

IN Re SRBA

Case # 39576

Subcases 22-13503, and 22-13212

**MOTION FOR SUMMARY
JUDGEMENT**

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAY 21 2009	
By _____	Clerk
_____	Deputy Clerk

INTRODUCTION

I, Michael L Reid, hereby request relief from the court in the matter of the protests of my recommended water rights, #22-13503 and 22-13212. The burdens placed upon me in this matter are great and the risks for the court small in comparison to holding a trial after another irrigation season.

The objectors, except me, are all defendants in other actions that I am pursuing. With the exception of Mr. Rothgeb, the objectors are junior priority groundwater users that hold their rights in conflict with senior surface users on Paradise Springs. Concerning Mr. Rothgeb, he is the defendant in another SRBA action I am the objector for. The benefit to the junior groundwater users of filing their protest is that the Director of Water Resources for the State of Idaho will not begin to administer the junior priority groundwater rights on the west side of Basin 22 until my rights are codified by the court. The Director will continue to abrogate his authority and responsibility to administer other partially decreed rights in Basin 22 until my rights are partially decreed, to the advantage of groundwater users in Basin 22 and beyond.

The advantage gained is another year of out of priority diversions with no hope of administration of any kind. Even the kind of administration doled out by the Director of the Department of Water Resources would be preferable to nothing, because at least we would be one step closer to a court decision concerning the constitutionality of said administration.

What is clear, by every scrap and piece of the objective evidence and all of the evidence I have ever seen is, that John J Miller had a homestead claim in 1896 that didn't work out because he was "utterly unable to get any water for the said tract, either for irrigation or culinary purposes." (See homestead document Exhibit A-7). He then moved to the north, here to the Paradise Springs area and began to work to improve his 2nd homestead filing and use the water he filed on, the date being May 23, 1901 (exhibit C). John Miller's original homestead claim, #5444, was for the exact land that the Rexburg Decree has as the place of use for John Miller's water right, #22-405 (exhibit A-2). The mistake that was made by the court in Rexburg, which decreed the Miller right for 2.0 cfs onto the NE1/4 of the NW1/4 of Section 31, the South 1/2 of the SW 1/4 of Section 30, and the SW of the SE of Section 30, was done so in ignorance of Mr. Miller's withdrawal of his previous filing and subsequent final proof of the homestead which he filed the water right for, claim #8850. Mr. Miller's original homestead claim was canceled in July of 1902 (exhibit A-2), the Rexburg Decree hearings were in 1905, and it would seem that the clerks at the Rexburg Decree had a map that was a few years old, showing Mr. Miller's original homestead claim rather than claim # 8850. This would have been an easy mistake to make, especially considering how many other mistakes were made for less reason than this.

The first listing of water rights known to me after the Rexburg Decree was handed down, which is dated 1916, shows that the JJ Miller right is decreed onto his original homestead claim, #5444. Since this is up a 60-80 vertical foot rise, it clearly is physically impossible for this water to have been used on the property that the Rexburg Decree assigns to JJ Miller (exhibit F). As previously stated, JJ Miller homesteaded this land under claim #5444 (exhibit A-2), but abandoned this homestead because of the complete inability to get any water for culinary or irrigation purposes. (exhibit A). He then moved north to his patented homestead, claim #8850, where he filed on his water right 22-405 from Paradise Springs, with a priority date of 5-23-1901 (Exhibit C). We can see that Mr. Miller was not a lazy man from the testimony of the two homestead related visitors to Mr. Miller's place in the early 1900's (Exhibit A 4, 10-13). They both report that the entryman, Mr. John J Miller, was residing on his homestead, #8850, and that he had built a house, dairy barn, fish hatchery, fencing, and had 25 acres of irrigated oats on top of the rest of this, and in only 7 years! I can say from experience that even in today's world, this would be a feat. In the early 1900's in Teton Valley, with no electricity or machinery, this is truly astounding. Mr. Miller clearly was a hard worker who tirelessly worked towards improving his place and using all of his water. The water was, of course, the reason he gave up his prior homestead and moved to Paradise Springs (exhibit A-7).

