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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	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION
Case No. 39576	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
	)	SRBA Assigned Case 94-00012

I. BACKGROUND

Norman and Robin Riley filed an action in the Snake River Basin Adjudication contesting ownership of a water license as between the Rileys and Catherine Rowan.¹ The parties disputed ownership of water right license 22-07280 issued by the Idaho Department of Water Resources. A trial was held in the SRBA. Following trial, a decision was issued by then Presiding Judge Daniel C. Hurlbutt, Jr. *Memorandum Decision* (94-00012, Aug. 28, 1997). The *Memorandum Decision* determined that Rileys own a one-half interest in water license 22-07280 and that Rowan owns a one-half interest in the license. *Id.* at 13. The decision was appealed to the Idaho Supreme Court.

The decision of the SRBA District Court was upheld, although the Court determined that Rileys and Rowan took the water license as contingent remaindermen rather than as vested remaindermen. *Riley v. Rowan*, 131 Idaho 831, 965 P.2d 191 (1998). The Idaho Supreme Court upheld the conclusion that Rileys and Rowan each own a one-half interest in the license.

¹ The SRBA case was filed following the case of *Rowan v. Riley*, Madison County Case CV-93-350 in which the Honorable District Judge James C. Herndon held that he lacked jurisdiction to resolve the ownership of the water right at issue.

Although we conclude that the district court was incorrect in determining that Jim Howe [Rileys' predecessor] and Rowan held vested remainders when the permit was applied for, we nevertheless affirm the district court's conclusion. Thus, for the above stated reasons, we affirm the SRBA district court's decision that each of the parties is entitled to a one-half interest in water license 22-07280.

Id. at 965 P.2d 191, 194 (emphasis added).

After the SRBA and Idaho Supreme Court determined that Rowan and the Rileys each owned a one-half interest in 22-07280, Judge Hurlbutt ordered *Director's Reports* be issued consistent with these decisions. IDWR issued *Amended Director's Reports* splitting the right into 22-07280A and 22-07280B. Rowan objected, asserting the *Amended Director's Reports* did not comply with either the SRBA or Idaho Supreme Court decisions. Judge Hurlbutt referred this case, requesting a Special Master's Report and Recommendation as to whether the *Amended Director's Reports* comply with the *Memorandum Decision* and *Riley v. Rowan*.

II. STANDARD OF REVIEW

A. THE AMENDED DIRECTOR'S REPORTS

The trial of these water rights focused on the issue of ownership. Both Rileys and Rowan participated at trial. Following the trial, IDWR issued *Amended Director's Reports* (Mar. 11, 1999) which divided water right 22-07280 into an A and B portion. 22-07280A is the *Director's Report* for Catherine Rowan, and 22-07280B is the *Director's Report* for Norman and Robin Riley. The *Amended Director's Reports* evenly divided total quantity, allocating 4.77 cfs for the A portion and 4.77 cfs for the B portion. In addition, the *Amended Director's Reports* evenly divided the irrigated acres, allocating 367 acres for 22-07280A and 367 acres for the 22-07280B. For each right, the 367-acre place of use includes two components: a primary service area of 207.5 acres and a supplemental service area of 159.5 acres. The *Amended Director's Reports* evenly divided the annual volume between the two rights.

B. PRIMA FACIE WEIGHT

The parties previously argued to the court as to the standard of review for these cases. The court held that the standard of review for these cases is the same as in other subcases. The *Director's Report* has *prima facie* weight as set forth in I.C. §§ 42-1411(4)-(5). The term *prima facie* evidence is an alternative label for a rebuttable presumption. *State v. Hagerman Water Right*

Owners, 130 Idaho 736, 947 P.2d 409, 418 (1997); *State v. Hebner*, 108 Idaho 196, 697 P.2d 1210 (Ct. App. 1985). Thus, giving evidence *prima facie* status confers a presumption that sufficient proof has been made to prevail on an issue absent competent evidence to the contrary. *Prima facie* proof does not shift the burden of persuasion on an issue. *Reddy v. Johnston*, 77 Idaho 402, 293 P.2d 945 (1956); D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK §§ 1.4-12.7 (1995). When rebutted, the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue. *State v. Hagerman Water Right Owners*, 130 Idaho 736, 947 P.2d 409, 418 (1997).

The *Director's Report* as *prima facie* evidence draws a conclusion as to a particular element of a water right. A presumption exists until the objector presents "substantial evidence" that the element is other than as recommended. If the objector presents such evidence, the presumption disappears. Nevertheless, the facts upon which the presumption is based are to be weighed with other facts that may be relevant. *Id.* at 419. See, *Order on Jurisdiction and Standard of Review, and Setting Additional Deadlines* (94-00012, Feb. 23, 1999).

