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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

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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 63-07539
)
) ORDER ON MOTION TO STRIKE
)
) ORDER RE: ATTORNEY' S FEES AND
) COSTS
)
) ORDER DISMISSING OBJECTION
)
) ORDER VACATING HEARING ON
) MOTIONS FOR SUMMARY
) JUDGMENT
)
) ORDER REQUESTING STATEMENT
) FROM PARTIES

I. BRIEF PROCEDURAL HISTORY

On February 13, 2008, Craig Whitted, acting *pro se*, lodged a late objection to the *Director's Report* for the above-captioned water right claim, asserting that one of the points of diversion, a groundwater well, is located on land owned by Mr. Whitted, and that the claimant, Sarah Jane Smith, is not authorized to use Mr. Whitted's land. At the hearing on Mr. Whitted's motion to file late objection, Mr. Whitted asserted that the water right should not exist because it was initiated in trespass. The motion to file late objection was granted by *Order* dated February 13, 2008. A trial date was set, together with a pretrial conference to be held on July 1, 2008. At the July 1, 2008, pretrial hearing, the parties stipulated to certain facts, and the trial was vacated upon the representations of the parties that there were no genuine issues of material fact, and that the issue(s) are legal issues that can be resolved on summary judgment. A deadline for

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the filing of motions for summary judgment was set for July 31, 2008. The claimant, Sarah Jane Smith, through her attorney John Marshall, timely filed a *Motion for Summary Judgment*, together with supporting affidavits and briefing. A hearing on the claimant's *Motion for Summary Judgment* was set for September 24, 2008. Sarah Jane Smith's *Motion for Summary Judgment* was directed toward Mr. Whitted's trespass theory of the case; relied upon the stipulated facts; asserted that the water right should be decreed with a valid point of diversion located on Mr. Whitted's land; and asserted that an easement by prescription should be decreed in connection therewith.

Mr. Whitted, still acting *pro se*, timely filed a *Motion for Summary Judgment*, together with the *Affidavit of Carrie Cusic Moore*, again asserting that the water right should not exist because it was initiated in trespass.

On September 10, 2008, Mr. Whitted, now represented by an attorney, Kimbell Gourley, filed a *Cross-Motion for Summary Judgment*, together with supporting briefing and affidavits. The *Cross-Motion* was filed after the July 31, 2008, deadline for filing motions for summary judgment. The *Cross-Motion* and supporting documents were also untimely pursuant to I.R.C.P. 56(c), which requires a motion to be served at least twenty-eight (28) days before the time fixed for hearing. In the *Cross-Motion*, Mr. Whitted has abandoned his trespass theory and now asserts that the use of the subject groundwater well by the claimant and her predecessors-in-interest has been pursuant to permission given by Mr. Whitted and by Mr. Whitted's predecessors-in-interest.

Also on September 10, 2008, the claimant filed *Sarah Jane Smith's Motion to Strike Cross-Motion for Summary Judgment and All Supporting Documents*. The *Motion to Strike* was heard on September 16, 2008. In the *Motion to Strike*, the claimant asserts that because of the untimeliness of the *Cross-Motion*, and because of the change in legal theories of the case by the objector, the Court should either strike the *Cross-Motion* and allow the case to proceed upon the motions for summary judgment already filed regarding the trespass theory, or in the alternative, should the Court allow the filing, Sarah Jane Smith should be awarded her reasonable attorney's fees and costs associated with the filing of her *Motion for Summary Judgment*.

II. ANALYSIS

This subcase involves both issues regarding the validity of one of the points of diversion for the subject water right and issues regarding what rights, if any, does the claimant have regarding the use of the land in the area where the well is located. Mr. Whitted initially pursued a theory of trespass in his objection to the existence of a point of diversion on his land. The claimant has essentially argued that even if the use of the land was in trespass when the well was drilled, such use met the elements of a prescriptive easement upon continued use for a five-year period. At the February 12, 2008, hearing on Mr. Whitted's late-filed objection, counsel for the claimant stated that any related quiet title action regarding a prescriptive easement should probably be heard in the Fourth District Court in Canyon County, rather than in the SRBA. Nevertheless, in her *Motion for Summary Judgment*, Sarah Jane Smith asserted that the SRBA Court should adjudge and decree that she has established an easement by prescription on Mr. Whitted's land. Given the interrelated nature of the trespass objection to the water right and the assertion of a prescriptive easement, it is the opinion of this Special Master that both issues could properly be resolved in the same action in the SRBA.

