

RECEIVED
JAN 24 1996
Department of Water Resources
Adjudication Bureau

RECEIVED
JAN 22 1996
OFFICE OF THE
ATTORNEY GENERAL

JUN 19 PM 3:50

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO

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	)	SPECIAL MASTER'S PRELIMINARY
	)	REPORT AND RECOMMENDATION
Case No. 39576	)	
	)	Subcase No. 36-10664

STATEMENT OF THE SUBCASE

On August 26, 1988, Perry and Margaret Patterson, 1745 E, 3100 S, Wendell, Idaho, filed their *Notice of Claim to a Water Right Acquired Under State Law* for 36-10664. Their claim is for .76 cfs of groundwater to irrigate 38 acres in T 8S, R 15E, §7, NW¼NE¼, B.M., Gooding County, Idaho, from April 1 to November 1, with a priority date of June 23, 1976. The Pattersons base their claim on portions of water rights transferred from two licensed water rights-- 36-07409 and 36-07631.¹

Early in the error correction process, IDWR proposed recommending the Pattersons' claim for "disallowal" because of forfeiture. However, during that process, Mr. Patterson said they were irrigating 1.6 acres of lawn and garden from their domestic well (36-10665), not 38 acres. On the *Notice of Error* form dated September 24, 1992, Mr. Patterson wrote:

I believe it [36-10664] should be allowed with at least some irrigation for my large lawn & garden & trees from my domestic well.... I did not develope [sic] the full 40 acres but I have irrigated area described above.

On November 2, 1992, IDWR filed with the SRBA Court its Director's Report for Reporting Area 3 (Basin 36). The Director recommended adjudication of 1.6 acres with the

¹ For some reason not apparent from the record, the Pattersons claimed a shorter period of use than licensed and approved for transfer. Both 36-07409 and 36-07631 have a period of use from March 15 to November 15. The approved transfer (36-07409B and 36-07631B) has the same longer period of use.

diversion rate (quantity), when combined with domestic use under 36-10665, limited to .05 cfs, the system capacity.² The recommended season of use was from April 1 to October 31. Essentially, IDWR changed its view of the claim from total forfeiture to partial forfeiture.

On April 30, 1993, the Pattersons filed objections to the Director's Report concerning quantity, points of diversion, purpose of use, consumptive use, remarks and the water right recommendation. In the section marked "other", Mr. Patterson wrote:

I came here in 1981, had a house to finish, ditch to change, leveling to do & fences & had a water right that was already a part of an existing right from 1976 approved then before I realize what is happening, the drought & adjudication & I am allowed 1.6 acres I did nothing wrong to deserve such a fine. Please consider my water right.

On September 10, 1993, IDWR filed its *Response to Objection* reaffirming its recommendation. The *Response* added that, since the licenses upon which the Pattersons' claim is based do not contain an annual volume of consumptive use, IDWR recommended 4.8 afy based on IDWR's uniform standard of consumptive use in the Pattersons' area (3 afy/acre).³

The Special Master for Reporting Area 3 was appointed on November 4, 1993. Efforts to settle the subcase were unsuccessful and the matter was tried on November 1, 1995, at the SRBA Courthouse, Twin Falls, Idaho. Mr. Patterson appeared in person *pro se* and Nicholas B. Spencer appeared for IDWR. IDWR called Allen D. Merritt, southern region manager for IDWR, to present the factual basis for the Director's recommendations. Mr. Merritt was deemed qualified as an expert in water rights examination. A complete copy of the claims investigation file for claim no. 36-10664 was admitted into evidence as IDWR Exhibit 100. Mr. Patterson called Acie Clements as his witness and offered into evidence assorted documents marked Claimant Exhibits 1-4.

² The instantaneous diversion rate of .05 cfs also derives from IDWR's standard of .03 cfs per acre applied to "small irrigated tracts". That would yield an annual diversion volume of 6.4 afy based on IDWR's standard of 4 afy/acre for the Pattersons' area.