John Miller did not testify in the Rexburg Decree hearings. There is no record of his testimony in any file in the three filing cabinets in St Anthony. I looked, diligently. However, Samuel Kunz did testify that Mr. Miller, Mr. Walton, and Ms. Withrick (the latter being a plural wife of Samuel Kunz) had been working on what we refer to as the Spring Dam, a 25 foot high structure that allowed Mr. Miller to water much of the north half of his homestead and some of the south half of his homestead (see Samuel Kunz testimony). Samuel Kunz (aka Grandpa Kunz) describes years of work on the dam, a collapse in said structure, and then a completion by June 1 of 1904. He further describes that JJ Miller was currently irrigating an approximate 9 acre portion of his homestead. At the time of Samuel Kunz's testimony, the huge (1+) acre garden was under the south ditch, as well as some pasture for their cows. John Miller had also taken a ditch north from the Spring to his house by then, and was proceeding to go as far north as he could. This is all before WW I and is being done by horse or by hand. This kind of work will break a regular man, but it was the call of that day and John Miller was equal to that call. John J Miller, throughout his life, showed a diligent effort to develop his water rights onto the land he claimed that day, May 23, 1901. Perhaps his desire to develop his water came from the 5 years he spent on homestead file # 5444 where he couldn't get any water for culinary or irrigation purposes. Perhaps he just wanted a productive farm. What ever the motivation of my predecessor, it is clear from the objective evidence that he wanted his water and that he used it in many, varying ways.

Section 1, The Homestead Documents

The affidavits of the two official visitors, one from the coal/phosphate examiners and one from the homestead examiner, show that John Miller was on homestead #8850 at the time of their visits, that he had built a house and barn, had a huge vegetable garden, 25 acres in oats, fencing, and a small fish hatchery (see homestead exhibits A-4, 10-13). He obviously was developing not just his water right, but his entire homestead, in an efficient and hard working manner. The affidavits used for his homestead proof by himself, his brother Conrad, and his neighbor and Caroline Withrick's son Robert Kunz, also affirm these facts (see homestead exhibit A 10-13)

Section 2, The Place Of Use

I stated above that JJ Miller had made a homestead entry in 1896 that he abandoned in 1901 to pursue the land he filed water right #22-405 for. This homestead entry, canceled claim #5444, proves to be the exact place of use that the Rexburg Decree put JJ Miller's water on to (exhibit A-2). Perhaps the Rexburg Decree clerks had an out of date map, one that listed JJ Miller's homestead as his canceled homestead, #5444, instead of his patented homestead, # 8850. This would logically account for the mistake made by the court. Besides the fact that the land where the Rexburg decree locates the Miller right is 60-80 vertical feet above the Paradise Springs outlet and that it is physically impossible to get water to run uphill, the fact that the court could have had 5 year old maps to work with when assigning water rights in Basin 22 is an extremely compelling fact.

Section 3, The Priority Date

Mr. Miller filed for his water on May 23, 1901, and apparently immediately went to work to build the Spring dam and bring water out to his house (exhibit C). Imagine the excitement for him, after having no water for 5 years and during a significant drought, to finally have a place he could use water on. And so it appears, from the testimony of Mr. Miller, his neighbors, and the examiners, that Mr. Miller worked hard to improve his homestead, patented homestead entry #8850, from the first day he got there. By June 1, 1904, the Spring dam was 18 feet high, according to Samuel Kunz's testimony. Samuel Kunz also testifies that the dam had collapsed during initial construction, but that they had rebuilt it. So we know that by 1904, the dam was high enough to bring water out to the north to John Miller's house, and out south to water the garden. It appears that between the time Mr. Miller filed on his water, May 23, 1901, and June 1, 1904, when the dam was 4 feet shy of complete, he had been working on building a sizeable earthen dam around the considerable flow of Paradise Springs, it had collapsed, and he had continued to build until complete, as it sits today, at about 25 feet high. George Walton then testifies in the Rexburg decree that they need another 4 feet to get the water high enough for Mr. Miller, Ms. Withrich, and himself to be able to water all the fields they want to (exhibit E). The fact that the spring dam collapsed (see Samuel Kunz testimony) and they had to rebuild, and that took another year or so, does not under Idaho Law mean that Mr. Miller should forgo his May 23, 1901 priority date. John Miller, by all accounts, from the time he first settled there, continued to develop his water rights diligently, both culinary and irrigation, and his sons Chet and Roy continued that process by using pumps and sprinklers to get water to the final places on his homestead that couldn't be flood irrigated. From the testimony of the phosphate and homestead examiners, and the sworn testimony of Robert Kunz, Conrad Miller, and John Miller, it appears that Mr. Miller worked diligently, without the aid of tractor or electricity, to develop bare land into a working farm, complete with a small fish hatchery, irrigated oats and a large vegetable garden.

The priority date of 6/01/04 should be changed to reflect what the objective documentation reflects, which is that John Miller filed for and began using water on 5/23/01, developed his water right with due diligence, and continued to use and develop his water continuously, without abandonment. His heirs continued that process right up to the present time. The fact that a 6/01/04 priority was assigned was a mistake by the court, as was the location of the place of use, and both of these need final correction from this court.

Section 4, Expansion

In his testimony, Samuel Kunz talks about how, after the spring dam was built and water began being used, water sprang up in the midst of sagebrush. Eventually, the 25 acre field to the north of the Spring Pond was too wet to cultivate anymore, and this is the field that was dried up to provide water for my field. There was not an expansion of the Miller's water right, just relocation within the original claimed place of use.

