

Galbraith, Trent

From: Spencer, Nick
Sent: Friday, November 04, 2005 5:25 PM
To: Galbraith, Trent
Cc: Harvey, Becky
Subject: RE: CONFIDENTIAL: RE: 21-4126 & Hagenbarth

Yes, I agree with what Becky is saying. A statutory claim form is basically viewed as evidence of what the claimant thought his water right was on the date of the claim, not proof of what it really was. However, because the claimant did go to the trouble of filing his statutory claim, we do use the statutory claim forms for the limited evidentiary purpose of establishing that a water right was in existence on the date the form was filed. Therefore, absent evidence of an earlier priority date we can recognize the date of the statutory claim as the priority date of the right. Even though Kent Foster says there is nothing else, I doubt that is true. There likely are records in the county recorder's office establishing the chain of title to the underlying acres, which can lead to other evidence showing when the water right was first used. The claimant can canvass the old timers in the neighborhood to get affidavits or even non-notarized statements. We have even been known to accept hearsay evidence. (That is evidence that comes from somebody other than the person relating it, e.g. "I know Fred's grandfather started irrigating in 1916 because my grandfather used to tell me that he got the ditch put in the year before he was drafted to go fight in World War One.") In short there should be old timers in the neighborhood who can provide useful information.

As to the second question, I also agree with Becky. At the time of the Rexburg Decree there was not a good legal mechanism to bring ALL the claimants to a given source into court to prove up their water rights. Each claimant had to be individually identified and personally served with process. Thus there were always water right holders who got overlooked and unless they were found, served with process, and thereby joined in the suit, they were not parties to it and their rights did not get adjudicated. Moreover, if they did not get joined their rights could not be cancelled for failure to appear and defend them and those rights could very well be in existence today. The Rexburg Decree obviously was an attempt to be as comprehensive as possible in terms of identifying all the sources and all the appropriators, but no doubt sources and appropriators got overlooked. Therefore it is quite possible that the Hagenbarth claim in Basin 21 didn't get adjudicated in the Rexburg Decree. However, they are going to have to work really hard to prove that is what happened. This is because you say Wood Livestock took title to the property in 1908. Wood Livestock was a named party to the lawsuit that resulted in the Rexburg Decree, and thus had to come forward to prove up its water rights. Since the Rexburg Decree covered Fremont and Bingham Counties, the only two counties in the Upper Basin in 1910, it seems highly improbable that Wood Livestock would have to prove up a right in what is now Basin 25, but would not have to prove up a water right in what is now Basin 21. Therefore, absent some contrary evidence, we can presume the right did not exist yet on the date of the Rexburg Decree, and that its priority date must be junior to that date. Note, however, that there are credible explanations Hagenbarths can come up with to explain the discrepancy. For instance, there may have been a cut-off date for joining parties and identifying water rights in the lawsuit that we don't know about, and maybe Wood Livestock did not acquire the property until after that date so they didn't need to intervene in the lawsuit to defend the right. However, if that were the case, then it becomes very important to find out who owned the property before Wood Livestock to see if they are listed in the Rexburg Decree. If they are not, then it may be that they got overlooked. However, since at the time the Rexburg Decree was entered the water right in question was owned by an entity that was a party to the lawsuit, we need the Hagenbarths to provide a credible explanation, with supporting evidence, of why the right in question would not have been included in the lawsuit if it existed at that time. NBS

-----Original Message-----

From: Galbraith, Trent
Sent: Wednesday, November 02, 2005 9:29 AM
To: Spencer, Nick
Subject: CONFIDENTIAL: RE: 21-4126 & Hagenbarth

Nick Do you agree with this?

Trent

-----Original Message-----

From: Harvey, Becky
Sent: Tuesday, October 18, 2005 3:16 PM
To: Galbraith, Trent
Cc: Spencer, Nick

Subject: CONFIDENTIAL: RE: 21-4126 & Hagenbarth

Hi Trent:

I will give this my best shot and then let Nick add his two cents...

Question #1:

I don't know what Kent Foster means by "Notice of Claim". If it is statutory claim, which by the number you gave me it appears it is, then it isn't good enough since the statutory claims were not verified or investigated by IDWR; it is evidence only as to the use as of the date the claim was filed not as a date of priority. The claimant will need to produce other documentation regarding the claimed priority date (e.g. Affidavits, homestead documents, crop reports, income tax records, etc.).

Question #2:

I can tell you what the Rexburg Decree states: "...waters of the Snake River and its tributaries situated in the Counties of Fremont and Bingham..." There are specific springs mentioned in the decree as well as generic statements such as "springs on lands". I notice that Wood Livestock has a Basin 25 decreed right in the Rexburg on Bear Trap Creek. Additionally, there are specifically identified springs for Basin 21 rights in the Rexburg but not in the names of Hagenbarth or Wood Livestock. Are there other decreed rights on that same source?

Hope this helps.

Becky

-----Original Message-----

From: Galbraith, Trent
Sent: Tuesday, October 18, 2005 2:29 PM
To: Harvey, Becky
Subject: 21-4126 & Hagenbarth

Hi Becky,

I have a question for you that I hope you can answer. I have e-mailed Nick about the question but he hasn't got back to me. Busy man! I have claim (21-4126) that is a beneficial use claim and doesn't have any evidence of priority. In the file I have a letter from Kent Foster stating the only evidence they have is a "Notice of Claim". Is this notice good enough for evidence of priority and how do I know.

Also I have some claims in the name of Hagenbarth that claim a priority date of 1893 with a source of "Springs tributary to Sinks". Were springs and sinks included in the Rexburg Decree? The land was deeded over to Wood Livestock company in 1908.

Thanks,
Trent