³ IDWR attached to its *Response* an "amendment" to the Director's Report correcting a typo error for the domestic well number. The amendment also listed three "remarks" about (1) the accomplished change in point of diversion, (2) the combined diversion rate and (3) the derivation of 36-10664. These remarks were later described as (1) a legal issue, (2) an overall limit on the combined rights and (3) necessary for "tracking purposes."

On November 3, 1995, the Special Master viewed the Pattersons' property at their request. Present during the inspection were Perry Patterson, Nicholas Spencer and Allen Merritt. The matter was then taken under advisement.

FINDINGS OF FACT

The essential facts in this case begin with two water right licenses to which an additional point of diversion (a well) on the Pattersons' land was added by administrative transfer proceedings. IDWR issued water right license nos. 36-07409 and 36-07631 to Hill Valley Farms, owned by Acie Clements, in 1976 and 1979. Both licenses included overlapping rights to irrigate parts of the 40 acre parcel now owned by the Pattersons-- T 8S, R 15E, §7, NW¼NE¼ (Patterson land). One license included 30 acres of the Patterson land and the other 38 acres. *Claimant Exhibits 3 and 4.*

The permit application for 36-07631 recited that Hill Valley Farms owned both the point of diversion and all the land to be irrigated. *Claimant Exhibit 4.* However, it came out during Mr. Clements' testimony that Hill Valley Farms never owned the Patterson land. Mr. Clements filed his applications for water on his own land and included the Patterson land at IDWR's suggestion, "because the land might come up for sale some day."

Hill Valley Farms operated a center-pivot sprinkler near the south-east corner of the Patterson land. To illustrate, its sprinkler would swing in a 270° arc from its twelve o'clock position clockwise to the nine o'clock position and then reverse direction. This arc would irrigate Hill Valley Farm land but none of the Patterson land. Mr. Clements said that the center-pivot *could* reach the Patterson land, but never did because the land was not suitable to irrigate for crops. The State of Idaho had scraped off all the top soil for construction on the interstate highway when it owned the property. Mr. Patterson agreed that the land has never been irrigated under either 36-07409 or 36-07631 or any other permit, except for the 1.6 acres from his domestic well.⁴ He also agreed that the land is not irrigable.

During trial, the question was asked how IDWR could issue two licenses that included land that was never irrigated. Mr. Merritt testified that Hill Valley Farms submitted proofs of

⁴ The Pattersons' claim for their domestic well, 36-10665, is uncontested.

application of water to beneficial use for both permits. Both proofs stated that water was being beneficially used on all the land described in the permits, including the Patterson land. IDWR's Gary Funderberk (sp?) field inspected the land both times and reported that water was being beneficially used in accordance with the permits.⁵ Mr. Merritt surmised that if water was not actually being applied to the Patterson land during both licensure examinations, the inspector was probably satisfied that the system *could* irrigate the land. In other words, the center-pivot was capable of sweeping over the Patterson land.

The Pattersons bought their 40 acre tract from the Rodes in 1981.⁶ Sometime before the sale, the Rodes drilled a domestic well near where the Pattersons' home is now located. There was no evidence of when the Pattersons' 1.6 acres were first irrigated from the domestic well. Because IDWR recommended that this portion of the claim be allowed, the court must presume the irrigation began some time before any statutory forfeiture period.

In 1982, Mr. Patterson said he went to IDWR "to apply for a water right."⁷ He did not recall applying for a *transfer* of water rights because he knew his land was never irrigated. However, his notarized signature appears on an *Application for Transfer of Water Right* dated October 8, 1982. In paragraph 10 of the application, Mr. Patterson represented that no portions of 36-07409 and 36-07631 have "undergone a period of five or more consecutive years of nonuse."

The purpose of the application was "to add a well to supply water to property separated from the original place of use by sale." That language from the application meant that a well would be drilled on the Patterson land to irrigate their land, but also suggested that the Patterson land was sold by Hill Valley Farms. Remember that Hill Valley Farms never owned nor irrigated the Patterson land.