When Mr. Whitted changed his legal theory to one of permissive use, the procedural difficulties of this interrelationship become much simpler. If the use of the subject groundwater well by Sarah Jane Smith and her predecessors-in-interest has been on a permissive basis, as is now asserted by Mr. Whitted, then Mr. Whitted no longer has a valid objection to the elements of the water right claim. In other words, as between the State of Idaho, and the owners of the water right, the historical use of water from the subject point of diversion has been valid. The only issue remaining, then, is whether the claimant has established an easement by prescription which would allow for the future use of water under the water right; or, whether no such prescriptive easement has been established because the use of the land has been by permission and, such permission having been revoked, the claimant is now prevented from using the point of diversion. If

the latter be the case, upon a period of five years non-use of the subject well, the result may be partial forfeiture of the water right with respect to use of the well.

III. ORDER

Based upon the foregoing analysis and upon the comments made on the record at the September 16, 2008 hearing, the following are hereby ordered:

1) The *Motion to Strike* is **denied**, meaning that the *Cross-Motion for Summary Judgment* and all supporting documents will remain part of the record. The hearing date of September 24, 2008, however, is **vacated**. Should Mr. Whitted want a hearing on his *Cross-Motion for Summary Judgment*, counsel should contact the Clerk of the Court to obtain a hearing date, time, and location.

2) The September 24, 2008, hearing on Sarah Jane Smith's *Motion for Summary Judgment* is **vacated**.

3) Sarah Jane Smith's request for costs and attorney's fees incurred in connection with prosecuting the case in response to Mr. Whitted's trespass theory is **granted**. It is clear that counsel for the claimant would not have filed for summary judgment regarding trespass if the objector had initially framed the case in terms of permissive use. The claimant is directed to file a memorandum of costs and fees in the same manner as is contemplated under I.R.C.P. 54. It is the opinion of this Special Master that the payment of the claimant's costs and attorney's fees is authorized under I.R.C.P. 15(a), which allows the Court to order the payment of costs in connection with an amendment to a pleading. It is further the opinion of this Special Master that Mr. Whitted's change in direction, from trespass to permission, constitutes an amendment to the pleadings for which leave of court must be granted. This Special Master will allow Mr. Whitted to proceed on his theory of permission and finds that a recommendation of an award of costs incurred by the claimant in response to the objector's original theory of the case is

proper. The claimant shall file such memorandum of costs within fourteen (14) days after the entry of this order. In the event that Mr. Whitted disagrees with the memorandum of costs, he may file a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of costs. Failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed. In connection with the filing of a motion to disallow costs, counsel for Mr. Whitted should contact the Clerk of the Court to obtain a hearing date and time. Any amount of costs and attorney's fees ultimately found to be proper by this Special Master will be set forth in a *Special Master's Report and Recommendation* that the SRBA Presiding Judge issue an order and judgment for such costs and attorney's fees.

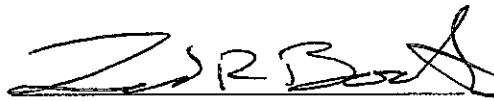
4) The objection previously filed by Mr. Whitted is **dismissed**. It is the intent of this Special Master to issue a *Special Master's Report and Recommendation* that the SRBA Presiding Judge issue a partial decree for water right 63-07539 with the elements as set forth in the *Standard Form 5* which was filed on January 10, 2008. Such *Special Master's Report and Recommendation* will not be filed until all the other issues in this subcase have been resolved – i.e. the costs and attorney's fees have been determined, and the matter of the quiet title action is resolved. Although the objection filed by Mr. Whitted is dismissed, Mr. Whitted shall remain a party to the subcase.

5) The attorneys for the parties are ordered to confer for the purpose of determining how to proceed on the quiet title (prescriptive easement) action. As stated at the hearing, this Special Master is willing to hear the quiet title cause of action and make a recommendation to the SRBA Presiding Judge. This Special Master concludes that jurisdiction over the quiet title cause of action is overlapping with the Canyon County District Court. In the alternative, this Special Master is also willing to recommend that the SRBA Presiding Judge dismiss the quiet title action without prejudice so that either party may re-file the action in Canyon County. In the event that the parties disagree as to how to proceed, a hearing on the matter will be scheduled. After conferring, the

attorneys for the parties are ordered to file a joint statement as to how they wish to proceed. If the parties cannot agree, each party may file a separate statement. If the parties, or either of them, desire to have the quiet title action heard in the SRBA, such party should also file a proposed trial scheduling order, which may include proposed hearing dates for dispositive motions, including Mr. Whitted's pending *Cross-Motion for Summary Judgment*. **The statement(s) shall be filed by October 3, 2008.**

IT IS SO ORDERED

Dated Sept. 17, 2008



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER was mailed on September 17, 2008, with sufficient first-class postage to the following:

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