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May 1, 1989

Rita Lundy
Big Lost River Irrigation
District
POB 205
Mackay, ID 83251

Dear Rita:

Re: Timberline Beef, Inc. v. BLRID

Enclosed is a copy of Judge Herndon's decision in the Timberdome matter. Have the officers and board members study it carefully and make any recommendations as to additional findings and conclusions.

Sincerely,



Ray W. Rigby

dk

Enclosure

BLANCH COUNTY, IDAHO.
April 20 1989
4:10 P.M.
District Judge

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BUTTE

TIMBERLINE BEEF, INC., and
BOYD B. BURNETT,

Plaintiffs,

vs.

BIG LOST RIVER IRRIGATION
DISTRICT and its Directors
J. DOYLE JENSEN, WILLARD
BELL, JAMES BABCOCK, DICK
ROTHWELL and VERNON WARNER,

Defendants,

and

TIMBERLINE BEEF, INC., and
BOYD B. BURNETT,

Plaintiffs,

vs.

TIMBERDOME CANAL COMPANY,
INC.,

Third Party
Defendant.

Case No. 17-80

MEMORANDUM DECISION

I. INTRODUCTION

This matter came on for trial on September 21, 1988, before
the court sitting without a jury. Kent W. Foster, Esq., HOLDEN,

KIDWELL, HAHN & CRAPO, appeared on behalf of Timberdome Canal Company Inc., (TCC), and Ray W. Rigby, Esq., RIGBY, THATCHER, ANDRUS, RIGBY & KAM, Chartered, represented Big Lost River Irrigation District (BLRID).

Plaintiff Timberline Beef, Inc., and Boyd Burnett (plaintiffs) initiated this lawsuit on June 5, 1980, against BLRID and its directors. Plaintiffs claim certain water rights and ditch rights by contract and prescription and ask the District Court to enter a restraining order, preliminary injunction and a judgment quieting title to the ditch rights and requiring BLRID to deliver water to plaintiffs.

A temporary restraining order and order to show cause was entered on June 5, 1980. The parties then stipulated that the temporary restraining order previously granted would -- with certain clarifications -- continue and it remained in effect at the time of trial.

As the case progressed, BLRID answered and counterclaimed against plaintiffs for unpaid toll charges and plaintiffs replied and alleged an offset. Plaintiffs then filed a third-party complaint against TCC and included in TCC's response was a cross-claim against BLRID. BLRID answered TCC's cross-claim in January, 1982, and also cross-claimed against TCC. TCC answered BLRID's cross-complaint with a general denial and an affirmative defense that construction, improvement, operation and maintenance work done by TCC since 1976 more than offset the total charges of BLRID.

Meanwhile, plaintiffs indicate that they no longer are interested in the matter and plaintiff Boyd Burnett filed bankruptcy and no longer claims a legal interest in the outcome.

Thus, the trial before the court involves the issues framed by TCC's cross-claim against BLRID, BLRID's cross-claim against TCC and each party's reply.

The parties briefed well the case and the court has read and relied in part upon the excellent trial briefs, post-trial briefs and responses they presented.

The court considered the evidence, heard and observed the witnesses, read and reviewed the exhibits and briefs, and enters the following Findings of Fact:

II. FINDINGS OF FACT

1. BLRID is an irrigation district formed under and by virtue of and subject to the provisions of Title 43 of the Idaho Code. It exists for the purpose of owning, holding, operating and maintaining a reservoir and water distribution system. ⁺ The distribution system includes a dam, canals, lateral ditches, water diversion and other structures and devices for the purpose of diverting and storing water in the Mackay Reservoir under certain storage rights on the Big Lost River, and conveying such water under such storage rights to natural flows of the Big Lost River and its tributaries, held by individual landowners within the boundaries of said district, to the lands of such landowners for the irrigation thereof.

* water rights

2. TCC is a nonprofit corporation organized pursuant to Idaho

Code Title 30, Chapters 1 and 3, by a group of landowners who own and farm several thousand acres in an area commonly called Era Flats, situated in Butte County, north and west of Arco, Idaho, and outside of and generally to the south and west of the BLRID. The company was organized on July 1, 1976, for the purpose of constructing and maintaining a system of canals and ditches to receive and convey water diverted from the public water supply by its stockholders, under rights held by them, from the various points of diversion to irrigate stockholders' farms. TCC owns its canal system and as a "carrying company" transports water, decreed to stockholders in their individual capacities, through its canal system.