The Pattersons' application was duly advertised in the *Gooding County Leader* and on March 14, 1983, IDWR approved the application. It also assigned two new water right numbers,

⁵ Mr. Funderberk inspected 36-07409 on July 16, 1975, and 36-07631 on August 16, 1977.

⁶ The LeMoynes (sp?) bought the Patterson land from the State of Idaho at auction in 1972. They sold the land in 1975 to the Rodes who, in turn, sold it to the Pattersons.

⁷ Allen Merritt testified that he found no evidence of any application for a water right filed by the Pattersons, other than the application for transfer and the Pattersons' SRBA claims.

36-07409B and 36-07631B.⁸ The approval gave the Pattersons the right to drill a new well and divert .76 cfs or 152 afy to irrigate 38 acres from March 15 to November 15, presumably with dual priority dates of November 21, 1973, and June 23, 1976.⁹

The Pattersons agreed that from 1983, when the transfer application was approved, until the present, they had not drilled the irrigation well nor irrigated any of their land, other than the 1.6 acres from their domestic well. An SRBA field exam by Norm Brown on November 30, 1990, confirmed such limited use. IDWR argued that this gap of over seven years from 1983 until 1990 constituted partial forfeiture of the Pattersons' claim under 36-10664.

Mr. Patterson testified that he has subdivided his land and is now selling parcels. So far, he has sold one parcel in the southeast corner and the new owner has installed a modular home. Mr. Patterson wants "enough water to make the parcels look nice." The reasons he gave for not drilling an irrigation well on his land since 1983 are IDWR's moratorium on well-drilling and the SRBA Court's "gag order" preventing him from talking with IDWR. "Someone" at IDWR told Mr. Patterson that he could not drill a well on his property because of the moratorium. He spoke with a well driller in Wendell, maybe D&G Drilling, and was told the same thing. When Mr. Patterson filed his SRBA claim in 1988, he said IDWR told him, "You lost your water right. It's the law."

Mr. Merritt testified that there is a moratorium on well drilling in the Pattersons' area since at least 1983. However, the moratorium has always applied only to *new* water right permits. It does not apply to approved transfers of points of diversion, domestic wells or replacement wells. Mr. Merritt said that if the Pattersons' claim were not partially forfeited, he could still get a permit and drill an irrigation well on his property as approved in the transfer application back in 1983.

⁸ There is no indication in the record why IDWR did not recommend the Pattersons' claim under either or both of these water right numbers since IDWR argued that the licenses are *partially* forfeited.

⁹ Mr. Merritt testified where a claimant elects to file a single SRBA claim based on two licenses with different priority dates, IDWR recommends the latter date to avoid injury to other water users.

CONCLUSIONS OF LAW

IDWR maintains the critical issue in this subcase is whether the Pattersons' claim has been forfeited. It alleges that partial forfeiture occurred when the Pattersons failed to apply their full water right to beneficial use between 1983 and 1990. The Pattersons' transfer application was approved on March 14, 1983, and the SRBA field exam was done on November 30, 1990. That would amount to over seven years, eight months. One might argue that when the Pattersons filed their SRBA claim on August 26, 1988, it tolled the running of any statutory forfeiture period. However, that would still equal more than 5 years, 5 months after the transfer approval.

Idaho Code § 42-222(2) states in relevant part:

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 and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter.

During trial, Mr. Patterson asked how could he lose or forfeit a water right he never had. His argument seems to be as follows. Hill Valley Farms never owned the Patterson land and water was never applied to the Patterson land under license nos. 36-07409 and 36-07631. Therefore, since the water was never appurtenant to the Patterson land, how can IDWR claim it has been partially forfeited?

The SRBA Court is charged with determining the nature, extent and priority of the rights of all users of surface and ground water from the Snake River Basin. The Court takes claims as they were filed, together with their history and facts and sometimes they are "messy." The Pattersons elected to file their claim here based on two licenses issued by IDWR and those licenses are "messy." But in the final analysis, the Pattersons' claim in subcase no. 36-10664 depends solely on whether license nos. 36-07409 and 36-07631 (and their progeny, 36-07409B and 36-07631B) are at least partially valid.