Section 5, Transfer

When I became aware that right 22-405 had been misdecreed into sections 30 and 31, I filed a transfer of 1/4 of this right to my land. It went unprotected by any and all of the objectors in this case, who at that time had both knowledge of the transfer and the ability to file a protest for just cause. No protest was filed. The transfer sat for a rather long time on Ron Carlson's desk before he signed the transfer (Exhibit I). At this time, it became a legal transfer in the eyes of Ron, which was what I needed to get further down the path towards conjunctive management of the wells. Ron did not sign this transfer because he wanted to. He did so because he had no other choice, because all of the facts are clear in this case. It was transferred to Pam Skaggs' office, and I petitioned Ms. Skaggs to please complete the work as soon as possible (Exhibit H). I never heard from her nor did I write her again, and my phone messages were left unreturned.

This transfer procedure is in stark contrast to what happened when Trees, Inc., an objector in this case, dug a 6" well for culinary purposes and then used that well without authorization to water their 40 acres. When I protested this, they filed a transfer, which was granted and signed by Ms. Skaggs within 6 weeks of filing. In Ron Carlson's reply to me about the transfer's delay on his desk, he states that I have "not been singled out for inattention." It seems clear that I was singled out for inattention, both by Ron and Pam.

The next I heard of the transfer, Trent Galbraith was asking me to withdraw the transfer, it had been lost, and he could accomplish the same thing in the SRBA. He said he knew that the water had been used on the NE corner of the SE of the NW of 30, and that the POU on the Rexburg Decree was a mistake. He said that all of the elements of my water right would be granted in the SRBA, but he couldn't go ahead and do that unless I withdrew the transfer. He said that this would be the most efficient and fastest way to get through the process. I am a team player, and so I did withdraw the transfer at that time, years after it got to Ms. Skaggs' desk. Who wouldn't have? The mere thought that it would be in that black hole in Boise another second was enough to make me go with Trent.

If I had it to do over again, I would have made Ms. Skaggs finish the transfer. Only now do I understand fully that, in the eyes of the court, a completed transfer would be worth much more than an SRBA recommendation. I congratulate IDWR and Trent on this play, as it has worked perfectly to their advantage. I will try not to be such easy prey next time. The fact that I made this mistake should not hold the Special Master back from assuming that, treated fairly and normally, I would have said transfer, and the only real consideration in this case would be my objection to the priority date, which is also factually clear.

Section 6, Similar Rights Not Protested

My water rights, 22-13503 and 22-13212, are essentially exactly the same as the other holders of the Miller Right, but none of these other Miller right holders have had their rights protested. The objectors must then agree that the JJ Miller right was used on his homestead, claim 8850, and not anywhere else. Don Miller, right 22-13211, is in the exact position as me, we use the same pump to irrigate congruent hillside above the ditch and use the right his father Roy got from John Miller. Don Miller's right is not protested. Could there be any better examples of the reason for the objection to my rights than these? The reason the objectors filed a protest on my rights is because I have filed a delivery call with IDWR and they are the primary defendants in this action. By protesting my right, and taking it to trial, they delay conjunctive administration for yet another irrigation season. The Director refuses to take action for me *or other senior right holders* until I have my partial decree. I am the target because I have filed the delivery call. If summary judgement is not granted, then their objection has been successful because it will have delayed the process another 6 months.

Section 7, No abandonment

In Exhibits G, J, K, and L, the people who used the water testify about that use. From 1901 until 1915, we have the testimony of objective agents that water is being developed and used. We then have Chester Miller's testimony about using the water from 1917 onward, Don Miller's testimony about Samuel Miller's water use, and LeRoy Miller's water use after him. And we have Rex Miller, Craig Kunz, and the Schiess' testimony that cover's the use from about 1960 to the present. We also have Ray Rigby's letter, Exhibit O, that shows there has been an intent to pump water from the Springs and that in 1967 it was important enough to my predecessors to hire an attorney to try to settle the mistake.

CONCLUSION

There is no independent, objective evidence showing anything other than what I have stated all along: the decree was in error, both place of use and priority date, and the reasons for these mistakes are understandable and forgivable. All independent reviewers, from Ray Rigby to Kent Foster to Ron Carlson and Trent Galbraith, have concluded the same things. I pray that the court will grant me full relief in this matter and also award all costs that I incurred as a result of this malicious objection.

I hereby swear that the above statements are true, and I served a true copy of this Motion upon the counsel for objectors, TJ Budge.

Dated this 20th day of May, 2009, by

M/L Reid
Michael L Reid
Claimant and Objector

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