*Belton
Lester
Blaine*

3. Era Flats is arid land and grows agricultural crops for commercial purposes only through the artificial application of water. The area lies several miles to the west of the Big Lost River. A large canal, named the "Blaine" Canal, also known as the "U-C" Canal, was constructed by the Utah Construction Company in the earlier part of this century for the purpose of conveying water from the Big Lost River to the Era Flats area.

4. The aquifer under Era Flats does not contain sufficient water to sustain irrigation by means of wells.

5. In 1972 individuals, who subsequently became TCC shareholders, discovered a productive water well field and drilled several producing wells, primarily in Section 32, Township 5 North, Range 26 East, and Section 5, Township 4 North, Range 26 East, Boise Meridian.

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6. Water from the wells was pumped into the Blaine Canal and conveyed approximately 4 1/2 to 5 miles to Era Flats. In order to facilitate the transportation of the water, a smaller canal, or ditch, was built within the banks of the Blaine Canal from a point within the old Blaine Canal where it intersects the north section line in the northeast quarter of the northwest quarter of Section 5, Township 4 North, Range 26 East, Boise Meridian. The "canal within the canal" then continues in a southerly direction and bearing a little west within the banks of the old canal through Sections 5, 6, 7, 8, 18, 19 and 30 of the said township and range to a point on the west section line in the northwest quarter of the northwest quarter of Section 30, where the old Blaine Canal ended. A new ditch and laterals then conveyed the water to the lands irrigated.

7. Since the 1976 irrigation season, the canal system, called the Timberdome Canal, conveyed, and still carries, approximately 3200 miner's inches (640 cfs) of water from the wells to the farms of the respective shareholders on Era Flats.

8. Certain Era Flats landowners (stockholders of TCC) also own land within the BLRID and appurtenant to decreed natural flow or other water rights, such as licensed rights for wells. Through various approved transfer applications and exchange agreements, they obtained the right, and do in fact, transport approximately 1800 miner's inches of water through the Moore Canal into the crossover ditch and then into the Timerdome Canal for irrigation at Era flats. These water rights are more particularly described

in the following filings with the Idaho Department of Resources: 34-0692, 34-0496, 34-0093, 34-0032A, 34-7079, 34-7485, 34-7077, 34-7120 and 34-2330.

some of these are filed pending

9. One of the principal BLRID operating canals, the Timberdome Canal, generally parallels the Blaine Canal and flows approximately 1/8 of a mile to the east of the Blaine Canal at that point -- in Section 18, Township 4 North, Range 26 East. TCC shareholders constructed a ditch, termed the "crossover," which carries TCC shareholder water as allowed by permits and transfers it to the Moore Canal west of the Blaine Canal to augment the water being carried in the Timberdome Canal.

(TCC or BLRID) not a shareholder

10. The individuals who drilled the wells and constructed the small canal within the banks of the Blaine Canal in 1972 eventually began to refer to themselves as "Timberdome Canal Associates" (Associates).

let all persons then as comp

not true - we always controlled

11. When BLRID asserted ownership and control of the Timberdome Canal, the Associates entered into transport agreements with BLRID. The agreements provide for a toll charge for operation and maintenance of the new canal system. In addition, all individuals who transport water through the Moore Canal for delivery to the Timberdome Canal agreed to pay a toll charge to BLRID for the service.

TCC, the corporation, has never entered into a transport agreement or any other written contract with BLRID. BLRID was given to understand and always considered that TCC succeeded in obtaining the rights of the Timberdome Canal and not only gained the benefit of the transport agreements between the Associates and the BLRID but also the toll charges.

MEMORANDUM DECISION

doesn't extend from res.

U.C. 10 18 9

delivery of Big Lost River and Antelope drainage and area runoff flood waters. True to its operational plan, the BLRID did not then

and does not now deliver irrigation waters through the Blaine Canal. The canal was used during certain high water years, such as 1983, for flood control and runoff waters from the Big Lost River, Antelope Creek and adjacent lands ran into the canal. TCC shareholders placed these flood waters to beneficial use on their lands.

