is based upon diversion and application to beneficial use.

IV. AMENDED RECOMMENDATION

In accordance with the foregoing, IT IS RECOMMENDED that the *Motion to File Late Notice of Claim* for water right 65-23481 be **conditionally granted**, with the condition being that the claimant file a notice of claim consistent with the conclusions set forth herein. Specifically, this means that water right claim 65-23481 should include only the claim for non-irrigation season stockwater, (and if desired by the claimant a claim for incidental stockwater during the irrigation season), with a point of diversion that is limited by the parameters of water right 65-3111X.

With respect to Allen Ranch's late claim for early and late season irrigation, because the basis of such a late claim is different than the basis for the stockwater claim (i.e. beneficial use rather than prior decree), IT IS RECOMMENDED that Allen Ranch be granted leave of court to file a separate late claim for such use, with a priority date no earlier than May 20, 1971, and no later than July 1, 1971.

Dated, April 24 2013



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTIONS TO ALTER OR AMEND FILED BY ALLEN RANCH, MR BUNCE AND MS. CHESSE; AMENDED MASTER'S REPORT AND RECOMMEND was mailed on January 24, 2013, with sufficient first-class postage to the following:

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ORDER

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