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DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JAN 28 2009	
By <u>Lodged</u>	Clerk
	Deputy Clerk

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 No.: 63-7539

**MEMORANDUM IN SUPPORT OF
MOTION TO ALTER OR AMEND**

COMES NOW Craig Whitted, ("Mr. Whitted") by and through his counsel of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman, P.A., and hereby files this Memorandum In Support of Motion to Alter or Amend the Special Master's December 16, 2008 Order and Recommendation ("Recommendation").

The matter under consideration was previously briefed by counsel for Mr. Whitted in his Memorandum In Support of Motion to Disallow Costs and Fees and his Reply Memorandum on the same topic. Rather than repeat each argument contained in those briefs, they are hereby incorporated by reference into

the present Memorandum as if set forth in full. This Memorandum will instead concern itself only with those points especially in need of emphasis in light of the Special Master's Recommendation.

ARGUMENT

The Recommendation sets out an award to claimant Sarah Jane Smith ("Ms. Smith") of \$23,140.71 in costs and attorney fees pursuant to Idaho Rule of Civil Procedure 15(a). Under the circumstances of this case, however, Rule 15(a) does not support such an award.

The Recommendation bases its ruling on the assertion that Mr. Whitted "changed his position" from an assertion of "trespass" to one of "permissive use" and thus was required to amend his pleading. Reasoning that Rule 15(a) permits an award of costs in the event of an amendment to the pleadings, the Recommendation requires Mr. Whitted to pay Ms. Smith's costs and attorney fees associated with Mr. Whitted's Objection. The Recommendation states that "[t]he payment of costs and attorneys' fees incurred by Smith regarding Whitted's trespass position is simply the price that Whitted should pay to abandon his position and adopt a new one." *Recommendation*, p. 6.

The record, however, provides no support for the proposition that Mr. Whitted changed his position. The key to the present motion is to recognize what position was actually taken by Mr. Whitted. Mr. Whitted's consistent position was that Ms. Smith did not possess a water right stemming from the well on his property because the well was originally drilled without permission from Mr. Whitted's predecessor-in-interest. Ms. Smith does not dispute that the original drilling of the

well constituted trespass. The point bears repeating: Mr. Whitted's claim of "trespass" was limited to the trespass involved in initially drilling the well in 1967.¹ Mr. Whitted did not make assertions with respect to subsequent use by Ms. Smith's predecessors-in-interest until the issue of was raised by Ms. Smith's prescriptive easement claim in her motion for summary judgment. Mr. Whitted's discussion of permissive use of the well subsequent to 1967 was perfectly consistent with his position that the original 1967 act of drilling the well constituted trespass. Whatever the legal effect of his position with respect to the water rights dispute, his position did not change.

For the purposes of Rule 15(a), the concern is what position was asserted in a party's pleading. See I.R.C.P. 15(a). The only pleading filed by Mr. Whitted in the present case was his Objection, filed on December 31, 2007. See I.R.C.P. 7(a) (listing types of pleadings); SRBA AO1 2(r) (adding "objections, responses to objections, and notices of claims" to the category of "pleadings" recognized in SRBA actions).

In his Objection, the only statement relevant to the present question was his statement that "[t]he water rights holder [Ms. Smith] has no rights on this property, SWSE 14152 W. BM." *Mr. Whitted's Standard Form 1 Objection* (attached sheet). That statement was fully consistent with Mr. Whitted's assertion that the well was drilled in trespass. The statement is also, and equally, consistent with Mr. Whitted's position that Ms. Smith and her predecessors-in-interest did not obtain a prescriptive easement over his property and their use – subsequent to 1967 – was pursuant to revocable permission.

¹ Excepting very recent use after Mr. Whitted revoked permission, which was also trespass.

The Recommendation comments that "[t]he most that can be said about the language used by Whitted in his objection is that, although not explicitly stated, it is not inconsistent with revoked permission." *Recommendation*, p. 3 (emphasis added). Given, however, that the Imposition of costs and attorney fees pursuant to Rule 15(a) is predicated on the allegation that Mr. Whitted's position as to permissive use is Inconsistent with his pleading, a recognition that his pleading is not inconsistent with permissive use is decisive.