Without laying blame, there were a number of mistakes leading up to the Pattersons' claim. In the end, those mistakes compounded one another. First, Hill Valley Farms applied for water rights on some land it did not own and IDWR never asked for proof of ownership. Second, Hill Valley Farms filed two proofs of beneficial use stating it was irrigating certain land when it was not. Third, two separate licensure field exams confirmed the land was being irrigated when

it was not even irrigable. Fourth, Mr. Patterson signed a transfer application without understanding its meaning. For all practical purposes, Mr. Patterson thereby agreed license nos. 36-07409 and 36-07631 *were* appurtenant to his land and they were not then subject to a claim of forfeiture. Fifth, Mr. Patterson did not look further into IDWR's well drilling moratorium. If he had, he would have learned that the moratorium did not apply to his approved transfer.

Having said that, the fact remains that the Pattersons did nothing to apply water to their land within five years after 1983, other than irrigate 1.6 acres from their domestic well. They did not drill the irrigation well approved in the transfer. From all appearances, the Pattersons want to keep their licensed water rights to the full 38 acres for some future use without having used the water for more than five consecutive years. Looked at another way, the Pattersons want to keep a right to use water that was never applied to their land which is not irrigable anyway. Ironically, the Pattersons' claim rests on licenses they proved should not have been issued for their land and a transfer which should not have been approved.

By statute, the state must presume that the licenses upon which the Pattersons base their claim are valid and the licenses are entitled to *prima facie* weight before the court.¹⁰ Therefore, there are actually two questions before the court. Do the facts supporting the Director's recommendations prove partial statutory forfeiture of those rights after the licenses were issued and the transfer approved? Alternatively, do those facts overcome the *prima facie* weight given to the licenses and prove the licenses are partially invalid?

Forfeiture is predicated upon a statutory declaration that all rights to use water are lost where an appropriator fails to make beneficial use of water for a continuous period. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). Proof of intent is not required. *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944). Where an appropriator fails to apply his water to a beneficial use for a continuous five year period, he loses all rights to the use of such water, with some exceptions: (1) an extension granted under I.C. §42-222(2) upon a showing of good and sufficient reason for non-use; (2) where cessation is involuntary or due to

¹⁰ I.C. § 42-220 states in relevant part: "Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be *prima facie* evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with the conveyance of, the land for which the right of use is granted."

the unlawful acts of others; (3) where there is resumption of use prior to subsequent appropriation; and (4) where Indian reserved rights are involved. *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976).

The general rule in Idaho may be stated this way. There can be no forfeiture "if the non-user is prevented from exercising his right to the water by circumstances over which he has no control, or where claimant to the water to which such user is entitled is prevented from using it by the wrongful acts of another." *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 16, 297 P.2d 524 (1956).

Other western states also recognize "sufficient cause" to exempt certain rights from forfeiture: (1) drought or other unavailability of water; (2) active service in the armed forces of the United States during military crisis; (3) nonvoluntary services in the armed forces of the United States; (4) the operation of legal proceedings; and (5) federal laws imposing land or water use restrictions or acreage limitations or production quotas.¹¹

Forfeitures are not favored, and clear and convincing proof is required to support a forfeiture. *Jenkins v. State Dept. Of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). All intendments are to be indulged in against a forfeiture. *Hodges v. Trail Creek Irrigation Co.*, *supra*.

Although the law concerning forfeiture is well defined in Idaho, the same cannot be said of partial forfeiture. The Special Master is not aware of any statutory authority or case law in Idaho recognizing such. That issue is currently before the Presiding Judge in the SRBA on a request for designation as a basin-wide issue.

Alaska explicitly provides for whole or partial forfeiture by statute "if the appropriator voluntarily fails or neglects, without sufficient cause, to make use of all or a part of the appropriated water for a period of five successive years." Alaska Stat. §46.15.140. California recognizes partial statutory forfeiture by case law. *Erickson v. Queen Valley Ranch Co.*, 22 Cal.App.3d 578, 99 Cal.Rptr. 446 (1971). The Utah Supreme Court is struggling with the concept:

¹¹ Lynn B. Squires, "Unused Riparian Water Rights in Washington, *Department of Ecology v. Abbott*," 103 WN.2d 686, 694 P.2d 1071 (1985)", 60 Wash. L. Rev. 787, 802 (footnote 88), June, 1985.

