

JUL 10 2009

DEPARTMENT OF
WATER RESOURCES

IN Re SRBA

Subcases 22-13503, and 22-13212

Case # 39576

REPLY TO OBJECTOR'S RESPONSE

INTRODUCTION

For over a year I have looked forward to seeing the case that the objector's would present against my Paradise Springs water rights, recommended as 22-13212 and 22-13503. I even wondered about a piece of evidence that I had missed or a person who I hadn't spoken with, or a fact I had not uncovered. Instead of actual evidence, I got even less than I expected from the objectors—a single affidavit full of half truths and self serving hearsay from Larry Kunz, "President" of Teton Rainbow Ranch, the farm that has the most groundwater rights within the Paradise Springs Zone of Influence as defined in the Brockway evaluation. And from Mr. Budge, the classic character assassination, complete ignorance of overwhelming evidence and reality in general, and cleverly worded defenses. I can't believe TJ actually suggested summary judgement in favor of the objectors after he had to postpone the original hearing for lack of preparation and obviously from the June 23 date on Larry's affidavit, lack of evidence. Baseless attacks like these are a big reason why my predecessors have preferred to "turn the other cheek" as my neighbor Don Miller puts it. I turned all four cheeks and I have none other to turn, although I much admire Don Miller's faith.

SECTION 1, Rebuttal to Character Assassination

Mr. Budge suggests that water rights should be defined 'as they are, not as claimants wish them to be,' and my favorite, that I have "engaged in a vigorous campaign to leapfrog the priorities of (my) neighbors in an apocalyptic quest to make the last first, and the first last." He also argues for the claim that Don Miller filed for his father LeRoy Miller, which I have repeatedly protested to IDWR about and more recently to this court in an effort to withdraw this claim.

I know of nothing I have done that would end the world in apocalypse nor have I made any claims or statements in the SRBA based on the way I wished it would be. In fact, what I am trying to do is to clear up a problem that was first noticed in 1939, some 70 years ago. Because of the difficulty that IDWR seems to have with conjunctive management, the priority doctrine, and the mistakes in the Rexburg Decree, I have found myself in the middle of one of the smaller but precedent setting water fights that exist today.

Since I purchased the original 40 acres of my farm, I have worked to build bare land into my home and the first and only raw milk micro-creamery licensed by the State of Idaho (license #001). I grow the hay and grain, move the hand lines, milk the cows twice a day, bottle the milk, make the cheese, deliver the products, do the books, pull calves, clean the barn, wash bottles—I do everything here on my 180 acre certified organic farm without help and have for almost ten years now. There are no employees. The state tests the milk monthly and it is the best there is.

Instead of an apocalyptic or self serving quest, what I am doing is trying to solve the most divisive problems on the west side of Basin 22 using research, objective evidence, logic and patience.

Section 2, Water Right 22-11639

Mr. Budge makes a great deal about this right that I have objected to and will withdraw. On July 21, 2009 at 3pm, I expect to withdraw this claim in front of this court. It is most confusing and factually means nothing. There is one sentence in the comment line that speaks volumes though, "Based on the Miller Right."

In Trent's notes about this right (Ex. M, Response to Motion), he notes to himself that he would recommend this as beneficial use, "This is if they used extra water!" I explained to Trent at least three times that this was not extra water, that this was in fact 22-405 being claimed with a 1969 priority date because that was when the permanent pump went in. Why this claim was filed in this manner is obvious if you've ever tried to claim the Miller Right in the Idaho Falls IDWR office. It's not that the agents are against you personally, it's that they are there to assist with the filing of recommendable rights and as such, since the Miller Right is decreed to another POU, what evidence do you have of use of water? What Don Miller had that day he filed the initial claim for his father, LeRoy, was the electric record of the first season of use of the permanent pump, from 1969. He had no water law degree or water background at all, but he knew that there were problems with the decree (see Ray Rigby letter) and turned the other cheek and accepted what the agent wanted to file. When I spoke to Don about the water rights prior to the time I bought this place, he explained that his family had homesteaded here, and had used their water in various ways and continuously to the present. The water rights were very important to me even then, and with a homestead right, this was the best place available for at least 24 months prior to or after I bought it. I understood that there might be some technical issues with the water rights, since I too was aware of the LeRoy Miller claim filing, but that the history of use was rock solid.

I have been to IDWR in Idaho Falls to file on the Miller right and I can personally attest to the fact that unless you were to talk to Skip Jones (in that era), there was no filing on the Miller right due to the POU error. Eventually I obtained enough evidence where I could talk to Skip and file on the Miller right, and eventually file the transfer.