22. Also, on at least two occasions -- but not on a regular basis -- members of the BLRID diverted waters from the Moore Canal into the Blaine Canal and then out again on their lands to irrigate. The BLRID possesses 100 cubic feet per second (cfs) of Antelope Creek decreed water and from time to time delivers the decreed water from Antelope Creek to the BLRID lands via the Blaine Canal by diverting the Antelope Creek water where it intersects the Blaine Canal and transporting it to the intersection of the Blaine Canal and the Moore Canal and then diverting it to the Moore Canal. Also, the court finds the BLRID had the right to convey water rights of its members totaling 100 cubic feet per second (cfs) of Antelope Creek decree via the Blaine ditch by diverting the Antelope Creek water where it intersects the Blaine Canal and transporting it to the intersection of the Blaine Canal and the Moore Canal and then diverting it into the Moore Canal. However, the evidence does not support that this procedure was followed

unless the two occasions described in this paragraph involved

MEMORANDUM DECISION

Best idea as an alternate to delivery by Moore Canal (1936 - shut off river - ran water over canal)
(Not true) 1974 high water - to by pass canal & then back over Blaine Canal to get Antelope water which are on
1966 1968 show reference to court E. to water
So how come we have abandoned it?
8 years west Antelope Creek water - a water master can use it to move or over u.c. to River (more than 10

Antelope Creek decreed water.

23. At one time a diversion works and ditch had been constructed in the southerly portion of the Blaine Canal so that waters could be diverted from the Blaine Canal back to the Big Lost River. This works, known as the "bifurcation," has not been recently used and the diversion works is blocked with dirt. The canal is overgrown with trees and debris. All waters flowing down the Blaine Canal at that point go into the Timberdome Canal system.

24. Proof of construction of the canal system outlined in the Thomas application in 1906, including a map showing the actual location of the canals as constructed, was not filed until December 26, 1978 and was not approved by the Secretary of Interior, United States, until February 14, 1979. *(Proof of construction not necessary) accepted 1979*

25. The lands upon and across which that portion of the Blaine Canal, the subject matter of this action, is located -- except for the portion which remains public land and a small area in Section 30 (patented by the United States to individuals under federal laws other than the Carey Act) -- the patentees, legal descriptions, and patent dates are as follows:

LEGAL DESCRIPTION

<u>PATENTEE</u>	<u>(ALL IN TOWNSHIP 4N, RANGE 26E)</u>	<u>PATENT DATE</u>
Henry Harger	Sec. 7 - E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 8 - SW $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ E $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, SE $\frac{1}{4}$	October 17, 1890
Burton B. Harger	Sec. 19 - SW $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$	Feb. 01, 1901
James M. McCrumb	Sec. 5 - Lots 1 & 2, SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$	June 02, 1904

Selina Stout	Sec. 5 - SW $\frac{1}{4}$	Dec. 30, 1905
Nathan M. Lamont	Sec. 7 - E $\frac{1}{2}$ NE $\frac{1}{4}$, Sec. 8 - NW $\frac{1}{4}$ NW $\frac{1}{4}$	Dec. 10, 1915
John F. Sutton	Sec. 18 - SW $\frac{1}{4}$ SE $\frac{1}{4}$. Sec. 19 - NW $\frac{1}{4}$ NE $\frac{1}{4}$	Jan. 08, 1918
Forest H. Ravenor	Sec. 6 - N $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$	Aug. 01, 1918
Hiram Moore	Sec. 5 - Lot 3	Sept. 27, 1918
Wm. C. Mann, Jr.	Sec. 18 - W $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$	June 22, 1919
Rachel Hartvigsen	Sec. 7 - W $\frac{1}{2}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$	July 01, 1920
M. V. Witty	Sec. 30 - Lots 1 & 2	May 26, 1924
Roy C. Pearson	Sec. 5 - Lot 4, SW $\frac{1}{4}$ NW $\frac{1}{4}$	Sept. 25, 1950
Roy Waddoups	Sec. 6 - SE $\frac{1}{4}$ SE $\frac{1}{4}$	May 26, 1958

Why did they do so. 26. Grantors of the TCC easements for the Blaine Canal are successors in interest to the patentees described in paragraph 22.