Critically, the Special Master will apply the law of the case established in the *Memorandum Decision* and *Riley v. Rowan* in recommending whether the *Amended Director's Reports* be accepted.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. OVERVIEW

The issue is whether any party presented "substantial evidence" to rebut the *Amended Director's Reports*. The court must also determine whether the *Amended Director's Reports* for 22-07280A and 22-07280B comply with the Idaho Supreme Court decision in *Riley v. Rowan*, 131 Idaho 831, 965 P.2d 191 (1998). Neither the Rileys nor Rowan offered evidence at the hearing before the Special Master. This Special Master finds the *Amended Director's Reports* were not rebutted, and that they fully comply with *Riley v. Rowan*.

B. ANALYSIS

IDWR's first *Director's Reports* dated December 12, 1997, divided the water right unequally, giving Rowan greater volume. A later *Amended Director's Report* divided the right

equally but did not explain why IDWR's analysis changed. Rowan complains that IDWR changed its recommendation without explanation.²

1. IDWR's Initial Recommendation in December Licenses.

Initially IDWR issued *Director's Reports* and licenses dated December 12, 1997, dividing the A and B portions unequally. IDWR determined total quantity was 9.18 cfs. IDWR equally divided the instantaneous diversion rate, giving Rileys and Rowan 4.59 cfs ($4.59 + 4.59 = 9.18$ cfs). However, IDWR did not equally allocate quantity; IDWR allocated to Rowan a much larger volume than to Rileys. The *Director's Report* also allocated irrigated acres unequally. IDWR determined that permit 22-07280 applied to the irrigation of 734 acres. IDWR allocated 294 acres and 1029 afy to Rowan (22-07280A). IDWR allocated 440 acres and 422 afy to Rileys (22-07280B). IDWR explained in the *Supplemental Report Regarding Claims to Water Right Nos. 22-07280A and 22-07280B* (July 2, 1999) how it arrived at the initial allocation. IDWR's December allocation gave Rileys a much smaller acre-feet-per-year than Rowan because Rileys own another license which covers much of the same acreage. The initial *Directors Report* attempted to allow each claimant enough water to irrigate all of their land. This unequal allocation, however, did not comply with the Supreme Court directive to divide the water right in half. *Riley v. Rowan*. The *Amended Director's Report* (Mar. 10, 1999) corrected the unequal division of acreage and volume.

2. IDWR's Amended Director's Reports

After the initial recommendation was made, IDWR amended its recommendation. The *Amended Director's Reports* evenly divided the rate of diversion, volume, and irrigated acres in compliance with the Supreme Court Order. IDWR divided quantity exactly in half, giving Rowan 4.77 cfs and Rileys 4.77 cfs.³ IDWR determined that 415 acres were developed under 22-07280 without any combined use. IDWR calls these 415

² The *Director's Reports* were not entitled *Director's Reports*, but were attached to letters to Rowan and Rileys dated December 12, 1997. By agreement of the parties and by court order, the printouts of water right elements attached to the December 12, 1997, letter are deemed *Director's Reports*.

³ IDWR recalculated the total quantity and increased total quantity from 9.18 to 9.53 cfs. Rileys and Rowan concur that total quantity should be 9.53 cfs.

acres "primary service lands." IDWR determined that 22-07820 was developed in conjunction with license 22-02223 on 319 acres, and limited to a combined total of 1,118 afy. IDWR calls these 319 acres on which two rights are used "supplemental service lands."

In the final licenses and *Amended Director's Reports* for 22-07280A and 22-07280B, IDWR complied with *Riley v. Rowan* by dividing quantity, annual volume, and acreage in half. As a result of the division, Rowan's license 22-07280A is appurtenant to 207 primary acres and 159.5 supplemental acres. License 22-07280A has one-half the annual volume and one-half the total quantity of 22-07280.

Further, Riley's license 22-07280B is appurtenant to 207 primary acres and 159.5 supplemental acres. License 22-07280B has one-half the annual volume and one-half the total quantity.

3. Law of the Case

Both the SRBA Court and the Idaho Supreme Court held that 22-07280 should be divided in half. That is a directive to split the right on a 50-50 basis, which does not allow for an uneven division. Rowan argues that the ruling giving Rowan and Rileys each a "one-half" interest in the water right allows each party to receive that portion which will adequately irrigate his acreage regardless of whether the volume or acreage is equally divided. Thus, Rowan favors the unequal division which IDWR first followed in its December *Director's Report*. Rowan argues that the *Memorandum Decision* requires such a division, citing the following passage:

At Lucille's death, Jim Howe [Rileys' predecessor] and Catherine Rowan became co-owners of the permit. To rule otherwise would allow Jim Howe, a co-owner, to strip water from his cotenant's Catherine Rowan, one-half of the Farm. Idaho Water law does not permit such a result.

