

**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

) Subcases 36-02338, 36-02414,
) 36-02734 and 36-04011

) **ORDER PARTIALLY GRANTING**
) **MOTION TO ALTER OR AMEND**

BACKGROUND

Earlier Proceedings

Aqua Life, Inc.'s 4 claims were recommended for adjudication in the *Director's Report for Reporting Area 3 (Basin 36)*, filed November 2, 1992. On March 24, 1997, Buckeye Farms' *Motion to File Late Objections* was granted. In its *Motion*, Buckeye Farms alleged that in the 5 year period after the filing of the *Director's Report* (between 1992 and 1996), reports filed by Aqua Life indicated only a small portion of its claims were being put to beneficial use: "actual use at the [Gold Springs] facility gives rise to forfeiture of certain rights or portions of rights." Buckeye Farms' *Motion*, p. 2. Attached to the *Motion* was an affidavit of David B. Shaw.

The day before trial on its objections, Buckeye Farms filed a *Motion to Dismiss* based on a *Stipulation* signed by it and Aqua Life. The *Stipulation* contained a rotation agreement specifying how the parties would exercise their respective water rights. IDWR agreed with the final resolution. On February 12, 1998, an ***Order Granting Motion to Dismiss*** was entered stating that the claims would be decreed as they were recommended in the *Director's Report*.

Special Master's Report and Motion to Alter or Amend

A ***Special Master's Report*** covering the 4 claims was filed on April 8, 1999. The ***Report*** concluded that Aqua Life was entitled to partial decrees as described in ***Recommendations*** attached to the ***Report***.

On May 28, 1998, the North Snake Ground Water District filed its *Motion to Alter or Amend* and attached a *Brief in Support of Motion to Alter or Amend*. In the *Motion*, the District alleged:

1. The Special Master's Recommendations do not include facility volume quantities for these fish propagation water rights. The absence of facility volume quantities reflecting the size of the fish propagation facilities could improperly subject

other water users to supply or mitigate water demands associated with facility expansion.

2. The Special Master's Recommendations do not take into consideration the evidence of partial forfeiture in the record.

Aqua Life's substituted counsel was granted leave to lodge a *Brief in Response to Motion to Alter or Amend* on May 7, 1999, and the *Motion* was heard on June 1, 1999. Jason R. Miciak and Jeffrey E. Rolig appeared for Aqua Life; Dana L. Hofstetter appeared for the District; and Nicholas B. Spencer appeared for IDWR. The matter was taken under advisement pending the determination of identical issues on challenge before Presiding Judge Barry Wood.

Presiding Judge's Order on Challenge

On December 29, 1999, Judge Wood entered his *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*.¹ The Presiding Judge held that facility volume is **not** necessary as a traditional element of a water right or as a remark for the definition of the right, for clarification of any element of a right or for administration of the right by the IDWR Director. The one exception is where a license was issued with a facility volume remark which was not challenged by the license holder. In that case, the SRBA Court will add the following language:

The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume.

In the same *Order on Challenge*, Judge Wood also held:

Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree.

...

Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture.

Order on Challenge, pp. 27-28.

¹ The **Order on Challenge** was entered in the following 20 subcases: 36-02708, 36-07201, 36-07218, 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36-07427, 36-07720, 36-02659, 36-07004, 36-07080 and 36-07731.

DISCUSSION

Presiding Judge Woods' *Order on Challenge* disposes of the District's *Motion to Alter or Amend*. First, a facility volume remark can only be included in Aqua Life's fish propagation water rights which were licensed with a facility volume remark and if so, the facility volume remark was not challenged by the license holder.² Then, the SRBA Court will add language "clarifying" the facility volume remark.

Second, any time period of Aqua Life's alleged non-use after the filing of notices of claims in the SRBA cannot be used to establish forfeiture, unless Aqua Life abandons its claims. In these subcases, the claims were all filed in August, 1988, and there is no evidence that Aqua Life has or intends to abandon its claims. Any 5 year period of alleged non-use was tolled in 1988. Therefore, statements that Aqua Life beneficially used less than the claimed amounts during the period 1992-1996, cannot be used to prove forfeiture, whether partial or total.³

ORDER

THEREFORE, IT IS ORDERED that:

1. The North Snake Ground Water District *Motion to Alter or Amend* is **granted, in part**. A facility volume remark, plus "clarifying" language, will be added to the recommended *Partial Decrees* for subcases 36-02338, 36-02414 and 36-02734 **if** the underlying licenses included a facility volume remark and the facility volume remark was not challenged by the license holder; and
2. The portion of the *Motion* alleging that the *Recommendations* do not take into consideration the evidence of partial forfeiture in the record is **denied**.

Dated January 25, 2000.

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

² Claims 36-02338, 36-02414 and 36-02734 are based on licenses. There is no evidence in the records to indicate whether a facility volume remark was included in the licenses or whether the license holder challenged the remark. IDWR will be asked to supplement the record with copies of the 3 licenses before **Amended Special Master Recommendations** for the 3 claims are issued (if necessary). Claim 36-04011 was described as a "statutory claim."

³ The District's *Motion to Alter or Amend* only referred to evidence of partial forfeiture in the record which would be Mr. Shaw's affidavit. There is no other "evidence" of partial forfeiture in the record and the District offered none.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER PARTIALLY GRANTING MOTION TO ALTER OR AMEND** was mailed January 25, 2000, with sufficient first-class postage prepaid as follows:

Director of IDWR
Box 83720
Boise, Idaho 83720-0098

Office of the Attorney General
Peter J Ampe
Box 83720
Boise, Idaho 83720-0010

John K. Simpson
Box 2139
Boise, Idaho 83701-2139

Dana L. Hofstetter
608 West Franklin Street
Boise, Idaho 83702

Jason R. Miciak
Box 2749
Twin Falls, Idaho 83303-2749

Deputy Clerk