27. TCC's use of the Blaine Canal, including the addition of the Timberdome Canal within the original canal banks, does not interfere with the disbursal by BLRID of the runoff, Big Lost River and Antelope Creek floodwaters, or the occasional transportation of water by members of the BLRID.

28. The water delivered to TCC and transported through its canal system are delivered to land situated outside the irrigation district in Sections 25, 26, 34, 35, 36, Township (T) 4 North (N), Range 25 East, Boise Meridian (E.B.M.) and Sections 1, 2, 11, 12, T 3 N, Range 25 E.B.M; and Sections 5, 6, 7, 8, 17, 18, T 3 N, 26 E.B.M.

BLRID Bifurcation is within this area to the right of the canal.

29. The TCC-BLRID transportation agreements through the years set forth in the preamble that the District owns the canal known as Blaine Canal and that it is a part of the facilities of the BLRID. *It qualified it under 1866 & 1891 act*

30. The State of Idaho pursuant to a contract dated February 14, 1916, granted to the Utah Construction Company the following described right-of-way, to wit:

3
A right of way across all lands belonging to the State of Idaho or that may be ceded to the State of Idaho by virtue of the Act of Congress, commonly known as the Carey Act, for the construction and operation of said reservoir and irrigation system, which right of way shall be equal to the actual width of the canal, lateral or waste ditch at its base, from tow to tow of the embankment, together with a strip of land along one side of such canal, lateral or waste ditch, and adjacent thereto, not to exceed 50 feet in width along the main canal, 30 feet in width along the laterals leading from said main canal

*concerning
because
Era would
not get
their water*
31. Utah Construction Company by quit claim deed transferred its interest in the canal and ditch works to BLRID in 1936. The quit claim deed refers specifically to the Blaine Canal, the Era Canal and the lower Blaine Canal.

32. BLRID claims the Blaine Canal as part of its system. It assesses users for waters flowing through it and at times has sprayed weeds and done infrequent maintenance. The court finds that the bifurcation works connecting the Blaine Canal with the lower Blaine Canal and the Era Canal not functional. The BLRID does not officially use the lower Blaine Canal. Certain water users transport waste waters from sources other than the Blaine Canal, through a portion of the lower Blaine Canal. Although described in the 1916 conveyance, the BLRID apparently does not use

nor make any claim to the Era Canal.

33. The individuals farming lands on Era Flats, first individually, then as association and finally as TCC provide the costs and expenses for ditch rider services, ^(for Era Canal) additional construction, operation and maintenance of the Blaine Canal. In

addition, they paid for the new construction of their ditch within the Blaine Canal and modifying and rebuilding the bank of the old Blaine Canal. ?

34. BLRID charges the following rates:

1988

Class 1	Irrigable acres	\$4.00
Class 2	Decreed and storage waters transferred	2.15
Class 3	Irrigated by pumps solely, on member's own land without use of District facilities	1.80
Class 4	1900 Decree or later with not storage rights	1.80
Class 5	Pasture and sub-irrigated	1.55
Class 6	Gravel and waste land	1.50
Class 7	Town lots/acreages	4.00

Prior to 1986: For Toll Charges

Declared acreage for waters pumped directly into the U-C Canal \$1.00
Declared acreage that used co-mingled water and delivery through the Moore \$4.00

From 1986 to present: For Toll Charges'

All acreage using Moore and U-C Canal, whether pumped directly into U-C or pumped into the Moore \$4.00

35. BLRID members rejected a petition by Era Flats landowners to become part of the district.

III. CONCLUSIONS OF LAW

1. BLRID exists and operates as an irrigation district pursuant to Title 43, of the Idaho Code. Since 1936, BLRID has

Antelope Creek
maintained a distribution system including canals, lateral ditches, water diversion and other structures and devices used for diverting and storing water of the Mackay reservoir and delivering such water through the Big Lost River channel and its tributaries and a system of lateral and ditches. For example, the "Moore Canal" is part of the system. Since the BLRID holds ^{wrong} ~~no~~ water rights it serves as a "carrying company" for its members.