The Recommendation did not rely exclusively on the text of Mr. Whitted's pleading, instead reasoning that even if the pleading was broad enough to encompass both trespass and permissive use, the opposing party should be able to rely on Mr. Whitted's later statements. The wording of the pleading, however, is fixed by the words on the page, and is not altered by subsequent statements. Otherwise, there would be no need for Rule 15(a) at all. Further, any reliance interest Ms. Smith possesses with respect to keeping an opposing party from making inconsistent statements during the course of a judicial proceeding is governed by the doctrine of judicial estoppel; Ms. Smith putative reliance interest is outside the scope of Rule 15(a), which concerns only the amendment to pleadings. Ms. Smith's estoppel remedy, if any were merited, would not be an award of costs and attorney fees, but instead simply for Mr. Whitted to be estopped. See *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 121-22, 138 P.3d 316, 321-22 (2006).

For the purposes of argument, however, it would be best to address each of the statements referenced in the Recommendation to determine whether they demonstrate inconsistency. The Recommendation pointed first to Mr. Whitted's *pro*

se discovery response submitted in the record in the *Affidavit of J. Will Varin*. The document (for which neither Mr. Whitted nor Mr. Varin provided the interrogatory questions) states in full:

My knowledge of where the well is located.

My surveys.

Other recorded surveys.

The adjudication applications.

The owner did not use the water for more than 12 years 7 months.

Water right is forfeit after 5 years of no use. 92.07.17 05.02.19
05.03.02

The trespass of the person who had the well drilled,

He had full knowledge of the trespass and told not to drill the well before drilling was started.

Supreme court case *Rabido et al v Furey* IDAHO 1920 page 4 line 17

And any other laws or court cases that says water rights cannot be developed in trespass.

My witnesses will testify in person on the trespass of the person who drilled the well, other than the Dept. of Water Resources.

Affidavit of J. Will Varin, ex. A.

The Recommendation posits that the above discovery responses "clearly states that Whitted is alleging trespass." *Recommendation*, p. 4. Mr. Whitted's discovery responses did indeed allege trespass, but only with respect to the original drilling of the well in 1967. Mr. Whitted asserted "trespass of the person who had the well drilled" and stated that the driller "had full knowledge of the trespass and [was] told not to drill the well before drilling was started." He proposes to present witness who will testify to trespass, but only "of the person who drilled the well[.]" Because Mr. Whitted's discovery responses allege trespass only with respect to the 1967 drilling of the well (which the parties agree was trespass) nothing in those responses is inconsistent with Mr. Whitted's position that subsequent use of the well was pursuant to permission granted by Mr. Whitted's predecessors-in-interest.

The next set of statements by Mr. Whitted relied upon in the Recommendation came in the July 1, 2008 pretrial conference. (The "Pretrial Conference"). The Recommendation states that "[a]t the pretrial conference, Whitted cited to the Idaho Supreme Court case of *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920), for the proposition that a water right cannot be initiated in trespass." The *pro se* citation to *Rabido*, however, in which the Court held that a water right "cannot be initiated" in trespass, 33 Idaho at ___, 190 P. at 75, was not inconsistent with Mr. Whitted's position that the purported water right was "initiated in trespass" by the unauthorized 1967 drilling of a well on his predecessor-in-interest's property. Arguably, *Rabido* did not advance his argument in the fashion he intended, but his citation to *Rabido* demonstrates only an assertion of trespass – not an assertion of trespass subsequent to the drilling of the well that would be in any way inconsistent with permissive use.

Next, the Recommendation observes that "Mr. Whitted further stated that his trial witnesses would testify at trial regarding trespass of the well." *Recommendation*, p. 4. Again, Mr. Whitted's intended, as he also stated in his *pro se* discovery responses, to present witnesses to testify to the 1967 unauthorized drilling of the well on his predecessor-in-interest's property. He repeated this intention at the Pretrial Conference. Doing so was in no way inconsistent with his position that subsequent use of the well was by permission of the landowner.

