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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - S. CA	
Fifth Judicial District	
County of Twin Falls - State of Idaho	
APR - 1 2009	
By _____	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	)	Subcase 63-07539
	)	
Case No. 39576	)	ORDER DENYING MOTION TO ALTER
	)	OR AMEND
_____	)	

On December 16, 2008, this Special Master issued an *Order Re: Motion to Disallow Costs and Attorneys' Fees; Special Master's Report; Findings of Fact and Conclusions of Law for Water Right 63-07539*, which recommended that water right 63-07539 be decreed in the name of Sarah Jane Smith (hereinafter "Smith") with the elements as set forth in the *Recommendation* attached thereto, and further recommended that the SRBA District Court enter a judgment in favor of Smith, and against objector Craig Whitted (hereinafter "Whitted") in the amount of \$23,140.71. On January 28, 2009, Mr. Whitted filed a *Motion to Alter or Amend*, asserting that this Special Master erred in recommending an award of costs and attorneys' fees pursuant to I.R.C.P. 15(a). Mr. Whitted is no longer contesting any of the elements of the above-captioned water right. Oral argument on Mr. Whitted's *Motion* was heard on March 24, 2009. For the reasons set forth below, Mr. Whitted's *Motion to Alter or Amend* is **denied**.

This Special Master has previously found that Whitted changed his objection from an assertion that Smith's water right claim was invalid because Smith and her predecessors-in-interest had trespassed upon Whitted's land, to an objection asserting that Smith's use of the subject well located on Whitted's land has been permissive, and therefore Smith has acquired no rights in Whitted's property through prescription. This Special Master also concluded that Whitted's change in direction is governed by I.R.C.P. 15(a), and as such leave of court is required to make such a change. This Special Master allowed Whitted to change his assertion from trespass to permission, and found that the

change in direction by Whitted warrants an award of the costs and attorneys' fees incurred by Smith in defending against Whitted's trespass theory.

The objection filed by Whitted states: "The water right holder has no rights on this property, SWSE [Section] 14 [Township] 1S [Range] 2W BM." In his *Motion to Alter or Amend*, Whitted asserts that he has not changed his position, and that this Special Master erred by concluding otherwise. Specifically, Whitted argues that the above-quoted language from his objection encompasses the following factual events, although not explicitly stated therein: (1) The drilling of the well in 1967 was done in trespass; (2) At some point in time thereafter Whitted's predecessor-in-interest gave permission for the well to be located on his land; and (3) The permission has been revoked.

Whitted asserts that when he was objecting to the validity of Smith's water right claim in the SRBA, he was relying on the trespass that occurred prior to the granting of permission. Smith correctly understood Whitted's objection to be based upon trespass and accordingly filed a motion for summary judgment defending the water right. One of the arguments advanced by Smith in her motion for summary judgment was that any infirmities that may have existed with the water right due to trespass had long been cured based upon Smith's acquisition of a prescriptive easement upon the fulfillment of Idaho's (then) 5 year statutory period. In response to Smith's claim to a prescriptive easement, Mr. Whitted then abandoned his reliance on trespass, and switched to number (2) above – permission. Whitted's argument is that although Smith correctly perceived the language in the objection to mean trespass, Smith failed to perceive the permissive component of the language, and the risk for such failure should be borne by Smith, not Whitted.¹

Whitted asserts that the language he used in his objection means both trespass and permission, and therefore his change from trespass to permission is not a change governed by I.R.C.P. 15(a). In other words Whitted asserts that he gets to pick and choose which meaning he assigns to his objection based upon whether, as the lawsuit progresses, he deems it more important to challenge the validity of the elements of the

¹ In his *Memorandum in Support of Motion to Alter or Amend*, Whitted asserts that Smith's prescriptive easement claim was first raised in her motion for summary judgment. The record in this subcase does not bear this out. Smith's motion for summary judgment was the first time that Smith had reduced this claim to writing, but her motion was certainly not the first time the issue was raised.

subject water right or alternatively to defend against an action seeking a prescriptive easement upon his land.

Counsel for Whitted correctly points out that Whitted's objection is a pleading. A pleading requires a simple, concise, and direct statement fairly apprising the opposing party of the claim(s) and the ground(s) upon which they rest. *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App 1988); I.R.C.P. 8(a)(1). In other words, there is a modicum of basic information that needs to be communicated to the opposing party through a pleading. As to Whitted's trespass allegation, there is no question that the language he chose in his objection apprised Smith of his claim that Smith's point of diversion on Whitted's land was and is invalid by reason of trespass. Whitted meant trespass in his objection, and Smith accurately understood that Whitted meant trespass.

However, regarding Whitted's assertion that he and his predecessor-in-interest had given permission to Smith and her predecessors-in-interest, Smith and her lawyers apparently lacked the uncommonly keen perception required to accurately understand what Whitted meant. Whitted may have subjectively understood the words he chose to include permission, but for purposes of apprising an opposing party of the same his words fail. A reader of Whitted's objection could not reasonably conclude that the words he used meant that permission had been given.

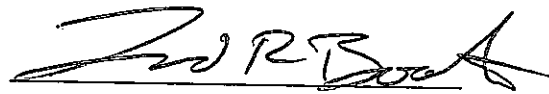
Smith has consistently asserted throughout the course of proceedings in this subcase that she claimed a prescriptive easement upon Whitted's land. This claim by Smith was made both as a defense to Whitted's trespass allegation as to the validity of the water right, and as a direct claim that would allow Smith the continued use of the well. Smith raised the issue at the hearing on Whitted's motion to file a late objection, and at the pretrial conference. Additionally, at the pretrial conference this Special Master specifically inquired of the parties as to whether there was a factual issue regarding permission to be determined at trial. Whitted stated nothing in response to this inquiry. Despite being informed that Smith would assert a claim for a prescriptive easement, Whitted waited until after Smith had expended considerable resources in defending against the trespass allegation before he let Smith know that his objection also included an unstated assertion of permissive use of Whitted's land.

Based upon the foregoing, Whitted's cross-motion for summary judgment constituted a change in positions to which I.R.C.P. 15(a) applies. This Special Master, in an exercise of discretion, allowed Whitted to proceed with his permissive-use allegation, but ruled that he would be required to compensate Smith for the money she spent in defending against Whitted trespass theory because Whitted's "permissive use" theory essentially nullified the work previously done by Smith's lawyers.

Based upon the foregoing analysis Whitted's *Motion to Alter or Amend* is **denied**.

IT IS SO ORDERED

Dated April 1, 2009



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO ALTER OR AMEND was mailed on April 01, 2009, with sufficient first-class postage to the following:

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