2. TCC, a nonprofit corporation organized in 1976 pursuant to Idaho Code Title 30, Chapters 1 and 3, maintains a canal system for the delivery of irrigation waters from within the BLRID to lands outside the district boundaries. TCC is a "carrying company" and distributes water decreed to its stockholders in their individual capacities, and does not own the right to use the waters it transports.

3. The court concludes TCC did not adversely possess rights in the Blaine Canal.

Idaho Code § 42-1208 provides:

Rights-of-way of irrigation districts Carey Act operating companies, nonprofit irrigation entities, and lateral ditch associations, are not subject to adverse possession and no person shall prevent free access of authorized personnel on rights-of-way or construct any obstruction on rights-of-way in an effort to adversely possess said right-of-way. (Emphasis added.)

Thus, any adverse possession by TCC must have occurred before the effective date of the statute on July 1, 1981 (1981 Session Laws, Chapter 344, Section 1, page 713.)

The party asserting adverse possession must establish the following:

- (a) Intent to possess;
- (b) Adverse possession (open, notorious, continuous and hostile for the prescriptive period) in fact;
- (c) And knowledge by or notice to the party against whom adverse possession is sought to be asserted.

Nelson v. Wagner, 108 Idaho 570, 700 P.2d 973 (Ct. App. 1985); Tremayne v. Taylor, 10 Idaho 792, 621 P.2d 408 (1980). Idaho Code § 5-207.

Although TCC and its predecessors openly and notoriously used the Blaine Canal, the evidence clearly indicates that TCC's operation was not notorious and hostile to the BLRID, or at least if it was, the district was unaware of the hostile use. For instance, TCC and/or its predecessors or its members or shareholders and the BLRID entered into a series of water transport agreements between 1974 and 1979 (see defendant's exhibits 14 through 20) where in effect the TCC membership asked and the district consented to the use of the Blaine Canal. Mountain Home Irr. Dist. v. Duffy, 79 Idaho 435, 319 P.2d 965 (1967).

Also, TCC's use of the Blaine Canal as its main arterial for irrigation water and BLRID's diversion of flood waters did not conflict, but actually complimented each other.

4. In this action the parties discuss the doctrines of abandonment and forfeiture. Defendant correctly recites Idaho Code § 42-222(2) that all rights of the use of water acquired under this chapter otherwise shall be lost and forfeited by a failure for the term of five years to apply to a beneficiary use for which it was

appropriated. Defendant goes on further to point out that forfeitures are not favored in the law and clear and convincing proof is necessary to support a claim of forfeiture. Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982). The defendant also points out that the common law doctrine of abandonment differs from statutory forfeiture. As Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981) explains:

*issue was
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was lost
ditch right*

Abandonment is a common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right. Forfeiture, on the other hand, is predicated upon the statutory declaration that all rights to use water are lost where the appropriator fails to make beneficial use of the water for a continuous five year period. I. C. § 42-222(2) . . . Abandonment is more difficult to prove than forfeiture, in that mere nonuse does not result in abandonment. Rather, the party alleging abandonment must prove by clear and convincing evidence that the owner of the water right intend to abandon that right

Yet the question in this action does not focus on the abandonment or forfeiture of water. The irrigation district waters from area runoff and Antelope Creek are defined by all parties as surplus or flood waters and according to the evidence are turned into the Blaine Canal only during high water and when impliedly the waters would flood or exceed the capacity of the Moore ditch and the district's diversion system. The district's operating plan in 1936 outlines that the Blaine Canal will be reserved for future services as may be required in times of high runoff from the Big Lost River and Antelope Creek. (See paragraphs 4 and 5, Plan of Operation, Big Lost River Irrigation District, defendant's exhibit 11.)

5. The real issue concerns whether or not BLRID abandoned or forfeited an easement or any other property interest (other than a water right) that it might have had in the Blaine Canal.

* The Blaine Canal today is not a primary arterial for BLRID irrigation water. At best, BLRID uses the Blaine Canal as set forth in its 1936 Plan of Operation -- as a collector of flood water issuing from Antelope Creek Valley and floodwater from the Big Lost River. The UCC and its predecessors discovered long before 1923 that the Lost River drainage did not produce enough water to irrigate all the lands. So the canal and distribution system for the area below the bifurcation works, which included the Blaine Canal as the primary canal, were abandoned.