When Don filed the claim, he said that the pump only runs two lines or a little more, and the agent said that was about 0.80 cfs. This would neglect the flooding we do on Don's lower 8 acres, which is included in the 54 acres. All told, between flooding and the pump, we use the full 1 cfs that all of the successors to the Miller Homestead agree was Don's father LeRoy's and now his and mine.

Mr. Budge conveniently ignores my protest of this right, all of the objective evidence and the letter I sent accompanying that protest as he delivers vague and unremarkable legal opinions.

Section 3, the Larry Kunz Affidavit

This is the kind of half true, self-serving hearsay that I expected, except that only one of the objectors participated instead of all of them. It starts with some true statements. Larry Kunz, who is a baby boomer approximately 55-60 years old, has farmed his whole life in and around my property and it's true he farmed this property. He claims to have helped Roy Miller to install the pump and claims to have irrigated it for the first year then

in 1969. He further claims that my property is physically incapable of being irrigated by gravity flow from Paradise Springs. What news that is to me! In fact, if my property is physically incapable of gravity irrigation, then so is the east half of the Caroline Withrich desert entry and the south half of the Walton place, both being places where Larry Kunz claims water rights from. In fact, George Walton testifies that they need an additional 4 feet to complete the dam so that they can all irrigate the places they want to. Do you think that they would build the dam higher than where they needed it? And if 4 feet mattered, would they take the ditch along an exacting contour line, especially when supported by artesian pressure? Right now, if I go out and stop outward flow from the pool where I pump from, water will overflow the pump pool and flow onto my property, and this is with the ditch in a lower position than it was originally to irrigate the other claims on Paradise Springs. The truth is, that if you follow the contour lines, there is about 8 acres more or less on my property that would fall below the original location of the Walton ditch. This area was part of the huge garden John and Clara Miller had and is a perfect place for such. The ditch continued east onto Larry Kunz's fields and supplied the Withrich right to that place. Further down it supplied the south half of the Walton right to that place. I find it incredible that Larry would claim the Walton and Withrich rights that required this ditch for irrigation, but say that the same ditch never ran across my place "to his knowledge." Considering that the transition from flood to sprinkler was beginning when he was born, I guess it's less of a lie when he says 'to my knowledge.' It is quite possible that before Larry Kunz was 10, the south ditch was remodeled to where it stands now, by Roy Miller's old place, and that things that happen to a guy before he's 10 years old might be hard to remember now. Chet went to school on the GI Bill and like many people, began using tractor pumps to irrigate during this time period, around 1960 according to his statement. With Duane Kunz irrigating the Withrich place with a tractor pump, there would have been no reason to keep the ditch in place anymore.

I partially agree with Larry that the upper approximate 25 acres of my place, above gravity flow, was the last field with original JJ Miller rights to be brought under electric pump powered sprinkler irrigation. Rex Miller's testimony suggests that the tractor pumping began before 1966 because he was still in school and moved pipe here. Tractor pumping was done sporadically, as needed on my property leading up to the installation of the permanent pump in 1969. Whether or not this means it was the last field with Paradise Springs rights to have this happen is debatable.

Mr. Budge further exerts that the accomplished transfer should not be accepted if it hurts other rights. He fails to prove injury to any such, and for that reason, I'm not sure it matters when Roy accomplished this transfer. He was given the go ahead to use the JJ Miller right for his place and to pump the water in the early 1960's. The land to the south of the spring, Roy Miller's place, is irrigated at .02 cfs/acre, not an expansion of the original right in either acreage or water use. It lies within the boundaries of the homestead that John Miller filed on and is within the boundaries described by John Miller when filing his claim for 2 cfs of Paradise Springs on May 23rd, 1901. There is no injury to any other right due to this accomplished transfer. The same amount of water is used from the Springs under the Miller right today on the same amount of acreage, or perhaps less water on the same number of acres considering sprinkler efficiencies.

Reply to the Main Response

First off, does Mr. Budge claim to still represent Mahogany Ranch Holdings? Most of the documents he signs do not include them, and to my knowledge they are defunct.

In Section II, Mr. Budge clings desperately to the notion that my property is incapable of being irrigated by gravity flow, which I have previously explained and documented as untrue. With this as the centerpiece to Mr. Budge's argument in Section II, it fails miserably.

In Section III, Mr. Budge asserts there is no competent evidence to prove that the upper 25 acres (approximately) was brought under irrigation by accomplished transfer. Not only is the opposite true again, but this brings up the point that Mr. Budge has presented no independent, objective, or competent evidence to the contrary. This accomplished transfer does not result in any expansion of water, land, or water use, and therefore does not create any additional burden on the flows of Paradise Springs. There has been no attempt to expand either the amount of water or the number of acres irrigated under my rights.

