

RECEIVED

FEB 27 1996

Department of Water Resources

1996 FEB 26 PM 2:47

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED _____

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. 36-10664
)
)
)
)
)
)

ORDER CONCERNING SPECIAL
MASTER'S PRELIMINARY REPORT
AND RECOMMENDATION

On January 19, 1996, the Special Master filed a *Preliminary Report and Recommendation (Report)* concerning the above subcase. On February 2, 1996, IDWR lodged its *Comments on and Request for Clarification of the Preliminary Special Master's Report and Recommendation (Comments)*. No one else responded to the *Report*.

The Director was concerned about an apparent inconsistency in the *Report*. The Special Master found that land now owned by the claimants, the Pattersons, should never have been included in license nos. 36-07409 and 36-07631. Nevertheless, the Special Master concluded that some water was applied to beneficial use on the Patterson land in accordance with the terms of the licenses. Hence, the Director views these findings as incompatible and suggests that the *Report* be amended to reflect that at least 1.6 acres were "properly included within the scope of the licenses."

Evidence produced at trial was that when Hill Valley Farms (Acie Clements) applied for permit nos. 36-07409 and 36-07631, the application included overlapping claims for most of the 40 acre parcel now owned by the Pattersons. However, Hill Valley never owned any of the Patterson land. Mr. Acie said that he included the land at IDWR's suggestion, "because the land might come up for sale some day."

Hill Valley "proved up" the permits and was issued licenses which included 38 acres of the Patterson land. Mr. Clements said he never irrigated the land and described it as not suitable to irrigate for crops. The Pattersons agreed that the land was never irrigated under any permit, except for 1.6 acres near their home irrigated from their domestic well.

The Director cited no authority for his conclusion that some of the Patterson land was properly included within the scope of the licenses. Perhaps the Director believes that it is not speculation to file an application for a water permit without possessing any legal right to the use of the property designated as the place of use. In other words, trespassers may make valid appropriations of water in Idaho.

That was the position of the Director in *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974). In that case, the Director found that certain permits "are not void for having been filed without the applicants owning or possessing any rights to the lands where the proposed points of diversion are to be located or the proposed use is to be made." 95 Idaho at 780.

However, the Idaho Supreme Court in *Lemmon v. Hardy* said the Director's conclusion of law is in error:

The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid.

....

Lack of a possessory interest in the property designated as the place of use is speculation. Persons may not file an application for a water right and then seek a place of use thereof. 95 Idaho at 780-781.

The correct conclusion of law remains: none of the Patterson land should have been included in license nos. 36-07409 and 36-07631. Hill Valley lacked a possessory interest in the Patterson land and it was speculation for Hill Valley to include the land in its application for the permits. Further, all but 1.6 acres of the Patterson land was non-irrigable when the licenses were issued and remains so. Because no holder of a water license is entitled to use more water than can be beneficially applied, the licenses were, at best, only partially valid. They should not have been issued for any more than 1.6 acres of the Patterson land, assuming Hill Valley had some possessory interest in the land.

That being said, the fact remains that Mr. Patterson went to IDWR "to apply for a water right" and ended up getting an approved transfer. As noted in the *Report*, the approval gave the Pattersons the right "to add a well to supply water to property separated from the original place of use by sale." Of course, the Patterson land was never separated from the original place of use by sale because Hill Valley never owned the land in the first instance. But, in fairness to the Pattersons, it may be argued that the transferred licenses, 36-07409B and 36-07631B, were not void but voidable and thus gave the Pattersons some water rights as "successors in interest" to Hill Valley. Those rights, in turn, relate back to the underlying licenses, 36-07409 and 36-07631.

Admittedly, there is some inconsistency in basing a recommendation on licenses that are only partially valid, at best. But from all the evidence, the Pattersons paid filing fees and made improvements to their land, generally in accordance with the terms of the transfer. They relied in good faith on the apparent validity of a duly approved transfer application. For those reasons, equity, and not harsh rules, should determine the results, particularly where the likelihood of harm to other appropriators is lacking. Hence, the *Report* concluded:

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.

THEREFORE, IT IS ORDERED that a *Special Master's Report and Recommendation* shall be filed with no changes from the *Special Master's Preliminary Report and Recommendation*.

DATED February 26, 1996.



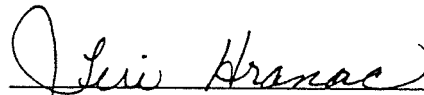
TERRENCE A. DOLAN
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER CONCERNING SPECIAL MASTER'S PRELIMINARY REPORT AND RECOMMENDATION was mailed on February 23, 1996, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

Perry and Margaret Patterson
1745 East, 3100 South
Wendell, ID 83355


Deputy Clerk