Thus, if the BLRID, or its predecessors, had an easement or right of way, could they have abandoned or forfeited either all or a portion of it? Or, put another way, due to the Thomas filing, could TCC have obtained through its predecessors an easement in the Blaine Canal from the point TCC shareholders' waters were transferred to it and down to the place of use on Era Flats?

The law clearly allows an owner to terminate his easement by abandonment. 28 C.J.S. Easements, §§ 59-60 (1941). Abandonment is normally a question of the owner's intention and that intention must be clearly manifested by the circumstances. Mere non-use is generally insufficient unless coupled with a requisite intent. The intent is not a subjective intent, but can be shown from all the revelant facts. 28 C.J.S. Easements, supra, 25 Am. Jur. 2d, Easements & Licenses, §§ 103-105 (1966).

The court concludes that a forfeiture -- as contrasted to abandonment -- in this instance requires a declaration of forfeiture "by some competent authority, and the grant herein being of a public nature, such declaration can be made only by an Act of Congress or in an appropriate judicial proceeding...." United States v. Whitney, 176 F. 593 (D. Idaho 1910).

However, an abandonment at common law does not require congressional or judicial edict.

In this case, the abandonment occurred during either the earlier years that BLRID received the project from the Utah Construction Company or before. In any event, a period of five years exists back from 1936 wherein the court concludes the operators of the Big Lost River Irrigation project abandoned the Blaine Canal except for the purposes set forth in the BLRID's Plan of Operation. The parties then recognized the Big Lost River drainage contained inadequate water for irrigation of the lands to be served by the Blaine Canal. The Utah Construction Company developed the project in sections and in fact relinquished some of the lands in 1921. In addition, the bifurcation works was allowed to go into disrepair and disuse. Last, but not least, one part of the operation plan was:

* { [t]o hold the main Blaine Canal and lower Blaine Canal in reserve for future service as might be required in times of high run-off, also to act as a supplementary carrier to the regular system as occasion may require. Also to use the said Blaine Canal as a collector of flood water issuing from the Antelope Creek Valley and to divert the same to the Moore west side canal system for more efficient application of lands adjacent to Moore....

The Big Lost River Irrigation District Plan of Operation, (P. 43, § 4, see defendant's exhibit 11). The evidence shows and the court so concludes that the BLRID uses the Blaine Canal only for the purposes set forth in the Plan of Operation. Meanwhile, the principal expense for maintenance, modification, and repairs of the canal from the point of the crossover ditch to the bifurcation works is carried out by TCC.

6. The question remains, however, can the TCC gain an easement and right-of-way in a canal which had its beginning with an application filed pursuant to the Federal Right-of-Way Act of 1891?

First, the court concludes that the maps must be filed and accepted by the Secretary of the Interior, or his designate, before the right-of-way pursuant to the Federal Right-of-Way Act of 1891 vests.

While it is true that 43 U.S.C. § 946 states that the right-of-way "is hereby granted," this statutory provision must be read in conjunction with other provisions found in §§ 947 and 948 of Title 43. Section 947 indicates that in order to secure the benefits of §§ 946-949, an applicant must file a map of the canal, reservoir, etc. The right-of-way allowed for by the Federal Right-of-Way Act is obtained by applying "at the local land office and ultimately securing the approval by the Secretary of the Interior of a map of the ditch, canal, or reservoir." The right-of-way vests when the Secretary of the Interior gives his approval. Kern

on application

River Co. v. United States, 257 U.S. 147, 151 (1921) (emphasis added). Moreover, § 948 provides that §§ 946-949 'shall apply "on the filing of the certificates and maps therein provided for." (Emphasis added.) It is clear, therefore, that filing a map and obtaining approval by the Secretary of the Interior is a condition precedent to vesting the right-of-way under the Act. For example, in United States v. Tujunga Water & Power Co., 48 F.2d 689 (9th Cir. 1931), the court held that the filing of the map and approval of its details creates a binding contract under the Act by which the grantee receives the right-of-way and in return promises to build the canal, ditch, reservoir, etc. In Uhrig v. Crane Creek Irrigation District, 44 Idaho 779, 260 P. 428 (1927), the maps and other filings were made in timely fashion. The final proof was then accepted by the government. Under these circumstances, the court held that "[t]he grant vested in defendants' predecessors the right of way for the reservoir, subject to the right of forfeiture for failure to complete the work within five years." Id. 44 Idaho at 781, 783, 260 P. at 429-30. The "title to the land shown upon the applicant's maps vests in him upon the approval thereof by the Secretary of the Interior." Whitney, 176 F. at 594. Before the right-of-way vests in an applicant, the Secretary must have maps of the applicant's project in order to determine which lands are affected by granting the right-of-way.