Mr. Budge notes again that claim 22-11639 doesn't mention a transfer or doesn't claim the correct priority. I discussed this above, and the same applies here. The claim notes that this is "based on the Miller right" because that is as good as you can get without all the evidence I uncovered. The claim basically documents the other cheek being turned again by my predecessors in this episode of the 70 year old problem.

Mr Budge incorrectly assumes that I have argued that the Spring Dam immediately created a wetland to the north of the fish hatchery. I do argue that this, in combination with surrounding flood irrigation, helped to build the level of the aquifer over time. Soon after WWII, Chet stuck his tractor in this area and decided it was too wet to farm anymore. What I am arguing is, that like the ESPA and other areas, it took some time to build the aquifer into what it was and over a 40-50 year time period, this area became a flood irrigation created wetland. It continued to benefit from the irrigation and runoff of surrounding fields but became too wet to work.

Finally, Mr. Budge notes that even if an accomplished transfer took place, that it should have a priority of 1969 if it injured other existing rights. For the last time, 1969 is not the time when the transfer took place. After WWII, prior to the drilling of the Cedron well, water was tractor pumped onto my place. John Miller lived from September 3, 1871 until December 27, 1963. At the time of his first homestead claim he was 14 and spoke Swiss. When he died in 1963, and before his death, his heirs decided to use their water in the most efficient way possible, namely by pumping with a tractor those areas not previously floodable and using the savings of water efficiency to eek out irrigation on higher ground that needs the water more. People own water in Idaho and the successors to the JJ Miller place have sworn agreement to water being used in the way we have claimed it, within the original POU. Since no expansion took place, no other water right user could have been injured.

In Section IV, Mr. Budge again revels in the claim which will be withdrawn as mistaken. The filing of 0.8 cfs for the pump was not a mistake; this 0.80 cfs is about the output of the pump. In the claim, no mention is given of the flooding done below the current ditch, about 8 acres, which in combination with the pump equals 1 cfs, which is what Roy Miller passed on to Don who then passed that on to me.

And in Section V, Mr. Budge tries to usurp this court's very purpose by declaring that no water decrees should be reopened long after cases are decided. It is the job of the SRBA court to determine the truth, and if that truth requires the modification of decrees, then that is standard operating procedure. I was involved with the adjudication of right 22-180 and during the hearing in Rexburg last year, the Special Master advised my neighbor

Now, in order to beef up his defense, he includes them as objectors again. As for Rothbeb, his place is foreclosed on and I wonder if he is a real objector s well.

With regard to the statement of undisputed facts, it is a list filled with dispute as far as I am concerned. Cleverly worded and deceitful statements abound. Many of these first ten statements imply things that are not the case, although as worded they could be true. Take #10, which is completely untrue. Statement #11 ignores the all evidence including fact that right 22-11639 has been objected to and will be withdrawn. Statement #12 says the "Neighboring water users had always understood that the claimants property was irrigated under a 1969 priority date," when it appears to be only Larry Kunz, out of all the objectors and neighbors, who understood this. Regardless of who understood what, the evidence shows that this is untrue.

Mr. Budge states in paragraph 2 of his Argument (response to motion, p.5) that the 'Claimants position is not supported by either the history of water right 22-405 or the history of irrigation of the Claimant's property.' I know that time was tight for Mr. Budge leading up to this hearing, but did he not read any of the evidence that I submitted? All of the objective evidence supports a long history of the use of 22-405 within the place of use claimed 5/23/01, and my clear chain of title to such.

Mr. Budge then tries to blame IDWR for mistakes in their recommendation, claiming they have violated codes in order to recommend my claim. First off, IDWR has never been on the side of me having this claim. They have actually done everything in their power to prevent its recommendation. For example, on December 18, at 10 am, I received a call from Trent. He explained to me that on this deadline to file recommendations with the court, he would not be able to recommend my rights as I had been notified in writing would happen, unless I could prove that water was used on my place between 1969 and 1987. He said that the rest of the history of use was complete, but since I had no independent proof of use during the 70's and 80's, my recommendation would not go through. He further said that I had until 2pm to provide such evidence because that is when the recommendations are due.

My first thought was to call an attorney. To receive such a request on the final day, nay, in the final hours, is clearly beyond the power of IDWR. Instead, I called the people who had worked the land during those times, and within the four hours Trent had 2 statements on his desk recalling the water used during the 70's and 80's, and later I included a statement from another user (the Schiess twins) affirming their water use as well. That is why the date is December 18, 2008 on their statements and the destination phone number for the receiving fax is IDWR. The point is, IDWR has never done anything proactively to my benefit; only after pushing and prodding has anything ever received attention. To suggest they erred to my advantage would be the opposite of anything they have done.

What they did do was, they examined the evidence and used common techniques to recommend rights the way they are, not the way the objectors wish they were. The recommendations are and should remain prima facia evidence.