Next, the Recommendation notes that "Mr. Whitted also stated on the record that the well was drilled without permission." *Recommendation*, p. 4. Again, that

has consistently been Mr. Whitted's position, and it does not clash with later permissive use.

Next, the Recommendation states that:

at the pretrial conference, this Special Master Inquired of the parties -- In an attempt to determine what factual issues need to be determined at trial, whether there was a factual issue regarding whether or not Rex Jensen (Smith's predecessor-in-interest and the man who had the well drilled) had been given permission to drill the well on his neighbor's land. Mr. Whitted made no assertion at the pretrial conference that there was a factual question of permission.

Recommendation, p. 4.

At the Pretrial Conference the parties did indeed agree that Rex Jensen was trespassing when he drilled the well at issue. It is unsurprising that Mr. Whitted did not assert that Rex Jensen's drilling was permissive because that was not Mr. Whitted's position. The agreement of the parties that the drilling of the well was an act of trespass is in keeping with Mr. Whitted's position that the drilling of the well was in trespass, and was not inconsistent with subsequent permissive use of the well.²

The Special Master may have taken the discussion of trespass at the time of construction of the well as suggesting that Mr. Whitted was claiming that all subsequent use of the well was also in trespass, *i.e.*, non-permissive. Such a position (had it been asserted) would arguably be legally stronger with respect to a water rights dispute than Mr. Whitted's actual, and limited, assertion that the 1967 drilling of the well was done in trespass. Crucially, however, Mr. Whitted himself never made any assertions with regarding either trespass or permissive use with

respect to subsequent years until the issue was raised as a result of Ms. Smith's claim of prescription in her motion for summary judgment.

Mr. Whitted's position that the use of the well subsequent to drilling was permissive was arguably not helpful with respect to the underlying water rights claim, but, regardless of its effect on the merits of the now-dismissed Objection, it does not support any allegation of inconsistency relevant to an award of attorney fees pursuant to Rule 15(a).

Finally, even if the award of costs and attorney fees under Rule 15(a) is allowed to stand, it must be reiterated that the size and scope of the award – which requires Mr. Whitted to pay all costs and fees associated with his Objection both before, during, and after his alleged change of positions – is neither reasonable nor proportionate to the case at hand. See *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct.App. 2000); *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct.App. 1985).

CONCLUSION

The pleadings, submissions and statements made by Mr. Whitted demonstrate that he has consistently asserted that the well was drilled without the authorization of his predecessor-in-interest, and thus was an act of trespass. This assertion is not inconsistent with his position that subsequent use of the well by Ms. Smith's predecessors-in-interest was permissive. Whatever the arguable legal infirmities (for the purposes of his now-dismissed water rights Objection) of his position that the trespass at the time of the 1967 drilling of the well would prevent

² It is also unsurprising that Mr. Whitted "made no assertion at the pretrial conference that there was a factual question of permission" because permissive use arose as a defense to Ms.

the later formation of a water right even in light of the well's subsequent permissive use, his position was consistent. As a result, Rule 15(a) does not support the imposition of costs and attorney fees against Mr. Whitted in this action.

For the above reasons, as well as those discussed in prior briefing, Mr. Whitted respectfully requests that the Special Master vacate the award of costs and attorney fees set forth in the Recommendation.

DATED this 28 day of January, 2009.

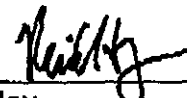
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.


Reid W. Hay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of January, 2009, a true and correct copy of the foregoing document was served as follows:

John M. Marshall J. Will Varin GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83701-2720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery
Idaho Department of Water Resources, c/o Nicholas B. Spencer 322 E. Front Street Boise, Idaho 83720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery


Reid W. Hay

Smith's claim of a prescriptive easement stated in her later motion for summary judgment.