The question of partial forfeiture is not addressed in our statutes and has never been directly before this court, with regard to a city or any other entity. A 1943 case did, however, intimate-- without squarely deciding-- that partial forfeiture is possible.... As a matter of law, the trial court in this case held that partial forfeiture does not apply in the state of Utah. Such a result would mean that the use of any part of a water right, no matter how small, would preserve the whole. As a matter of public policy, it might be prudent to allow partial forfeiture; all of the policy reasons that support forfeiture as a general principle would be furthered by, and hindered without, partial forfeiture. *Eskelsen v. Town of Perry*, 819 P.2d 770, 774 (footnote 9) (1991).

The court could determine this subcase based on IDWR's recommendation that the Pattersons' claim has been partially forfeited. However, that approach would require a presumption that the two underlying licenses were wholly valid, and therefore, the Patterson land at one time had an appurtenant right to irrigate 38 acres. Only then could the court address the issue of whether that right has been partially forfeited. But that approach would put the court squarely behind a continuing charade. The central facts are that the Patterson land is not irrigable now and was not irrigable when the licenses were issued, except for 1.6 acres. The court must not perpetuate a fiction that non-irrigable land can have appurtenant water rights just because of past mistakes.

It is generally said that beneficial use is the basis, the measure and the limit of an appropriative water right. In Idaho, no holder of a water license "shall at any time be entitled to the use of more water than can be beneficially applied to the lands for the benefit of which such right may be confirmed...." I.C. §42-220. When water rights are adjudicated in Idaho, the amount of water allotted "shall never be in excess of the amount actually used for beneficial purposes for which such right is claimed...." I.C. §42-1402.

The evidence in this subcase, submitted by both IDWR and the Pattersons, has overcome the *prima facie* effect of license nos. 36-07409 and 36-07631 and the approved transfer (36-07409B and 36-07631B). Both licenses are partially invalid. The Patterson land should never have been included in either license in the first place. However, there is evidence that some water was applied to beneficial use on the Patterson land in accordance with the terms of the licenses, even though the point of diversion was not approved. Under the circumstances, and in the interests of justice, the court can "indulge in" at least one intendment. The Pattersons or their

predecessors in interest beneficially used water under the licenses, enough to irrigate 1.6 acres.

The Pattersons are entitled to no more water than can be beneficially applied to their land. They are entitled to enough water to irrigate 1.6 acres under the two licenses and the approved transfer, but no more.

RECOMMENDATION

Therefore, it is recommended that Perry and Margaret Patterson be adjudicated the following water right under claim number 36-10664:

Name and address of claimants:

**Perry and Margaret Patterson
1745 E, 3100 S
Wendell, ID 83355**

Source of water:

Ground water

Quantity of water used:

.05 cfs

Right No. 36-10665 is also diverted through same point of diversion and the total combined rate of diversion of these rights is limited to .05 cfs.

Date of priority:

June 23, 1976

Point of diversion:

**T 8S, R 15E, §7, B.M., Gooding County, Idaho,
NW¹/₄NW¹/₄NE¹/₄**

Purpose of use:

Irrigation

Period of use:

April 1 to October 31

Place of use:

**T 8S, R 15E, §7, B.M., Gooding County, Idaho,
NW¹/₄NE¹/₄- 1.6 acres**

Annual volume of consumptive use:

4.8 afy

Conditions on exercise of water right:

None

Remarks or other matters necessary for definition of the right, for clarification of any element of the right, or for administration of the right by the director:

None

No general provisions are included pending the resolution of Basin-Wide Issue No. 5.

DATED January 19, 1996.



TERRENCE A. DOLAN

Special Master, Reporting Area 3
Snake River Basin Adjudication