Memorandum Decision at 10.

Rowan argues that Judge Hurlbutt's language regarding stripping water meant that each co-owner is entitled to a division of the water right to adequately irrigate his or her land. This Special Master finds, however, that the *Memorandum Decision* required an even division of every aspect of the right.

a. Memorandum Decision Requires an Equal Division

That passage of the *Memorandum Decision* must be placed in context. The *Memorandum Decision* was discrediting Rileys attempt to acquire the entire water right. It is clear from other passages in the decision that Judge Hurlbutt meant for every aspect of the right to be equally divided. For example, the passage prior to the one cited by Rowan clearly anticipates a 50-50 division:

The actions of Jim Howe [Rileys' predecessor], his application for the permit, his use of the permitted right to provide water for the Farm, his agreement to partition the Farm with Catherine Rowan, and his later acquisition of a one-half interest in Catherine Rowan's "south well," all reflect that Jim Howe understood and intended that he took an interest in the permit as a co-owner of land with Catherine Rowan, not as a lessor of the land. Any action otherwise would have breached his fiduciary duty to his sister. The only interest Jim Howe had in the permit was as an owner and was identical to that of Catherine Rowan.

Id. at 10.

Furthermore, the evidence upon which Judge Hurlbutt placed emphasis supports an equal division. The *Memorandum Decision* referred to a Correction Grant Deed (Exhibit R) in deciding that Rowan and Rileys are each entitled to a one-half interest in the water right.

Grantor does hereby grant and convey to Grantee an individual one-half interest and right to any water from the south main well which is located on Grantor's property.

Exhibit R. The *Memorandum Decision* clearly holds that Rowan's right and Rileys' right be identical and evenly divided.

b. Riley v. Rowan Requires an Equal Division

The Idaho Supreme Court language in *Riley v. Rowan* also calls for an equal split of the water right. The Supreme Court held:

Jim Howe's only interest in the water permit was the one-half interest he obtained following Lucille Howe's death and the partition of the property. The bill of sale Jim Howe entered into with the Rileys could transfer no more than Jim Howe owned.

Accordingly, we conclude that after the water permit became water license No. 22-07280 the Rileys and Rowan were each entitled to a one-half interest.

Riley v. Rowan, 965 P.2d at 194. Had the Supreme Court meant to say that Rileys and Rowan had each acquired that portion of the water right appurtenant to the land acquired during the partition, the Supreme Court would have said so. They specifically chose the language "one-half." That language directs that each of the parties is entitled to an exact and even division of every aspect of the water right, including diversion rate, volume, and acreage. An unequal division would flout the Supreme Court decision.

IV. CONCLUSION

Therefore, this Special Master RECOMMENDS that the SRBA District Court accept these water rights as licensed and as set forth in the *Amended Director's Reports*. Although Judge Hurlbutt's *Order of Reference to Special Master Bilyeu* states that "[this case] is referenced to Special Master Bilyeu for a *Recommendation* for partial decrees for right numbers 22-07280A and 22-07280B in conformity with this court's *Memorandum Decision*," IT IS FURTHER RECOMMENDED that the court issue an order accepting the *Amended Director's Reports*, but issue no final decree at this time. These water rights were taken out of sequence in order to resolve the ongoing dispute between the Rileys and Rowan. Consequently, water rights 22-07280A and 22-07280B have not been included in a *Director's Report* for which notice has been served on all parties in the SRBA. Judge Hurlbutt ordered that the determination of this case would resolve the dispute between Rileys and Rowan, but would not limit other parties to the SRBA from filing objections in the SRBA when the irrigation and other rights are reported for Basin 22. Therefore, the elements set forth in the *Amended Director's Report* should be recognized in an order of the SRBA court and should bind the parties here, but should not be finalized in a *Partial Decree* until Basin 22 is reported and other parties have an opportunity to object.

DATED: July 20, 1999.


BRIGETTE BILYEU, Special Master
Snake River Basin Adjudication

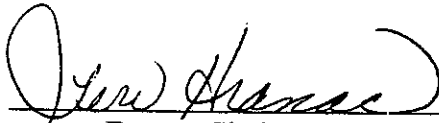
CERTIFICATE OF MAILING

I certify that a true and correct copy of the *Special Master's Report and Recommendation* was mailed on July 20, 1999, with sufficient first-class postage prepaid as follows:

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