Secondly, the lapse of time between the date of filing and 1906 and the final approval in 1979 does not, by itself, extinguish any rights allowed by the Act of 1891.

Section 948 also states that if any section of the system is not completed within five years of its location, rights under §§ 946-949 are forfeited as to the uncompleted sections to the extent that they are not complete. This forfeiture does not automatically divest title from the grantee and revest title in the government; rather, a declaration of forfeiture must be made by congressional action, judicial proceeding, or other competent authority. Uhrig, 44 Idaho at 783, 260 P. at 430. Carns v. Idaho-Iowa Lateral & Reservoir Co., 34 Idaho 330, 334-35, 202 P. 1071, 1072 (1921). Whitney, 176 F. at 595. Moreover, the issue of forfeiture or abandonment is confined to a grantee under the act "and the United States as grantor with reverter rights." Third parties outside this relationship have no right to enforce the reverter right that belongs to the United States. Wiltbank v. Lyman Water Co., 13 Ariz. App. 485, 477 P.2d 771, 777 (1970). Thus, no forfeiture occurred to the benefit of TCC.

Thirdly, the court recognizes that according to Wiltbank the property right going to the grantee under the Act is not what is understood as an easement. Rather, the grantee has a limited fee allowing him or her to use the land surface for a particular purpose, i.e., a fee simple subject to a condition subsequent. The limited fee cannot be conveyed for a purpose other than the purpose specified in the grant. Wiltbank, 13 Ariz. App. at ___, 477 P. 2d at 774. If the United States disposes of land subject to a right-of-way under the Act, then that disposition carries with it "all interest of the United States in the land, including the

reversion in case of breach of conditions subsequent or in case of abandonment." Hurst v. Bigham, 34 Idaho 342, 349, 202 P. 1068, 1070 (1921). In this case, each patent from the federal government contains a specific reservation for a right-of-way for ditches or canals constructed by authority of the United States. In the parcel granted by the State of Idaho, the conveyance notes "subject to the provisions of the laws of the United States...." Transfers of federal land to private parties transfers all interests in the land. Hurst, 34 Idaho at 349, 202 P. at 1070. However, the transfer remains subject to the reservation. Wiltbank, 477 P.2d at 776. Plaintiff argues that the late approval in 1979 places the federal government in the posture where it has nothing to convey. However, the reservation in the patent protects any rights the United States had at the time of filing and these rights-of-way relate back to the time of the filing.

Thus, the court concludes the rights-of-way sought by BLRID's predecessors in interest vest and relate back once the Secretary of the Interior (in this case 1979) approves and accepts the application and maps.

Finally, this court concludes BLRID's predecessors in interest and BLRID in its earlier years abandoned certain elements of the right-of-way.

The doctrine of abandonment requires an intent to abandon and the intent must be clearly manifested by the circumstances. Evidence of non-use does not suffice to extinguish an easement. Plaintiffs have to show either verbal expression of an intent to

abandon or conduct inconsistent with an intention to make further use. Abbott v. Thompson, 56 Or. App. 311, 641 P.2d 652 (1982), 28 C.J.S. Easements, §§ 59-60; 25 Am. Jur. 2d, Easements & Licenses, §§ 103-105 (1966). When the particular purpose for which an easement is granted ceases to exist, it is abandoned, or is made impossible of accomplishment, the easement terminates. Kearney & Son v. Fancher, 401 S.W. 2d 897 (Tex. Civ. App. 1966). 25 Am. Jur. 2d Easements & Licenses, § 106, supra, p. 510.

Neither party disagrees that the Blaine Canal downstream from the bifurcation was abandoned.