In Section I, page 6 of the response, Mr Budge argues that code 42-1427 does not apply to my water rights. If you think that the Rexburg Decree was correct in its ruling that Paradise Springs water was used on the JJ Miller canceled homestead, even though this is physically impossible and untrue, then this section might have some merit. Since it is obvious, through all of the objective evidence, that the Rexburg Decree was in error, and that my property is within the original claimed POU of the JJ Miller filing of 5-23-01, and was flood irrigated, there is no reason that IDWR erred or exceeded its authority in its procedures or decisions.

Craig Kunz and I that many mistakes like the one made with 22-180 in the Rexburg Decree happened, and she further stated that it was a wonder given the circumstances of life around the turn of the century that more mistakes weren't made.

Conclusion

I wondered if Mr. Budge had in fact forgotten about the June 24 hearing or if he just had no evidence and no case and hoped that an additional 2 weeks would be enough to scare something, anything, up. Since it's inception, this objection has been handled like the objectors were pro se and not with counsel. I found out about the protest not through documents being served on me, but accidentally as I did other research. I had to call Mr. Budge and ask for the copies of the protests to be served. Not all were properly signed when they arrived weeks late. Discovery materials have yet to arrive from my second request for documentation although I have been promised they would be forthcoming at every turn. The hearing for this motion had to be postponed for questionable reasons, and the wait produced only one piece of seriously impinged testimony from Larry Kunz and TJ's affidavit which both ignores and fails to respond to the major points made in my motion and the evidence supporting such. I can only reiterate that this objection was made to delay whatever process awaits us in conjunctive management, that there are no real issues the objectors have with my water rights other than the fact that they are prior to the groundwater rights in the area and this scares the objectors. I have made every effort to allow the objectors the time and materials they claim to have needed and this has produced nothing of circumstance in the way of evidence or logically or legally supported arguments. My experience has been to give an inch and they take a yard, or give a yard and they take a mile.

I once again ask this court for summary judgement and to make the objectors pay the costs for their unsupportable objection.

So sworn this 7th day of July, 2009, by MIL TR-21
Michael L Reid

A true copy of this reply was served by US Mail on the following on July 8, 2009:

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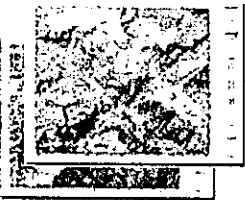
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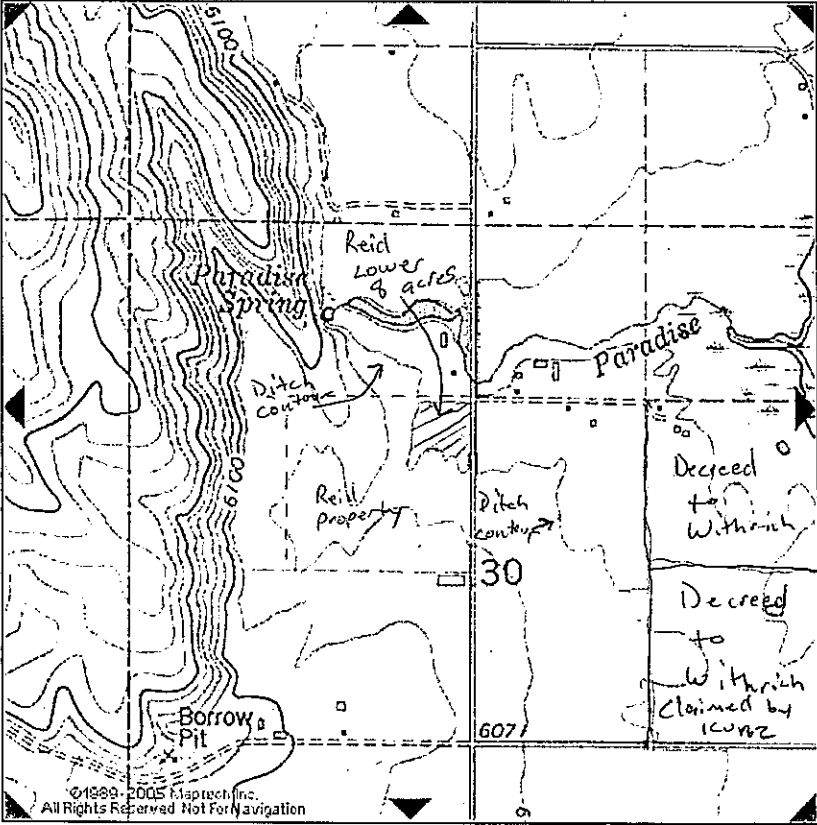
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Please note that this is a zoom of the topo included in the Brockway Report and is not a new map. I thought a zoom in would give a better perspective than the larger topo.