This court also finds by the clear and convincing evidence that the portion of the Blaine Canal from the crossover ditch and the point where well waters are pumped into it was abandoned down to the bifurcation by the BLIRD and its predecessors in interest for all purposes except flood control.

Canal system operators clearly demonstrated abandonment. They acknowledged that the waters available for irrigation in the drainage were not sufficient to supply the land served by the Blaine Canal, and in fact, these segregated lands were cancelled in 1921 by the U.S. General Land Office on the grounds that water could not be supplied to irrigate these lands. The settlers within the project and the operators of the irrigation system exclusively used the Moore Canal to deliver irrigation waters. The Plan of Operation for the BLRID when organized specifically states that the Blaine Canal would be used for flood control and makes no mention of the canal as a general carrier for irrigation waters.

In actual practice, the BLRID has not used this section of the Blaine Canal for the conveyance of irrigation waters. They have allowed the diversion works of the bifurcation to become inoperable.

7. The court concludes that the abandonment occurred in the late 1920's and early 1930's. The evidence does not pinpoint the exact years when the abandonment happened. However, the evidence clearly demonstrates that the portion of the Blaine Canal in question was abandoned for more than the five year prescriptive period by the Utah Construction Company for irrigation purposes at the time the segregated tract of land served by the Blaine Canal was returned to the United States. An intent to abandon or the actual abandonment on behalf of the BLRID clearly is sustained by the BLRID Plan of Operation and the district's actual use of the Blaine Canal during the late 30's and early 40's.

The abandonment occurred when the BLRID as an irrigation district was treated under the law as an entity acting in its proprietary capacity -- subject to the same principles of abandonment as private individuals or concerns. Lewiston Irrigation District v. Gilmore, 53 Idaho 377, 23 P.2d 730 (1933); Barker v. Wagner, 96 Idaho 214, 526 P.2d 174 (1974).

8. Therefore, the court concludes that the BLRID rights in the Blaine Canal were abandoned except for purposes of flood control as specified in the Plan of Operation, and the status of the title of the lands through which the Blaine Canal runs was such that the landowners could convey to TCC and its shareholders an

easement for an irrigation ditch. Therefore, title to the easement and right-of-way for the TCC Canal through the Blaine Canal is hereby quieted in favor the plaintiffs and against the defendant for the portion of the Blaine Canal situated in Township 4 running from the point where the TCC shareholder waters are either pumped or conveyed via the crossover ditch to the Blaine Canal to the bifurcation works and then on to the TCC irrigation system, except for the use of the said lands, ditch works and easement by the BLRID for flood control purposes.

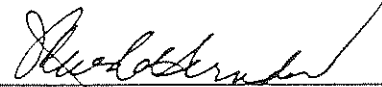
9. The court concludes that the record does not establish any monetary damages for plaintiffs and does not grant any.

10. The court finds no statutory basis for the awarding of attorney fees and declines to award attorney fees. Plaintiffs are entitled to costs pursuant to Rule 54(d), Idaho Rules of Civil Procedure.

11. The court concludes that the BLRID properly can charge assessments for the use of the Moore Canal and the crossover ditch and expenses reasonably incurred by the district for transporting and conveying the TCC irrigation water to the Blaine canal. The court further concludes that it is neither equitable nor appropriate for the BLRID to charge for waters after they are delivered to the Blaine Canal since the TCC members do the maintenance and repairs on the said lateral. The court also finds no basis in the law for an assessment to the TCC based on the irrigated acreage owned outside of the district by TCC shareholders.

12. Counsel may propose additional findings and attorney for TCC should submit a proposed judgment containing the legal descriptions of the lands affected by this decision.

DATED this 27 day of April, 1989.



JAMES C. HERNDON
District Judge

District Court
Seventh Judicial District
Bingham County, Idaho

I hereby certify that a full, true and correct
copy of the foregoing instrument was mailed
this 27th day of April, 1989,
by 1st class mail with prepaid postage to:

Kent W. Foster, Esq. - P.O. Box 50130 - Idaho Falls, Idaho 83405

Ray W. Rigby, Esq., - Box 250 - Rexburg, Idaho 83440

By:


Deputy Clerk